Confidentiality

of

DSS

Records

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NOTES ABOUT THE 2024 EDITION

This Edition will to some extent be a placeholder for the next Edition, as there are several topics that I am searching for clarification on. The new or revised material in this edition is:

An addition to the Local District policy section that is particular to foster care records

An addition to the CPS records section of the Federal statute for CPS confidentiality requirements

Revised sections on records concerning unfounded CPS referrals and "1034" reports

A revised section on the disclosure of public assistance and SNAP records, particularly about disclosure to law enforcement

Also added is a brief section concerning information received by the LDSS foster care unit from criminal background checks on potential foster homes.

The addition of the Federal Trade Commission and Consumer Product Safety Commission to the section on State and Federal agencies that may wish to obtain DSS records.

NOTES ABOUT THE 2022.5 EDITION

I didn't plan to do a mid-year update to the 2022 Edition, but… over the last few years I have noticed that there seems to be a great number of new attorneys in the ranks of LDSS attorneys. When Dave Milliken and I came up with the idea of creating a confidentiality handbook twenty-five or so years ago, it was our intention to make a basis reference guide that we could use rather than re-researching confidentiality issues every time they came up. As time has gone by, not only have confidentiality questions come up more frequently, they have also become more complex as new law related to confidentiality has gone into effect, and with the rise of electronic databases. This edition re-arranges some of the material from previous editions, hopefully to aid clarity and ease of access. Several new additions have been made to existing sections and a few new sections have been added.

NOTES ABOUT THE 2022 EDITION

This edition contains a new section concerning media and public access to court rooms and fair hearings; expansion of the section on preventive services; a section on the authority of NYS administrative law judges to issue administrative subpoenas; a section on the confidentiality of ERAP records; and an expansion of the section concerning access to foster care records by a former foster child.

NOTES ABOUT THE 2021 EDITION

This edition contains new sections concerning the release of child fatality reviews and CPS fair hearing decisions, as well as the disclosure of CPS information to the media and others pursuant to Social Services Law §422-a. There is also some

addition of Federal law that forms the basis for some of the State laws. In addition, there are some sections that have been updated with additional caselaw.

NOTES ABOUT THE 2019 EDITION

This is the first edition of the Handbook since my retirement from the Monroe County Law Department. I have re-arranged some of the sections, and have added lengthier discussions on responses to FOIL requests, and obtaining medical, mental health, and substance abuse treatment records. Most of the material in the FOIL and obtaining treatment records sections are from a presentation that I did with Susan M. Lettis, Esq. of the Otsego County Attorney's Office at the 2018 Summer NYPWA Conference. I have also added a section on records maintained by a Specialized Secure Detention facility, and added a footnote on the definition of "District Attorney." There is also a discussion of the authority of the New York State Welfare Inspector General to receive records from the local districts, and the release of records to State or Federal agencies based upon the authority of the agencies as opposed to authority in the confidentiality statute or regulation.

NOTES ABOUT THE JANUARY 2017 EDITION

This edition adds some discussion on the use of unfounded CPS reports to defend a lawsuit against a local district; production of records of unfounded CPS reports and or FAR records to a grand jury; providing foster care information to law enforcement or the National Center for Missing and Exploited Children; SNAP records; case records for pregnant adolescents; and sharing of information with other government agencies, as well as within the social services district.

NOTES ABOUT THE JANUARY 2015 EDITION

This edition adds some discussion on the sharing of CPS information with members of multi-disciplinary teams and the Justice Center, and updates some statutes, regulations and cases in other areas.

NOTES ABOUT THE DECEMBER 2012 EDITION

This edition adds material on the 2011 amendments to Social Services Law §427-a regarding the confidentiality of records for a differential response program. Also added is a section on the Family Educational Rights and Privacy Act (FERPA). The issue of whether Social Services Law §422 permits child protective records to be released via an authorization or release is re-visited, along with the an analysis of the new Social Services Law §422 (4)(A)(aa) which permits the release of child protective information to adult protective in certain circumstances. Brian Wootan, Esq., OTDA counsel, has also contributed a revised section on Child Support Enforcement records. There is also a brief section on disclosures to Federal and State agencies. Lastly, a

discussion of the effect of computer crime laws as liability enhancer for the unauthorized use of electronic information has been added.

NOTES ABOUT THE DECEMBER 2010 EDITION

This edition adds material on New York State criminal court subpoenas, disclosures to State and Federal agencies, and intra-agency disclosures between services and public assistance sections within a local social services district. There is also an update in the Child Support Enforcement Section.

NOTES ABOUT THE AUGUST 2006 EDITION

This edition is the first done without David R. Milliken, Esq., who co-authored all of the previous editions. There are additions to the sections on CPS, Foster Care, FOIL, HIPAA, and the Physician/Patient privilege. This edition is also reorganized with an Appendix for forms and a letter from the Federal Office of Civil Rights related to HIPAA, and that regulation's effect upon agency access to medical records. There is also a section that discusses the recently enacted State Technology Law §208.

NOTES ABOUT THE JUNE 2003 EDITION

This edition adds material on basic confidentiality policy requirements, domestic violence programs, (in the Public Assistance section), Welfare Management System (WMS) information, as well as a discussion of the effect of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). This edition also has revised sections on subpoenas, unfounded CPS reports, detention program records, adoption records, and drug and alcohol records.

NOTES ABOUT THE OCTOBER 2000 EDITION

This edition was completed just after our October 2000, teleconference, and reflects some changes that we felt were appropriate after discussions with some of the State agencies. There are some revisions to the sections on CPS, Adoption and Public Assistance. We continue to include the section on Children's Detention Center records, notwithstanding the New York State Office of Children and Family Service's view that it is not correct.

NOTES ABOUT THE JULY 2000 EDITION

No substantive changes were made, however the order of the topics has been rearranged, and the outline has been converted to a paginated table of contents. Some typographical errors were also corrected.

NOTES ABOUT THE DECEMBER 1999 EDITION

Sections on Federal Court subpoenas and child support records have been added. Two sections of the Social Services Law that pertain to confidentiality of Medicaid records are mentioned in the section on public assistance. A section on child support has also been added.

NOTES ABOUT THE AUGUST 1999 EDITION

The only significant changes made were those that reflect the amendments made by New York State to reflect the federal Child Abuse Prevention and Treatment Act (CAPTA). New York enacted its legislation effective June 30, 1999. For the purposes of this handbook, the most significant changes are those that concern changes to Social Services Law §422, especially with regard to access to and admissibility of unfounded reports, and three new exceptions to CPS record confidentiality.

As with the other information in this handbook, I urge you to review the statutes, regulations and cases yourself, and if you are not counsel for your DSS, to consult with your counsel.

CONFIDENTIALITY OF DSS RECORDS

Appendices

INTRODUCTION

DSS Client related records are generated in every type of case that a local social services district (LDSS) becomes involved with, whether it be a public assistance case or a services case. All of these records have confidentiality attached to them, and it is important that LDSS personnel and their attorneys bear this in mind, particularly when there is a request for the production of those records. An unauthorized disclosure of client records can have severe consequences, both civil, and in some cases, criminal.

Additionally, LDSS personnel sometimes have the need to obtain records concerning their clients or others, and these records may have confidentiality that applies to them.

The purpose of this Handbook is to provide guidance in the area of records confidentiality. The guidance primarily takes the form of statutory, regulatory, agency directive and caselaw references. I urge you to review these references yourself, as there may have been amendments or new cases that have been reported subsequent to the issue of this Handbook. There are also some opinions presented in this Handbook. These opinions are based upon my research, and my interpretation of that research- you should feel free to make your own interpretations, and come to your own conclusions and opinions on these issues.

DSS RECORD CONFIDENTIALITY

GENERAL STATUTES AND REGULATIONS

All records generated by a local social services district are confidential to some extent, under State law, and for programs that include federal funding, Federal Law.[1] Section 136 of the Social Services Law (SSL) contains the basic confidentiality guidelines for DSS records and 18 NYCRR 357[2] the basic regulations. However, over time, a number of other statutes and regulations have been enacted or promulgated related to the confidentiality of specific types or categories of social services records. Additionally, many records that a social services district obtains, and which become part of the local district's case file, remain subject to confidentiality law and/ or regulation established for that particular type of record. Some examples of this are medical, behavioral health, substance abuse treatment, and education records. So, the full gamut of laws, rules and regulations that pertain to DSS records are sprinkled throughout a host of other statutes and regulations, although for the most part, they are to be found in the Social Services Law.

[1] Federal law requires that States take such reasonable steps as the State deems necessary to restrict the use and disclosure of information about individuals and families receiving assistance under the program attributable to funds provided by the Federal Government. See 42 USCA §602 (a)(1)(A)(iv)

[2] At first glance, 18 NYCRR Part 357 appears to apply only to public assistance records. However, 18 NYCRR 403.8 requires that the local districts "…shall safeguard the use and disclosure of information on applicants for and recipients of services in accordance with Part 357 of this Title."

Another consideration is that depending on the type of record, there may be both State and Federal law and/or regulation that applies to the confidentiality of the records. One example of this was the enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which added a new wrinkle to the area of confidentiality of medical records and Medicaid records. Although HIPAA added new protections for medical records for people in other states, in New York there was already a number of State laws which provided confidentiality protections for medical, behavioral health and substance abuse records. For New York, HIPAA implementation was ultimately more an issue of applying the preemption clauses found in the HIPAA regulations to State law to determine which provided greater protection from access by third parties.

The purpose of this material is to give you some familiarity with all of the areas of DSS record confidentiality, some in depth coverage of the more common record request situations, as well as some forms that you may find useful in your practice.

18 NYCRR 357.6 requires that local social services districts disseminate to staff a policy and procedures manual related to confidentiality. The manual must establish and describe responsibilities and procedures for staff to: safeguard information; inform clients of records collection, access, utilization, and dissemination; regulate employee access to information; and disciplinary actions for violations of confidentiality statutes, regulations and policies. Note though, that this regulation does not give a local district permission to establish policies that are contrary to Federal and State confidentiality requirements. 18 NYCRR 357.5 sets forth some specific security requirements related to internal security for local districts. The requirements of this section can form the foundation of your local district's confidentiality policy and procedures manual. With the recent trends toward electronic files and ease of access to information, one portion of this regulation is especially important. 18 NYCRR 357.5(g) states that "[e]mployees of the… local social services district… consistent with applicable statute and regulation, shall have access to individual identifiable information only where the employee's specific job responsibilities cannot be accomplished without access to individual identifiable information." Pursuant to this regulation, local district employees are not authorized access to all local district records solely by virtue of their employment by the local district.

Note also that 18 NYCRR Part 428, sets forth the requirements for the Uniform Case Record, which may contain CPS, preventive services, and foster care records. Included in these requirements at 18 NYCRR 428.10(a)(2) is that for local districts:

> (2) All records must be maintained in a manner consistent with the confidential nature of such records in accordance with sections 136, 372(4), 422(4), 422(5-a) and 427-a(5) of the Social Services Law and Part 357 and sections 423.7 and 432.13 of this Title.

The regulation also contains guidance on records retention for foster care, preventive services, child protective, and adoption records.

Although this material cites various laws and regulations, you would be best served by looking at those citations and keeping them handy for specific reference. In 2018 the Office of Temporary and Disability Assistance issued 18-LCM-10 (May 14, 2018), entitled "Use and Safeguarding of Protected Information" which provides a list of Federal and State statutes and regulations related to the child support, public assistance and medical assistance functions. On June 4, 2020 OTDA released 18-LCM-10-T, which is the most current version of that LCM.

It is also worth noting that some types of client records have laws and/or regulations that apply specifically to those records. This includes child protective, adult protective, preventive services and foster care records.

Another question that has come up over the years is about whether or not the confidentiality continues after the death of the individual who was the subject of the records. The answer there appears to be yes. See *Kivisto v. NYC Human Resources Admin*., 92 AD3d 525 (1st Dept., 2012).

Because there are different types of social services records, with different laws and regulations that pertain to their confidentiality, it is important to determine just what type(s) of records are being requested and which laws and regulations apply, so that you can respond appropriately to the request.

WHAT ARE DSS RECORDS?

18 NYCRR 357.1(a). requires that:

> Information to be safeguarded includes names and addresses of applicants, recipients, and their relatives, including lists thereof; information contained in applications and correspondence; reports of investigations; reports of medical examination, diagnostic tests and treatment, including reports on whether an applicant or recipient has had an HIV-related test or has been diagnosed as having AIDS, HIV infection or an HIV-related illness; resource information; financial statements; and record of agency evaluation of such information. **This applies to all information secured by the agency whether or not it is contained in the written record.**

That regulation, as well as SSL §422(4)(A) (child protective records) and SSL §473-e(2) (adult protective records) stand for the proposition that the record consists of every bit of information that DSS gathers, and that it is all confidential. In addition to forms and other types of documentary information that might go into a case record, there are also requirements for the timely entry of progress notes into the case record. The confidentiality requirements cover not only the written case records, but also testimony related to the case record.

Since the law and regulations concerning DSS records are so scattered, it is sometimes easier to look at each type of record separately, even though there is some overlap. In addition to the information that an LDSS's caseworkers gather by their own observation, they also obtain information from other service providers in the medical, mental health, substance abuse, and other professions. This information often has its own confidentiality requirements, which we will also look at. Further, there are some confidentiality and/or evidentiary privileges that pertain to social workers, doctors, and psychologists that can have a bearing on disclosure- we will also look at those.

PENALTIES FOR BREACHES OF CONFIDENTIALITY

It is important to make sure that LDSS employees are made aware of LDSS policy on the confidentiality of LDSS client records. Unauthorized access to, or release of, DSS clients records may result in criminal and/or civil liability, as well as employee discipline sanctions.

The only breach of social services record confidentiality that is designated as a crime is for the unauthorized release of child protective information. Social Services Law §422(12) designates that release as a Class A Misdemeanor. However, as paper records are increasingly giving way to electronic records, computer crimes under the Penal Law are now coming into play. *In People v. O'Grady,* 263 A.D.2d 616 (3rd Dept., 1999), the Court upheld the conviction for the crime of Computer Trespass of a New York State Department of Taxation employee. The employee had used her work computer access to obtain information on the girlfriend of the employee's sister's separated husband. The sister then used this information to track down and harass the girlfriend.

The various computer crimes are found beginning at Penal Law §156.

Unauthorized access to, and/or use of, computer information may also result in employer discipline. See *Lawrence v State of New York*, 180 MIsc.2d 337 (Court of Claims, 1999).

The potential for abuse is particularly great with regard to WMS, as many local district employees have access to this service. Many local districts make specific warning to their employees that records in general and electronic records in particular may only be accessed in the context of the employee's work duties. In addition to any criminal charges, the unauthorized release of social services records may also result in civil liability as well as sanctions by the appropriate State agencies.

18-LCM-10 emphasizes that "Authorized entities, including district employees, must maintain the confidentiality and security of Protected Information in accordance with federal and state laws, rules, regulations, policies and agreements. Use and disclosure of such information is strictly limited for authorized purposes, such as uses directly related to the administration and delivery of program services. Employees must be aware at all times of their ongoing duty to comply with this limitation. That LCM also provides a list of Federal and State statutes and regulations related to the

child support, public assistance and medical assistance functions. The LCM goes on to stress that…

> Unauthorized access to, or disclosure of Protected Information, may result in civil liability and/or criminal prosecution. Individuals who access such information without authorization, or disclose it beyond authorized official purposes, may also be subject to employment disciplinary actions and/or termination.

While 18-LCM-10 pertains specifically to records that are regulated by OTDA, the same cautions should also apply to local district client records that are regulated by OCFS and DOH as well.

LDSS POLICY ON CONFIDENTIALITY OF CLIENT RECORDS

State regulations require that a local district have a policy concerning the confidentiality and management of client records:

> 18 Section 357.6. Confidentiality policy and procedures manual
>
> The New York State Department of Social Services, local social services districts, and other authorized agencies shall disseminate to staff a policy and procedures manual establishing and describing:
>
> (a) responsibilities of staff to safeguard information pursuant to statute, regulation and policy;
>
> (b) procedures for properly informing clients of records collection, access, utilization and dissemination;
>
> (c) policies and practices relating to the safeguarding of confidential information by the agency;
>
> (d) procedures relating to employee access to information; and
>
> (e) disciplinary actions for violations of confidentiality statutes, regulations and policies.

There is also some guidance in the Foster Care Practice Guide for Caseworkers and Supervisors (Chapter 10 Assessing the Safety of Children in Foster Care Page B-1) that, although specific to foster care, gives some good basic advice to any LDSS employee who has access to confidential information:

1. Electronic records

   When working on a case record in CONNX, foster care workers have an obligation to protect and preserve all information in a consistent and reliable manner. This may include physical and procedural controls (such as locking

a computer screen). Information must be protected and classified based on security best practices. See Appendix 10-A, “Protecting Confidential Information.”

2. Paper records

   Any paper record that contains individually identifiable information must be kept either in rooms that are locked when the records are not in use or in locked files. All such records should be marked "Confidential." Records may be used only by persons within OCFS, LDSS or VA whose specific job responsibilities cannot be accomplished without access to individual identifiable information and must not be exposed to anyone else. Foster care workers must not take records home without prior authorization by appropriate supervisory staff. When prior authorization is granted to take records home for a specific function or purpose, they must be kept in a secure location, not shared with anyone other than those expressly authorized by statute or regulation and be returned on the next business day that the staff member is in the office. When records are moved from one location to another, they should be placed in sealed envelopes marked "Confidential." [18 NYCRR 357.5].

3. Portable and mobile devices

   Portable devices storing or accessing confidential information related to an OCFS case present a unique security threat due to their small size and portability. They can be easily lost, misplaced, or stolen. The loss or theft of a portable device places at risk the confidentiality of the device’s contents and information. The unauthorized disclosure of confidential information could cause great harm to children and families, and is also a violation of law. Detailed requirements for portable device security are provided in the Administrative Directive, “Portable Device Security and Remote Access Guidance” (13- OCFS-ADM-01]. OCFS requires each LDSS to develop and implement a policy governing the use of mobile devices that ensures appropriate protection of, access to, and disclosure of confidential, personal, private, and/or sensitive information. The policy must: • Provide a comprehensive overview of the acceptable uses of a mobile device; • Define what resources are permitted to be accessed from mobile devices (e.g., email); Chapter 10 Assessing the Safety of Children in Foster Care | Page B-2 Foster Care Practice Guide for Caseworkers and Supervisors January 2019 • Specify what types of mobile devices can be utilized • Outline the degree of access that various classes of mobile devices may have • Specify how provisioning will be handled For more information, see “Establishing a Policy for the Use and Management of Mobile Devices by Local Departments of Social Services” (17-OCFS-LCM-14).

4. Social media

   Caseworkers and foster parents are likely to use social media to communicate with agency staff, friends, and other family members. Unlike

phone calls or texts, Facebook posts and Twitter "tweets" are accessible to a much wider audience. There is a much greater risk of misdirected messaging and an enhanced risk of miscommunication. Any individual identifiable information, including, but not limited to, photographs of children in care, is confidential and must not be included in posts on Facebook, Instagram, or other media sharing applications.

5. Training for caseworkers

   OCFS has produced a 45-minute, web-based information security awareness training course. This training is designed to provide staff with information regarding information security procedures and processes required to protect the confidentiality, integrity, and availability of client information. As required by the New York State Information Security Policy, information security training is compulsory for all staff having access to confidential state information. This training obligation may be satisfied by staff completing the training offered by OCFS or through completing a similar online training course offered by the Office of Temporary and Disability Assistance (OTDA). The OCFS training is available through the state's Human Services Learning Center website (https://www.hslcnys.org).

I suggest that it is also a good idea to make this part of new employee training as well as issuing reminders to staff, particularly when there is a new type of record or record format that comes along.

SPECIFIC TYPES OF SOCIAL SERVICES CLIENT RECORDS

ADULT PROTECTIVE SERVICES

Adult Protective records are covered in Social Services Law (SSL) §473-e. Records include referrals as well as any other information obtained, including written reports, names of sources and photographs. SSL §473-e(2). 18 NYCRR 457.16(g) further defines "record" as any information in the possession of the DSS regarding the subject of a report. All of this information is confidential and, unless released with the written permission of the subject of the report or their authorized representative, may only be released to:

a. any person who is the subject of the report or such person's authorized representative. "Subject of the report" is the subject of the referral or applications for APS services or is receiving or has received APS services. "Representative" is defined in 18 NYCRR 457.16(a)(2) as a person named in writing by the subject to be the subject's representative, a person appointed by the court to act in the interests of the subject, or the subject's legal counsel;

b. a provider of services to a current or former protective services for adults client, where a social services official, or their designee determined that such

information is necessary to determine the need for or to provide or to arrange for the provision of such services;

c. a court, upon a finding that the information in the record is necessary for the use by a party in a criminal or civil action or the determination of an issue before the court;

d. a grand jury, upon a finding that the information in the record is necessary for the determination of charges before the grand jury;

e. a district attorney, or assistant district attorney or investigator employed by the D.A., a member of the State Police, a police officer employed by City, County, Town or Village police department or County Sheriff, when such official requests such information stating that such information is necessary to conduct a criminal investigation or prosecution of a person, that there is reasonable cause to believe that the criminal investigation or prosecution involves or otherwise affects a person who is the subject of the report, and that it is reasonable to believe that due to the nature of the crime under investigation or prosecution such records may be related to the investigation or prosecution;

f. a person named as a court-appointed evaluator or guardian in accordance with Art 81 of the Mental Hygiene Law or Art. 17-A of the Surrogate's Court Procedure Act.;

g. any person considered entitled to such record in accordance with applicable law.

SSL §473-e(4) states that before the records are released, DSS must be satisfied that the confidential character of the records will be maintained and that they will only be used for the purposes for which they were made available.

SSL §473-e(3) authorizes DSS to withhold information in the record that it believes would identify a person who made a referral or who cooperated in an investigation of a referral if DSS finds that the release would be detrimental to the safety of interest of such person.

18 NYCRR 457.16(f) permits a DSS to move to withdraw, quash, fix conditions, or modify the subpoena, or to move for a protective order in accordance with the applicable provisions of the Criminal Procedure Law or CPLR. One case to be aware of if you encounter a subpoena for APS records in the context of a Mental Hygiene Law Article 81 guardianship is *Matter of Nunziata*, 72 Misc.3d 469 (Supreme Court, Nassau County, 2021). In that case, the court did allow certain APS records to be subpoenaed by a cross-petitioner, but the court also noted that the hearing timing requirements of Article 81 also limit to a great extent discovery practice in the context of guardianship cases.

With regard to a "personal representative," note that if the subject of the report had appointed an agent under a power of attorney, and that agent is claiming the status of a personal representative for purposes of authorizing the release of APS records, you should be examining the power of attorney to determine if such authority has

been granted. Also, the status of the agent as a personal representative would cease upon the death of the principal, which terminates the power of attorney. See *Vellozzi v. Brady*, 267 A.D.2d 695 (3rd Dept.,1999)

Also note that SSL §473(5) requires that:

> 5. Whenever a social services official, or his or her designee authorized or required to determine the need for, or to provide or arrange for the provision of protective services to adults in accordance with the provisions of this title has a reason to believe that a criminal offense has been committed, as defined in the penal law, against a person for whom the need for such services is being determined or to whom such services are being provided or arranged, the social services official or his or her designee must report this information to the appropriate police or sheriff's department and the district attorney's office when such office has requested such information be reported by a social services official or his or her designee.

So, in that situation, APS would be providing information, at least initially, to law enforcement before a request is made by law enforcement. That disclosure is not only permitted by this statute, it is required by the statute.

Applicable Law: SSL §473(5), SSL §473-e

Applicable Regs: 18 NYCRR 457.16

CHILD PROTECTIVE RECORDS

Generally

The basis of many of the confidentiality requirements related to CPS records comes from Federal Law. 42 USC.§5106a(b)(2)(B) requires that each State plan for CPS include:

> (viii) methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians, including requirements ensuring that reports and records made and maintained pursuant to the purposes of this subchapter and subchapter III shall only be made available to--
>
> (I) individuals who are the subject of the report;
>
> (II) Federal, State, or local government entities, or any agent of such entities, as described in clause (ix);
>
> (III) child abuse citizen review panels;
>
> (IV) child fatality review panels;

(V) a grand jury or court, upon a finding that information in the record is necessary for the determination of an issue before the court or grand jury; and

(VI) other entities or classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate State purpose;

(ix) provisions to require a State to disclose confidential information to any Federal, State, or local government entity, or any agent of such entity, that has a need for such information in order to carry out its responsibilities under law to protect children from child abuse and neglect;

(x) provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality;

The specific New York State confidentiality statute for Child Protective records is found in SSL §422. This statute sets out the law related to the statewide central register of child abuse and maltreatment. SSL §422(4)(A) states that not only are the state central register reports confidential, but so is any other information, reports written, or photographs taken regarding such reports that are in the possession of State DSS (now OCFS), the local department, or the commission on quality of care for the mentally disabled. This would include the local district CPS file. Pursuant to SSL §422(12), it is a class A misdemeanor for a person to willfully permit or encourage the release of any information from the local or statewide register to persons or agencies not permitted to receive the information by title 6 of article 6 of the Social Services Law.

SSL §422(4)(A) goes on to list 25 exceptions [SSL §422(4)(A)(a)-(bb)- subsection (r) was repealed, and (q) was repealed and combined with (l)] to the confidentiality statute. These exceptions cover both different individuals and/or agencies who may be entitled to the information, as well as different circumstances under which the records may be reviewed. But note also that the end of §422(4)(A) contains some modifiers to the list below. The list is as follows, with asterisks to denote any of the modifiers that may apply to the exceptions:

(a) a physician who has before him or her a child whom he or she reasonably suspects may be abused or maltreated;* *** **** *****

(b) a person authorized to place a child in protective custody when such person has before him or her a child whom he or she reasonably suspects may be abused or maltreated and such person requires the information in the record to determine whether to place the child in protective custody;* ***

(c) a duly authorized agency having the responsibility for the care or supervision of a child who is reported to the central register of abuse and maltreatment; ***

(d) any person who is the subject of the report or other persons named in the report;

(e) a court, upon a finding that the information in the record is necessary for the determination of an issue before the court;**

(f) a grand jury, upon a finding that the information in the record is necessary for the determination of charges before the grand jury;**

(g) any appropriate state legislative committee responsible for child protective legislation;

(h) any person engaged in a bona fide research purpose provided, however, that no information identifying the subjects of the report or other persons named in the report shall be made available to the researcher unless it is absolutely essential to the research purpose and the department gives prior approval;**

(i) a provider agency as defined by subdivision three of section four hundred twenty-four-a of this chapter, or a licensing agency as defined by subdivision four of section four hundred twenty-four-a of this chapter, subject to the provisions of such section;

(j) the justice center for the protection of people with special needs or a delegate investigatory entity in connection with an investigation being conducted under article eleven of this chapter;** ***

(k) a probation service conducting an investigation pursuant to article three or seven or section six hundred fifty-three of the family court act where there is reason to suspect the child or the child's sibling may have been abused or maltreated and such child or sibling, parent, guardian or other person legally responsible for the child is a person named in an indicated report of child abuse or maltreatment and that such information is necessary for the making of a determination or recommendation to the court; or a probation service regarding a person about whom it is conducting an investigation pursuant to article three hundred ninety of the criminal procedure law, or a probation service or the department of corrections and community supervision regarding a person to whom the service or department is providing supervision pursuant to article sixty of the penal law or article eight of the correction law, where the subject of investigation or supervision has been convicted of a felony under article one hundred twenty, one

hundred twenty-five or one hundred thirty-five of the penal law or any felony or misdemeanor under article one hundred thirty, two hundred thirty-five, two hundred forty-five, two hundred sixty or two hundred sixty-three of the penal law, or has been indicted for any such felony and, as a result, has been convicted of a crime under the penal law, where the service or department requests the information upon a certification that such information is necessary to conduct its investigation, that there is reasonable cause to believe that the subject of an investigation is the subject of an indicated report and that there is reasonable cause to believe that such records are necessary to the investigation by the probation service or the department, provided, however, that only indicated reports shall be furnished pursuant to this subdivision;*** **** *****

(l) a criminal justice agency, which for the purposes of this subdivision shall mean a district attorney[3], an assistant district attorney or an investigator employed in the office of a district attorney; a sworn officer of the division of state police, of the regional state park police, of a county department of parks, of a city police department, or of a county, town or village police department or county sheriff's office or department; or an Indian police officer, when:** *** **** *****

(i) such criminal justice agency requests such information stating that such information is necessary to conduct a criminal investigation or criminal prosecution of a person, that there is reasonable cause to believe that such person is the subject of a report, and that it is reasonable to believe that due to the nature of the crime under investigation or prosecution, such person is the subject of a report, and that it is reasonable to believe that due to that nature of the crime under investigation or prosecution, such records may be related to the criminal investigation or prosecution; or

(ii) such criminal justice agency requests such information stating that: such agency is conducting an investigation of a missing child; such agency has reason to suspect such child's parent, guardian or other person legally responsible for such child is or may be the subject of a report, or, such child or such child's sibling is or may be another person

[3] Per Criminal Procedure Law §1.20(32) "District attorney" means a district attorney, an assistant district attorney or a special district attorney, and, where appropriate, the attorney general, an assistant attorney general, a deputy attorney general, a special deputy attorney general, or the special prosecutor and inspector general for the protection of people with special needs or his or her assistants when acting pursuant to their duties in matters arising under article twenty of the executive law, or the inspector general of New York for transportation or his or her deputies when acting pursuant to article four-B of the executive law.

named in a report of child abuse or maltreatment and that any such information is or may be needed to further such investigation;

(m) the New York City department of investigation provided however, that no information identifying the subjects of the report or other persons named in the report shall be made available to the department of investigation unless such information is essential to an investigation within the legal authority of the department of investigation and the state department of social services gives prior approval;** *** **** *****

(n) chief executive officers of authorized agencies, directors of day care centers and directors of facilities operated or supervised by the department of education, the office of children and family services, the office of mental health or the office for people with developmental disabilities, in connection with a disciplinary investigation, action, or administrative or judicial proceeding instituted by any of such officers or directors against an employee of any such agency, center or facility who is the subject of an indicated report when the incident of abuse or maltreatment contained in the report occurred in the agency, center, facility or program, and the purpose of such proceeding is to determine whether the employee should be retained or discharged; provided, however, a person given access to information pursuant to this subparagraph shall, notwithstanding any inconsistent provision of law, be authorized to redisclose such information only if the purpose of such redisclosure is to initiate or present evidence in a disciplinary, administrative or judicial proceeding concerning the continued employment or the terms of employment of an employee of such agency, center or facility who has been named as a subject of an indicated report and, in addition, a person or agency given access to information pursuant to this subparagraph shall also be given information not otherwise provided concerning the subject of an indicated report where the commission of an act or acts by such subject has been determined in proceedings pursuant to article ten of the family court act to constitute abuse or neglect; **** *****

(o) a provider or coordinator of services to which a child protective service or social services district has referred a child or a child's family or to whom the child or the child's family have referred themselves at the request of the child protective service or social services district, where said child is reported to the register when the records, reports or other information are necessary to enable the provider or coordinator to establish and implement a plan of service for the child or the child's family, or to monitor the provision and coordination of services and the circumstances of the child and the child's family, or to directly provide

services; provided, however, that a provider of services may include appropriate health care or school district personnel, as such terms shall be defined by the department; provided however, a provider or coordinator of services given access to information concerning a child pursuant to this subparagraph (o) shall, notwithstanding any inconsistent provision of law, be authorized to redisclose such information to other persons or agencies which also provide services to the child or the child's family only if the consolidated services plan prepared and approved pursuant to section thirty-four-a of this chapter describes the agreement that has been or will be reached between the provider or coordinator of service and the local district. An agreement entered into pursuant to this subparagraph shall include the specific agencies and categories of individuals to whom redisclosure by the provider or coordinator of services is authorized. Persons or agencies given access to information pursuant to this subparagraph may exchange such information in order to facilitate the provision or coordination of services to the child or the child's family; *** **** *****

(p) a disinterested person making an investigation pursuant to section one hundred sixteen of the domestic relations law , provided that such disinterested person shall only make this information available to the judge before whom the adoption proceeding is pending; **** *****

(q) Repealed by L.2015, c. 436, § 4, eff. Jan. 19, 2016 .

(r) Repealed by L.2012, c. 501, pt. D, § 6, eff. June 30, 2013 .

(s) a child protective service of another state when such service certifies that the records and reports are necessary in order to conduct a child abuse or maltreatment investigation within its jurisdiction of the subject of the report and shall be used only for purposes of conducting such investigation and will not be redisclosed to any other person or agency;

(t) an attorney for a child, appointed pursuant to the provisions of section one thousand sixteen of the family court act , at any time such appointment is in effect, in relation to any report in which the respondent in the proceeding in which the attorney for a child has been appointed is the subject or another person named in the report, pursuant to sections one thousand thirty-nine-a and one thousand fifty-two-a of the family court act ;

(u) a child care resource and referral program subject to the provisions of subdivision six of section four hundred twenty-four-a of this title;

(v)(i) officers and employees of the state comptroller or of the city comptroller of the city of New York, or of the county officer designated by law or charter to perform the auditing function in any county not wholly contained within a city, for purposes of a duly authorized performance audit, provided that such comptroller shall have certified to the keeper of such records that he or she has instituted procedures developed in consultation with the department to limit access to client-identifiable information to persons requiring such information for purposes of the audit and that appropriate controls and prohibitions are imposed on the dissemination of client-identifiable information contained in the conduct of the audit. Information pertaining to the substance or content of any psychological, psychiatric, therapeutic, clinical or medical reports, evaluations or like materials or information pertaining to such child or the child's family shall not be made available to such officers and employees unless disclosure of such information is absolutely essential to the specific audit activity and the department gives prior written approval.**

(ii) any failure to maintain the confidentiality of client-identifiable information shall subject such comptroller or officer to denial of any further access to records until such time as the audit agency has reviewed its procedures concerning controls and prohibitions imposed on the dissemination of such information and has taken all reasonable and appropriate steps to eliminate such lapses in maintaining confidentiality to the satisfaction of the office of children and family services. The office of children and family services shall establish the grounds for denial of access to records contained under this section and shall recommend as necessary a plan of remediation to the audit agency. Except as provided in this section, nothing in this subparagraph shall be construed as limiting the powers of such comptroller or officer to access records which he or she is otherwise authorized to audit or obtain under any other applicable provision of law. Any person given access to information pursuant to this subparagraph who releases data or information to persons or agencies not authorized to receive such information shall be guilty of a class A misdemeanor;

(w) members of a local or regional fatality review team approved by the office of children and family services in accordance with section four hundred twenty-two-b of this title;

(x) members of a local or regional multidisciplinary investigative team as established pursuant to subdivision six of section four hundred twenty-three of this title;

(y) members of a citizen review panel as established pursuant to section three hundred seventy-one-b of this article; provided, however, members of a citizen review panel shall not disclose to any person or government official any identifying information which the panel has been provided and shall not make public other information unless otherwise authorized by statute;

(z) an entity with appropriate legal authority in another state to license, certify or otherwise approve prospective foster parents, prospective adoptive parents, prospective relative guardians or prospective successor guardians where disclosure of information regarding such prospective foster or prospective adoptive parents or prospective relative or prospective successor guardians and other persons over the age of eighteen residing in the home of such persons is required under title IV-E of the federal social security act; and

(aa) a social services official who is investigating whether an adult is in need of protective services in accordance with the provisions of section four hundred seventy-three of this chapter, when such official has reasonable cause to believe such adult may be in need of protective services due to the conduct of an individual or individuals who had access to such adult when such adult was a child and that such reports and information are needed to further the present investigation.

(bb) an entity with appropriate legal authority in another state to license, certify or otherwise approve residential programs for foster children where disclosure of information regarding any prospective or current employee of such program is required by paragraph twenty of subdivision (a) of section six hundred seventy-one of title forty-two of the United States code.

*After a child, other than a child in residential care, who is reported to the central register of abuse or maltreatment reaches the age of eighteen years, access to a child's record under subparagraphs (a) and (b) of SSL §422(4)(A) shall be permitted only if a sibling or off-spring of such child is before such person and is a suspected victim of child abuse or maltreatment.

**Nothing in this section shall be construed to permit any release, disclosure or identification of the names or identifying descriptions of persons who have reported suspected child abuse or maltreatment to the statewide central register or the

agency, institution, organization, program or other entity where such persons are employed or the agency, institution, organization or program with which they are associated without such persons' written permission except to persons, officials, and agencies enumerated in subparagraphs (e), (f), (h), (j), (l), (m) and (v) of SSL §422(4)(A). Care should be taken to make the appropriate redactions before disclosure is made.

***To the extent that persons or agencies are given access to information pursuant to subparagraphs (a), (b), (c), (j), (k), (l), (m), (o) and (q) of SSL §422(4)(A), such persons or agencies may give and receive such information to each other in order to facilitate an investigation conducted by such persons or agencies.

****SSL §422(4)(B) Notwithstanding any inconsistent provision of law to the contrary, a city or county social services commissioner may withhold, in whole or in part, the release of any information which he or she is authorized to make available to persons or agencies identified in subparagraphs (a), (k), (l), (m), (n), (o), (p) and (q) of paragraph (A) of this subdivision if such commissioner determines that such information is not related to the purposes for which such information is requested or when such disclosure will be detrimental to the child named in the report. **AND**

**** SSL §422(4)(C) A city or county social services commissioner who denies access by persons or agencies identified in subparagraphs (a), (k), (l), (m), (n), (o), (p) and (q) of SSL §422(4)(A) to records, reports or other information or parts thereof maintained by such commissioner in accordance with this title shall, within ten days from the date of receipt of the request fully explain in writing to the person requesting the records, reports or other information the reasons for the denial. **AND**

**** SSL §422(4)(D) A person or agency identified in subparagraphs (a), (k), (l), (m), (n), (o), (p) and (q) of SSL §422(4)(A) who is denied access to records, reports or other information or parts thereof maintained by a local department pursuant to this title may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules.

The end section of SSL §422(4)(A) also requires that a person or official required to make a report of suspected child abuse or maltreatment pursuant to section four hundred thirteen of this chapter shall receive, upon request, the findings of an investigation made pursuant to this title. However, no information may be released unless the person or official's identity is confirmed by the office. If the request for such information is made prior to the completion of an investigation of a report, the released information shall be limited to whether the report is “indicated”, “unfounded” or “under investigation”, whichever the case may be. If the request for such information is made after the completion of an investigation of a report, the released information shall be limited to whether the report is “indicated” or “unfounded”, whichever the case may be.

Lastly, the end section of SSL §422(4)(A) also requires that a person given access to the names or other information identifying the subjects of the report, or other persons named in the report, except the subject of the report or other persons named in the report, shall not divulge or make public such identifying information unless he or she is a district attorney or other law enforcement official and the purpose is to initiate court action or the disclosure is necessary in connection with the investigation or prosecution of the subject of the report for a crime alleged to have been committed by the subject against another person named in the report.

It is best when requests based upon the above exceptions are made to insist the requests be made in writing with the appropriate citation to the statutory section(s) as well as facts indicating the requestor fits within the exception(s) included. This provides a record of justification for any disclosures made if anyone ever questions them.

A question that seems to come up fairly often is whether a person who is permitted to have CPS records made available to them pursuant to SSL §422(4)(A)(d), may give some sort of consent, authorization, release, etc. for an LDSS to release those CPS records to a third party that is not listed in the exceptions to SSL §422(4)(A). For the reasons below, my opinion is that they may not.

SSL §422(4)(A)(d) says that "any person who is the subject of the report or other persons named in the report" may have the record made available to them. Notice that it does not say their representative or their lawyer may have access to the record under this exception. Ridiculous as this may seem at times, representatives should not be given access to CPS records under this exception, even if they have a release. Nor should access or information be given in response to an attorney-issued subpoena. Your district should have a policy for handling with requests by individuals to review and copy their own records. In the absence of any statutory, regulatory or case law to the contrary, you should only allow individuals to see their records. It is my position that a release is not sufficient for a release of CPS records to an attorney, or to anyone else, for two reasons.

First, while the adult protective statute for confidentiality permits disclosure to a subject's attorney with a release, the child protective statute contains no such permission. One general rule of statutory interpretation is that when a legislature says something in one place in a statute, but omits it in another, that omission was intentional. Thus, it is my view that if the Legislature had intended to allow attorneys, or others to view CPS records with a release, they would have written it into the statute as they did in the APS statute.

It seems to me that there are some easily identifiable differences that may well have led the Legislature to use two different approaches. In the APS situation, the only person whose privacy interest is affected by the release of records is the subject him/herself, and that person is an adult. Conversely, in the CPS situation, there are multiple groups of people whose privacy interests are impacted by the disclosure of

information. The three most obvious are parents, non-parent caretakers and children. If OCFS is right that a release is adequate, from whom must a release be obtained? Is a release from one parent enough? Or must you get it from both? And what of the children? Who can sign a release for them? A parent or parents, who may have significantly different interests from the child(ren)? A Law Guardian? And what of the non-parent caretakers, who also may have interests that diverge widely from those of the parents or the children? Can information about them be divulged upon a release executed by a parent or child? The varying and often competing privacy interests simply cannot be protected if releases are accepted.

"Subject of the report" is defined in SSL §412(4) as the person who has been reported to the central register as the person responsible for inflicting the injury, abuse or maltreatment on the child, or allows such injury to be inflicted. There can be more than one "subject of the report." "(O)ther persons named in the report" is defined in SSL §412(5) as the child who has been reported to the central registry, and the child's parent, guardian, custodian, or other person legally responsible for the child who is not named as the subject of the report.

The second reason for my belief that CPS records and other information cannot be divulged upon a release is the potential criminal sanctions for unauthorized release, which strongly suggests to us that a conservative interpretation is called for. While we are not aware of anyone having been charged under this statute, I certainly don't want anyone blaze that trail.

In March 2010, the Fourth Department held that a court could not compel a plaintiff in a lead paint case to execute releases for CPS information. The Court held that the trial court properly refused to compel the execution of the releases as defendants are not among the individuals to whom disclosure is permitted pursuant to SSL §422. See *Angela N. v. Suhr,* 71 AD3d 1489, (4th Dept., 2010). It would appear that the *Suhr* decision does settle the question, for the time being, of whether a subject of a report or other person named in a CPS report may authorize the release of CPS records to a person or party who is not authorized by SSL §422(4)(A) to receive that information.

A court may obtain CPS records, provided that it makes a finding "(t)hat the information in the record is necessary for the determination of an issue before the court." SSL §422(4)(A)(e). Our office has seen this most often in cases where a court has issued a subpoena for the CPS record at the request of a litigant. The requirement that the court make a "finding" indicates that the court must do something more than just issue a subpoena for the records on an *ex parte* request. See *Catherine C. v. Albany County DSS,* 38 AD3d 959 (3rd Dept., 2007). The proper procedure, when your DSS is not a party to the litigation is an application pursuant to CPLR 2307.

CPLR 2307 requires this type of subpoena to be issued by a justice of the Supreme Court in the district in which the records are located or by a judge of the court in which an action for which the records are required is triable. CPLR 2307 also requires that a motion for the subpoena be made on at least one day's notice to the

agency having custody of the records. Over the past several years our office has attempted to educate the bench and bar to these requirements, with varying degrees of success. Occasionally, we have needed to file motions to quash subpoenas obtained *ex parte*. Sample affirmations that contain objections for most categories of records are attached. OCFS apparently does honor subpoenas obtained *ex parte*. However, we point out the recent case of *M. of LaBella*, 265 AD2d 117, 707 NYS2d 120 (2nd Dept., 2000), in which the 2nd Department felt that disbarment was an appropriate sanction for an attorney, who among other things, failed to follow CPLR 2307, and obtained an *ex parte* subpoena for government records. Note that Criminal Procedure Law 610.20 has exceptions for both District Attorneys and criminal defense counsel that permits them to issue subpoenas directly (District Attorneys) or to submit proposed subpoenas directly to the court for "indorsement" (criminal defense counsel) without making a motion under CPLR 2307. **See Subpoena Requirements for DSS Records, *infra.***

Some courts believe that it is appropriate to make an *in camera* inspection of the CPS records to determine their relevance to the case in which the subpoena is sought. See *Fernandez v. Riverstone Associates*, 6 Misc3d 1019(A) (New York City Civil Court, 2005), and *Hally v. Steres., et al,* 2009 N.Y. Misc. LEXIS 6818, 2009 NY Slip Op 33343(U) (N.Y. Sup. Ct. June 22, 2009). I would suggest that you request any court that is considering the release of CPS records to make an *in camera* inspection of such records before it permits release or other access to those records by a party. When you are involved in a situation where CPS records are going to be produced to a court, you should also discuss with the court the need for a protective order regarding further re-disclosure or use by the parties, as well as the disposition of the records after the case is resolved.

The Court Exception

Another interesting point that has been discussed by the courts is whether SSL §422(4)(A)(e) means that section is to be used by parties in litigation to have a court receive CPS records for utilization by both the court and by the parties, or whether it means that only the court may receive the records and utilize them to decide an issue before the court- the parties would be prohibited from reviewing or utilizing those records. Looking at the *Sayegh* case, it would seem that in the Second Department, at least, is okay with civil litigants being able to utilize CPS records in their case. On the other hand, the Third Department seems to take a more restrictive view. In *C.T. by J.T. v. Brant*, 162 NYS.3d 551 (3rd Dept., 2022), the Court wrote:

> Reports of child abuse to child protective officials, as well as documents generated during the ensuing investigation, are confidential and may only be made available to "the specifically enumerated individuals, agencies or facilities detailed" in Social Services Law § 422(4)(A) (*Catherine C. v. Albany County Dept. of Social Servs*., 38 A.D.3d 959, [2007]; see *Allen v. Ciannamea*, 77 A.D.3d 1162, [2010]). Defendants observe that one entity entitled to access of those records is "a court, upon a finding that the information in the record is necessary for the determination of an issue before" it (Social Services Law §

422[4][A][e]), but that provision is "[n]arrowly interpreted to allow the court to have access to such records 'for its own use' to decide a particular issue," and it does not authorize " 'a court to expand the carefully crafted statutory and exclusive list of those to whom access is authorized' " (*Catherine C. v. Albany County Dept. of Social Servs*., 38 A.D.3d at 960, quoting *Matter of Sarah FF*., 18 A.D.3d 1072, [2005]). Accordingly, as Supreme Court determined, defendants are not entitled to disclosure of records relating to either a report of abuse or an investigation into one (see *Angela N. v. Suhr*, 71 A.D.3d 1489, [2010], *Catherine C. v. Albany County Dept. of Social Servs*., 38 A.D.3d at 960, *Lamot v. City of New York*, 297 A.D.2d 527.

Given this disparate treatment between the courts, you might consider raising this issue when there is a subpoena request made, I think that at the very least a court should be reviewing, *in camera,* the DSS records in general, and the CPS records in particular, before any further disclosure to the parties.

Release to Court Appointed Special Advocate (CASA)

It also appears that a court may not order CPS to release information to a Court Appointed Special Advocate that it has assigned to a case. *M. of Sarah FF,* 18 AD3d 1072 (3rd Dept., 2005). See also *M of Evan E.,*114 AD3d 149 (3rd Dept., 2013)

Release of CPS information to an LDSS welfare fraud investigation unit or law enforcement when there is evidence of welfare fraud

SSL 145 requires that any social services official who becomes aware of welfare fraud is required to report to law enforcement. This statute is also looked at as requiring reporting to a fraud unit. In July, 2023, OCFS counsel opined that CPS can provide CPS information to your fraud unit or law enforcement if it becomes aware of information concerning welfare fraud, even though SSL 422(4)(A) does not contain an exception for that. The advice was that CPS should be disclosing only information that is directly related to the welfare fraud- it is not *carte blanche* to give out any and all CPS information.

See also the section on intra-DSS information sharing, infra.

Records of Unfounded Reports

SSL §422(5)(a) was amended, effective January 1, 2022 to reflect the change in the standard of evidence to "indicate" a report of child abuse or maltreatment. The standard depends upon the time at which the investigation was commenced:

- an investigation of a report commenced on or before December 31, 2021 uses the "some credible evidence" standard

- an investigation of a report commenced on or after January 1, 2022 determines uses the “fair preponderance of the evidence” standard.

In either case, if the standard is not met all information identifying the subjects of the report and other persons named in the report shall be legally sealed forthwith by the central register and any local child protective services which investigated the report.

Such unfounded reports may only be unsealed and made available:

> (i) to the office of children and family services for the purpose of supervising a social services district;
>
> (ii) to the office of children and family services and local or regional fatality review team members for the purpose of preparing a fatality report pursuant to section twenty or four hundred twenty-two-b of this chapter;
>
> (iii) to a local child protective service, the office of children and family services, or all members of a local or regional multidisciplinary investigative team or the justice center for the protection of people with special needs when investigating a subsequent report of suspected abuse, neglect or maltreatment involving a subject of the unfounded report, a child named in the unfounded report, or a child's sibling named in the unfounded report pursuant to this article or article eleven of this chapter;
>
> (iv) to the subject of the report; and
>
> (v) to a district attorney, an assistant district attorney, an investigator employed in the office of a district attorney, or to a sworn officer of the division of state police, of a city, county, town or village police department or of a county sheriff's office when such official verifies that the report is necessary to conduct an active investigation or prosecution of a violation of subdivision four of section 240.50 of the penal law.

Note however that SSL §422(5)(b) makes restrictions on the re-disclosure of the unfounded reports by persons given access to unfounded reports pursuant to subparagraph (v) above. They are not to redisclose such reports except as necessary to conduct such appropriate investigation or prosecution and shall request of the court that any copies of such reports produced in any court proceeding be redacted to remove the names of the subjects and other persons named in the reports or that the court issue an order protecting the names of the subjects and other persons named in the reports from public disclosure.

If you are confronted with a request for records concerning unfounded reports, in addition to the limited list of persons or agencies to whom the information may be made available to, there are also restrictions on the admissibility of such reports into evidence, so you might consider raising those restrictions as well when responding to a litigation related request for these records. These restrictions are found in the latter half of SSL §422(5)(B):

> Notwithstanding section four hundred fifteen of this title, section one thousand forty-six of the family court act, or, except as set forth herein, any other provision of law to the contrary, an unfounded report shall not be admissible in any judicial or administrative proceeding or action; provided, however, an unfounded report may be introduced into evidence:
>
> (i) by the subject of the report where such subject is a respondent in a proceeding under article ten of the family court act or is a plaintiff or petitioner in a civil action or proceeding alleging the false reporting of child abuse or maltreatment; or
>
> (ii) (ii) in a criminal court for the purpose of prosecuting a violation of subdivision four of section 240.50 of the penal law (falsely reporting an incident in the second degree).

One of the earlier cases which considered the availability and admissibility of unfounded reports was *People v. McFadden*, 178 Misc2d 343 (Supreme Court, Monroe County,1998). In that case a criminal defendant who was charged with a variety of sex crimes requested that the court issue a subpoena for CPS records related to a CPS investigation concerning the incident which led to the criminal charges as well as the child's other history of unfounded allegations. The court found that the unfounded report might provide impeachment material for the criminal defense, and ordered the production of the records to the court for *in camera* inspection. The court did find that SSL §422(5) was unconstitutional, but only as to that particular defendant, so notice to the Attorney General was not required.

The subsequent case law in this area makes a distinction between the discovery of records concerning unfounded CPS referrals and the admissibility of such records. My suggestion when you have discovery requests for records of unfounded reports would be to set forth the statutory restrictions on both the release of such records, as well as their admissibility and request that the court receive any records that it orders to be produced for *in camera* inspection by the court, before it permits review of the records by the parties.

Although my reading of the statute has always been that the admissibility exceptions for unfounded CPS reports are limited to a criminal prosecution for making a false CPS report or for a civil suit alleging the making of a false CPS report, some courts have had a different take. In *Lim v. Lyi*, 299 AD2d 763 (3rd Dept., 2002), a custody case, the Third Department upheld the admission of unfounded CPS reports as well as caseworker testimony about such reports, where it found that one of the parties had alleged in their cross-petition that the original petitioner had made false allegations of child abuse against him:

> Petitioner and the Law Guardian next argue that Family Court erred by admitting the testimony of Barnes and the report of the child protective agency. Although unfounded child abuse reports are required to be sealed (*see* Social Services Law § 422[5]), such reports may be introduced into

> evidence “by the subject of the report where such subject * * * is a plaintiff or petitioner in a civil action or proceeding alleging the false reporting of child abuse or maltreatment” Social Services Law § 422[5]). Here, although respondent did not commence the proceeding in the first instance, he did cross-petition for sole custody. In his cross petition, respondent specifically stated that petitioner “bombarded [him] with completely false allegations in criminal and family court of child abuse.” Since respondent unequivocally alleged the false reporting of child abuse, and is considered a petitioner with respect to this claim, the admission of the unfounded report is proper. Likewise, the testimony of Barnes was admissible.

The *Lim* case stands for the proposition that records concerning unfounded CPS reports are discoverable if the party seeking those records are, in some fashion, deemed to be a “petitioner” in the action.

The reasoning in the *Lim* decision has subsequently been applied to a Family Court Article 8 case, and to a New York City Housing Court case.

In Matter of *D.M. v J.E.M*., 23 Misc3d 584 (Family Court, Orange County, 2009), family court ordered the production of unfounded CPS report records in a family offense proceeding, citing *Lim*, and holding that:

> The issue is whether the person seeking to subpoena and introduce an unfounded report of child abuse into evidence falls within the class of persons entitled by the statute to do so. The petitioner in this family offense civil proceeding falls within the class of persons entitled to introduce such report into evidence, namely, a petitioner, who was the subject of a report of child abuse, in a civil proceeding alleging the false reporting of child abuse or maltreatment

In *J.A.K. v. V.M*., 72 Misc3d 743 (Civil Court, City of New York, Bronx County, 2021), the court granted a subpoena for unfounded CPS records, in a case where a tenant alleged harassment by a landlord by means, of among other things, false reports to the SCR, which were investigated and unfounded. Over the objection of ACS, the court granted the subpoena, reasoning that “Since petitioner is the acknowledged subject of the reports made to ACS and she is the petitioner in this civil proceeding, she is entitled to receive the information requested and to offer it into evidence in support of her claim.”

The Fourth Department has affirmed a case in which the Family Court found that the party seeking the unfounded records did not fall within the class of parties entitled to introduce the unfounded report into evidence, In *Humberstone v. Wheaton*, 21 AD3d 1416 (4th Dept., 2005), the respondent in a custody case tried to introduce records concerning an unfounded report and to compel the testimony of the caseworker as to those records. In affirming the Family Court’s denial, the Fourth Department wrote:

> Contrary to the contention of respondent, she did not fall within any statutory provision allowing her to introduce into evidence an unfounded report of sexual abuse of the parties' daughter, and Family Court did not err in refusing to admit the report in evidence. Because the unfounded report was inadmissible, the court also did not err in refusing to permit its author to testify with respect to it.

The Fourth Department cited the *Lim* case in its decision.

Most recently, the First Department has weighed in on this issue. In *Matter of Michael Y.* 212 AD3d 494 (1st Dept., 2023), in his petition seeking modification of an order providing for the mother's visitation, the father alleged that the mother had made numerous false reports of child abuse or neglect against him, which were determined to be unfounded. Family Court issued a subpoena directing ACS to produce complete investigation progress notes and reports of suspected child abuse or maltreatment to the father. ACS did not challenge the subpoena or move for a protective order, but rather produced the requested documents in a redacted form so as to delete the name of the source or sources of the reports. The father moved to hold ACS in contempt, and ACS represented that it would produce unredacted documents. However, it then produced the identical redacted documents. When the father again moved for a contempt order or order compelling production, the court declined to review the documents in camera and denied the father's motion for contempt or to compel, finding the documents would not be admissible. The First Department reversed, holding that:

> Under the particular circumstances of this case, we find that the father made a *prima facie* showing of the elements necessary to hold ACS in contempt for its failure to fully comply with a lawful judicial subpoena. The subpoena was a valid order expressing an unequivocal mandate, requiring ACS to produce "complete" investigation and unfounded reports of suspected child abuse concerning the children. ACS does not deny that it was aware of the order. Further, ACS did not comply with the subpoena, as it produced reports that redacted the names of sources, not complete reports. Finally, the father suffered prejudice, because his modification petition alleges that the mother was causing false abuse reports to be filed with the authorities, and the unredacted unfounded reports may be admissible in such a proceeding (*see Matter of Youngok Lim v Sangbom Lyi*, 299 AD2d 763, 766-767 [3d Dept 2002]; *J.A.K. v V.M.*, 72 Misc3d 743 [Civ Ct, Bronx County 2021]; Social Services Law § 422[5][b][i]). In any event, the issue of whether the documents will be admissible in the custody proceeding is not relevant to whether the unredacted material should be produced in discovery (*see Matter of Kapon v Koch*, 23 NY3d 32, 38-39 [2014]).
>
> Once the father met his prima facie burden, it was incumbent on ACS to refute the showing or to offer evidence of a defense. ACS asserted that Social

> Services Law §422(7) permits the commissioner "to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation . . . which he reasonably finds will be detrimental to the safety or interests of such person." However, there was no indication that any such determination had actually been made. Since Family Court declined to review the reports in camera, there is nothing in the record to indicate whether the identity or identities of the source or sources of the unfounded reports were properly redacted, either because disclosure would be "detrimental to the safety or interests of such person" (Social Services Law § 422 [7]) or because the sources were mandated reporters (*see DeLeon v Putnam Valley Bd. of Educ.*, 228 FRD 213, 216 [SD NY 2005]; Social Services Law § 413[1]). Without such determination, it cannot be established whether ACS had a meritorious defense to the contempt motion or the motion to compel. Accordingly, we remand for such determination, from which Family Court can then determine whether ACS should be ordered to produce the unredacted reports or held in contempt, in Family Court's discretion.

In this case the court did not direct production of the records to the court for *in camera* review, but instead that they be provided directly to the party. ACS had relied upon SSL §422(7) to redact source information. That statute says:

> At any time, a subject of a report and other persons named in the report may receive, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation or the agency, institution, organization, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person.

Given that language, I would say that what ACS did was appropriate. The best course of action for the court would have been to have the records produced to court for *in camera* review to deal with the SSL §422(7) issues and then proceed from there.

There are also occasions when law enforcement wishes to obtain CPS records concerning unfounded reports. OCFS has provided guidance in their CPS manual:

> In most cases, an LDSS may provide information from CPS reports to a criminal justice agency only when a subject has been indicated or when the report is under investigation at the time that access to the information is sought. However, a criminal justice agency may have access to unfounded report information in three situations:
>
> > When the 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 §422(5)(a)(iii)].

When the criminal justice agency verifies that the unfounded report information is necessary to investigate or prosecute an alleged intentional false report to the SCR, pursuant to Section 240.50(4) of the Penal Law [SSL §422(5)(a)(v)].

When the criminal justice agency is acting in its capacity as a member of an OCFS-approved CFRT and the unfounded report information is necessary for the preparation of a fatality report pursuant to Sections 20(5)(d) and 422-b (2) of the SSL [SSL §422(5)(a)(ii)].[4]

Another situation in which you might wish to produce unfounded reports is when the local district is being sued and the unfounded reports might be relevant to the defense of the lawsuit. Although §SSL 422(5) does not explicitly permit the release to agency counsel (or outside counsel such as the Attorney General or County Attorney) it is the view of OCFS counsel that such a release is permitted when defending a lawsuit against the agency or the local district. Release would also be permissible to retained private attorney counsel that is representing a local district. Counsel will have to be mindful that the records remain confidential, and, also, that the admissibility of such records into evidence is constrained by §SSL 422(5)(b).

It is also worth noting SSL §422(5)(B) requires that legally sealed unfounded reports shall be expunged ten years after the receipt of the report. You may have a situation where there is a request or demand for these records that no longer exist. If that happens, the court or the party requesting the records might consider requiring that the caseworker testify about the substance of the now expunged records. Several courts have held that caseworkers cannot testify to recreate pre-1996 unfounded reports that that were expunged, or in some cases were not expunged, even though they should have been. See *M of K v K,* 126 Misc2d 624 (Supreme Court, New York County, 1984), *Ann L v X Corp*, 133 F.R.D. 433 (WDNY, 1990), *M of Timothy M, Jr,* 280 AD2d 969 (4th Dept., 2001). It appears that the Third Department has extended this line of reasoning to include unfounded CPS reports that have been sealed, but are not yet expunged, for cases in which the reports themselves would not be admissible. See *M. of Jolynn W. v Vincent X,* 85 AD3d 1217 (3rd Dept., 2011), which cited the *Timothy M, Jr* case in its holding. I am not aware of any cases where a petitioner in a case has requested that the caseworker testify about an expunged case where the records are no longer available.

The Second Department has held that unfounded reports should not be produced in response to a grand jury subpoena where under the facts of the case the reports would be inadmissible. See *M. of McGuire v DiFiore*, 112 AD3d 630 (2nd Dept., 2013).

[4] New York State Child Protective Services Manual Chapter 13—Section A—Page | **A-**35

Release of Source of Referral Information

There are two sections of SSL §422 that speak to the issue of the release of the identity or other information about referral sources.

The last sentence of the second to last paragraph of SSL §422(4)(A) places some limitations on the disclosure of referral source information:

> Nothing in this section shall be construed to permit any release, disclosure or identification of the names or identifying descriptions of persons who have reported suspected child abuse or maltreatment to the statewide central register or the agency, institution, organization, program or other entity where such persons are employed or the agency, institution, organization or program with which they are associated without such persons' written permission except to persons, officials, and agencies enumerated in subparagraphs (e), (f), (h), (j), (l), (m) and (v) of this paragraph.

The exceptions here are (e) a court; (f) a grand jury; (h); a *bona fide* research project; (j) the Justice Center; (l) law enforcement; (m) New York City Department of Investigation; and (v) the State and New York City Comptrollers.

Second, SSL §422(7) says that:

> At any time, a subject of a report and other persons named in the report may receive, upon request, a copy of all information contained in the central register; provided, however, that the commissioner is authorized to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation or the agency, institution, organization, program or other entity where such person is employed or with which he is associated, which he reasonably finds will be detrimental to the safety or interests of such person.

The term “commissioner,” as used in this section, would seem to refer to the Commissioner of OCFS, as the SCR is “owned” by OCFS, so I am not sure if this section of the law would apply to the local districts or not. This section was relied upon by ACS in the *Matter of Michael Y.* 212 AD3d 494 (1st Dept., 2023), which was discussed earlier.

If you have a situation where the request is that the records be produced to a court, you should raise the issue of the identity of referral sources to the court so that the court does not release that information to parties to the litigation before the court without considering whether written permission of the source(s) is/are required or at least the safety/interests issue.

SSL §422(5), which is the section of the statute that pertains to unfounded reports, does not address the release of information concerning the referral source.

1034 Reports

Family Court Act §1034 (Power to order investigations) permits a Family Court Judge to order the child protective service of the appropriate social services district to conduct a child protective investigation as described by the Social Services Law and report its findings to the court in any proceedings under Article 10, or in order to determine whether a proceeding under Article 10 should be initiated. OCFS directs that "If a Family Court judge orders a CPS investigation, CPS if required to report its findings directly to the judge who issued the order (commonly referred to as a "1034 report") CPS should also notify the SCR of the investigation and findings[5]
While FCA §1034 says that the investigation is to be carried out "…as described by the Social Services Law…" it is silent as to the confidentiality of the report itself or of any records made in conjunction with the investigation.

An old (1982) Family Court case, *Matter of Damon A. R.*, 112 Misc2d 520 (Family Court, New York County, 1982) stated in *dicta* that SSL §422 did apply to a FCA §1034 report that was prepared by the Society for Prevention of Cruelty to Children ("SPCC"). It appears that other courts have heard testimony from caseworkers who have conducted FCA §1034 investigations and made reports. For example, in *Ronald R. v. Natasha FF*., 217 AD3d 1163 (3rd Dept., 2023) the Third Department found no issue with regard to the testimony of the caseworker who prepared the report, which led to an indicated report.

In 2010, a Family Court order an LDSS to provide to the Court records related to a 2008 indicated referral, upon motion of the attorney for the child, based upon a reference to that indicated referral made in a 2010 1034 report which found that there were no CPS concerns as of the time of the 1034 report. It appears that the court had made the 1034 report available to the parties to the proceeding. *Brenda P. v. Patrisha W*., 30 Misc3d 1203(A) (Family Court, Clinton County, 2010). The decision did not address any disclosure of information obtained in preparing the 2010 1034 report.
If FCA §1034 reports are to be treated as confidential under SSL §422, it would follow that information related to an "unfounded" 1034 report would be treated under the rules found in SSL §422(5). I have not found any cases that states this. In *Matter of Daniel G. v Marie H.*, 196 AD3d 801 (3rd Dept., 2021), the Appellate Division discussed the testimony of the DSS caseworker who conducted the 1034 investigation, which found that that the parties' homes met the minimal standard of care for the safety of the children. The decision did not indicate who called the caseworker as a witness, nor did it mention any objection to the caseworker's testimony, so I don't know if the issue about who can offer evidence of an unfounded referral was raised at the trial court level.

Disclosure by a Commissioner of CPS Information Pursuant to SSL 422-a

[5] New York State Child Protective Services Manual, Chapter 8, Section B, Page B-1. Guidance on the SCR aspect is found in 19-OCFS-LCM-05.

SSL 422-a, which sets forth the conditions under which a commissioner or director of a local district may release CPS of information to the public. This section specifies the considerations that the commissioner must make as well as the type of information that she/he may release. SSL §422-a should be carefully read and discussed by a commissioner and counsel before information is released. The full statute is set forth below, with my annotations in **bold**:

> 1. Notwithstanding any inconsistent provision of law to the contrary [that would be SSL 422], the commissioner or a city or county social services commissioner **may** [**so disclosure is not mandatory**] disclose information regarding the abuse or maltreatment of a child as set forth in this section, and the investigation thereof and any services related thereto **if** he or she determines that such disclosure shall not be contrary to the best interests of the child, the child's siblings or other children in the household **and** any one of the following factors are present:
>
> (a) the subject of the report has been charged in an accusatory instrument with committing a crime related to a report maintained in the statewide central register; **[this would be a crime in which one of the children named in the report were a victim, and that the act(s) that are alleged in the criminal accusatory instrument are also part of the CPS report]** or
>
> (b) the investigation of the abuse or maltreatment of the child by the local child protective service or the provision of services by such service has been publicly disclosed in a report required to be disclosed in the course of their official duties, by a law enforcement agency or official, a district attorney, any other state or local investigative agency or official or by judge of the unified court system; **[requires public disclosure in a report, and the report must have been required to be disclosed- so non-mandatory blabbing doesn't count**] or
>
> (c) there has been a prior knowing, voluntary, public disclosure by an individual concerning a report of child abuse or maltreatment in which such individual is named as the subject of the report as defined by subdivision four of section four hundred twelve of this title; **[the person alleged to have abused or neglected the child has made a voluntary public statement concerning the CPS report]** or
>
> (d) the child named in the report has died or the report involves the near fatality of a child. For the purposes of this section, "near fatality" means an act that results in the child being placed, as certified by a physician, in serious or critical condition. **[requires a medical determination]**

Remember- a Commissioner may release information only after at least one of these four conditions has been met, *and you have determined that disclosure shall not be contrary to the best interests of the child, the child's siblings or other children in the household*- before going any further, skip down to subdivision 5 for

some guidance on the "best interests" issue that any disclosure may be made. Once you have determined that you can and want to release information, you then have to figure out what you can disclose. That is covered in section 2 below, but before that, skip ahead to section 3, because the status of the investigation of the CPS report also has a bearing upon what you can say.

2. For the purposes of this section, the following information may be disclosed:

(a) the name of the abused or maltreated child;

(b) the determination by the local child protective service or the state agency which investigated the report and the findings of the applicable investigating agency upon which such determination was based;

(c) identification of child protective or other services provided or actions, if any, taken regarding the child named in the report and his or her family as a result of any such report or reports;

(d) whether any report of abuse or maltreatment regarding such child has been "indicated" as maintained by the statewide central register;

(e) any actions taken by the local child protective service and the local social services district in response to reports of abuse or maltreatment of the child to the statewide central register including but not limited to actions taken after each and every report of abuse or maltreatment of such child and the dates of such reports;

(f) whether the child or the child's family has received care or services from the local social services district prior to each and every report of abuse or maltreatment of such child;

(g) any extraordinary or pertinent information concerning the circumstances of the abuse or maltreatment of the child and the investigation thereof, where the commissioner or the local commissioner determines such disclosure is consistent with the public interest. [**see subdivision 7 below regarding behavioral health related records]**

3. Information may be disclosed pursuant to this section as follows:

(a) information released prior to the completion of the investigation of a report shall be limited to a statement that a report is "under investigation";

(b) when there has been a prior disclosure pursuant to paragraph (a) of this subdivision, information released in a case in which the report has been unfounded shall be limited to the statement that "the investigation has been completed, and the report has been unfounded";

(c) if the report has been "indicated" then information may be released pursuant to subdivision two of this section.

So, only if the report was indicated do you go back to subdivision 2 to determine what you can disclose.

There are also some types of information that you may not disclose, for any reason

4. Any disclosure of information pursuant to this section shall be consistent with the provisions of subdivision two of this section. Such disclosure shall not identify or provide an identifying description of the source of the report, and shall not identify the name of the abused or maltreated child's siblings, the parent or other person legally responsible for the child or any other members of the child's household, other than the subject of the report.

5. In determining pursuant to subdivision one of this section whether disclosure will be contrary to the best interests of the child, the child's siblings or other children in the household, the commissioner or a city or county social services commissioner shall consider the interest in privacy of the child and the child's family and the effects which disclosure may have on efforts to reunite and provide services to the family.

6. Whenever a disclosure of information is made pursuant to this section, the city or county social services commissioner shall make a written statement prior to disclosing such information to the chief county executive officer where the incident occurred setting forth the paragraph in subdivision one of this section upon which he or she is basing such disclosure.

7. Except as it applies directly to the cause of the abuse or maltreatment of the child, nothing in this section shall be deemed to authorize the release or disclosure of the substance or content of any psychological, psychiatric, therapeutic, clinical or medical reports, evaluations or like materials or information pertaining to such child or the child's family. Prior to the release or disclosure of any psychological, psychiatric or therapeutic reports, evaluations or like materials or information pursuant to this subdivision, the city or county social services commissioner shall consult with the local mental hygiene director. **[this section speaks to the release of certain records]**

There used to be a Dear Commissioner Letter dated 12/17/1999 that included a checklist that a local district commissioner could use to assist in making the evaluation required in 422-a. That letter does not seem to be available on the OCFS website, but it was part of the 2009 CPS Manual.

There is also some guidance in the CPS Manual.

The 2009 version of the Manual provided this advice: **Unless one of the following four conditions is present[6], a commissioner is barred from confirming or denying the existence of a report under Section 422-a of the SSL.**

That advice went away starting with the 2017 version of the Manual.

The 2022 version of the Manual says at Chapter 13, Section A, page A-4:

5. Releasing information to the public

The OCFS Commissioner and LDSS commissioners may disclose certain CPS information to the general public under limited circumstances [SSL §422-a(1)]. (In this context, disclosure to the public means release to any person or agency not otherwise entitled to access to SCR/CPS information pursuant to Sections 422(4)(A), 422(5)(a) or 427-a(5)(d) of the SSL, as discussed above.) They must first determine that the disclosure is not contrary to the best interests of the child, the child's siblings, or any other children in the household [SSL §422-a(1)]. In making such determination, the OCFS or LDSS commissioner must consider the privacy interests of the child(ren) and family, and the effects any disclosure may have on efforts to reunite and provide services to the family [SSL §422-a(5)]. If that determination is made, and if any one of the following factors is present, OCFS or the LDSS Commissioner may release the information. The factors are:

> The subject of the report has been charged in an accusatory instrument with committing a crime related to a report maintained in the SCR.
>
> The investigation of the abuse or maltreatment of the child by the local CPS or the provision of services by CPS has been publicly disclosed in a report required to be disclosed in the course of their official duties by a law enforcement agency or official, a district attorney, any other State or local investigative agency or official, or by a judge of the unified court system.
>
> There has been a prior knowing, voluntary, public disclosure by an individual concerning a report of child abuse or maltreatment in which such individual is named as the subject of the report.
>
> The child named in the report has died or the report involves the near fatality of a child. "Near fatality" means an act that results

[6] The "four conditions" being: the subject being charged with a crime; law enforcement or a court making a required, public disclosure; a prior knowing, voluntary disclosure by the subject; or the fatality or near-fatality of the child.

in the child being placed, in serious or critical condition, as certified by a physician [SSL §422-a(1)].

If OCFS or the LDSS determines that CPS information may be released, the information that may be released is limited, based on the status of the investigation.

If the request for public disclosure is made while the report is under investigation, the only information that may be disclosed is a statement that a report is “under investigation” [SSL §422-a(3)(a)].

If there was a prior request for public disclosure while the report was under investigation and the report is unfounded, the only information that may be released is a statement that “the investigation has been completed, and the report has been unfounded” [SSL §422-a(3)(b)]. If no such prior request was made, the fact that a report was unfounded may not be released, except in connection with a subsequent indicated report, as discussed below.

If the report has been indicated, the information that may be released is limited to:

The name(s) of the abused/maltreated child(ren)

That the report was indicated, and the basis for that determination

Identification of CPS and other services provided to the child(ren) named in the report and the family

Whether any SCR report concerning the child(ren) named in the report has been indicated

Any actions taken by CPS and the LDSS in response to the report at issue and previous CPS reports, including the dates of such reports (including unfounded reports)

Whether the child(ren) or family received care or services from the LDSS prior to each SCR report involving the child(ren)

Any extraordinary or pertinent information concerning the circumstances of the abuse or maltreatment and the CPS investigation, where the OCFS or LDSS commissioner determines that such disclosure is consistent with the public interest [SSL §422-a(2) & (3)(c)].

However, no information may be released that would identify the source of the report, or the name(s) of the abused or maltreated child’s siblings, parent or other person legally responsible for the child, or

other members of the child's household, other than the subject(s) of the report [SSL §422-a(4)]. Further, the substance or content of any psychological, psychiatric, therapeutic, clinical or medical reports, evaluations, or similar materials (including the reports, evaluations or other materials themselves) pertaining to the child(ren) or family may not be released except as it applies directly to the cause of the abuse or maltreatment. The LDSS commissioner must consult with the local director of mental hygiene prior to authorizing the release of any psychological, psychiatric or therapeutic reports, evaluations, or similar materials [SSL §422-a (7)].

There is no authority to publicly disclose the existence of a FAR report, or any information from such a report.

Attorneys for the LDSS or attorneys for OCFS should be consulted prior to the release of any information to the public. In addition, where information will be disclosed, the LDSS commissioner must notify in writing the chief executive officer of the county in which the abuse/maltreatment occurred setting forth the basis for the determination to disclose the CPS information [SSL §422-a(6)].

There is a "bad" case floating around out there called *Sayegh v. McGuire*, 146 AD3d 788 (2nd Dept., 2017). In this case the 2nd Department reversed an Art 78 decision made on a SSL §422-a determination by a commissioner to not release information to the defendant in a civil case, saying that the court should have conducted a hearing instead and reviewed the records in camera. That seems wrong, since the release under SSL §422-a is completely discretionary on the part of a Commissioner. provided that certain conditions are met, and there are certain limitations on what a Commissioner may disclose if they do choose to disclose. That case was a civil wrongful death lawsuit, with the defendant being the deceased child's medical provider. I think that what should have happened here was for the defendant to make an application for a subpoena pursuant to CPLR 2307, to have the records disclosed to the court under authority of SSL §422(4)(A)(e). I do not think that SSL §422-a was meant to be a litigation discovery statute because if it is, it completely defeats the purpose of SSL §422.

FAR Records

In August, 2011 Social Services Law §427-a went into effect, permitting social services districts, upon the authorization of the office of children and family services, to establish a program that implements differential responses to reports of child abuse and maltreatment. Subsection 5(b) states that: "[A]ll records created as part of the family assessment and services track shall include, but not be limited to, documentation of the initial safety assessment, the examination of the family's strengths, concerns and needs, all services offered and accepted by the family, the plan for supportive

services for the family, all evaluations and assessments of the family's progress, and all periodic risk assessments."

SSL 427-a(5)(d) states that:

> All reports assigned to, and records created under, the family assessment and services track, including but not limited to reports made or written as well as any other information obtained or photographs taken concerning such reports or records shall be confidential and shall be made available only to:
>
> (i) staff of the office of children and family services and persons designated by the office of children and family services;
>
> (ii) the social services district responsible for the family assessment and services track case;
>
> (iii) community-based agencies that have contracts with the social services district to carry out activities for the district under the family assessment and services track;
>
> (iv) providers of services under the family assessment and services track;
>
> (v) any social services district investigating a subsequent report of abuse or maltreatment involving the same subject or the same child or children named in the report;
>
> (vi) a court, but only while the family is receiving services provided under the family assessment and services track and only pursuant to a court order or judicial subpoena, issued after notice and an opportunity for the subject of the report and all parties to the present proceeding to be heard, based on a judicial finding that such reports, records, and any information concerning such reports and records, are necessary for the determination of an issue before the court. Such reports, records and information to be disclosed pursuant to a judicial subpoena shall be submitted to the court for inspection and for such directions as may be necessary to protect confidentiality, including but not limited to redaction of portions of the reports, records, and information and to determine any further limits on redisclosure in addition to the limitations provided for in this title. A court shall not have access to the sealed family assessment and services reports, records, and any information concerning such reports and records, after the conclusion of services provided under the family assessment and services track; and

(vii) the subject of the report included in the records of the family assessment and services track.

18 NYCRR 432.13 (“Family assessment response”) at subdivision (g)(1) provides some amplification to “persons designated by OCFS” as including:

(a) local or regional child fatality review team members, provided that the child fatality review team is preparing a fatality report pursuant to section 20 or 422-b of the Social Services Law;

(b) all members of a local or regional multidisciplinary investigative team established pursuant to section 423(6) of the Social Services Law, when investigating a subsequent report of suspected child abuse or maltreatment involving a member of a family that was part of a family assessment response, provided that only the information from the family assessment response record that is relevant to the subsequent report be entered into the record of the subsequent report, which is to be provided to the multidisciplinary review team or agency; and

(c) citizen review panels established pursuant to section 371-b of the Social Services Law, provided that any information obtained shall not be re-disclosed and shall only be used for the purposes set forth in section 371-b of the Social Services Law;

Section 427-a(5)(e) sets forth the re-disclosure restrictions on persons given access to information pursuant to paragraph (d) of this subdivision and states that the information shall not be re-disclosed except as follows:

(i) the office of children and family services and social services districts may disclose aggregate, non-client identifiable information;

(ii) social services districts, community-based agencies that have contracts with a social services district to carry out activities for the district under the family assessment and services track, and providers of services under the family assessment and services track, may exchange such reports, records and information concerning such reports and records as necessary to carry out activities and services related to the same person or persons addressed in the records of a family assessment and services track case;

(iii) the child protective service of a social services district may unseal a report, record and information concerning such report and record of a case under the family assessment and services track in the event such report, record or information is relevant to a subsequent report of suspected child abuse or maltreatment. Information from such an unsealed report or record that is relevant to the subsequent report

of suspected child abuse and maltreatment may be used by the child protective service for purposes of investigation and family court action concerning the subsequent report and may be included in the record of the investigation of the subsequent report. If the social services district initiates a proceeding under article ten of the family court act in connection with such a subsequent report of suspected child abuse and maltreatment and there is information in the report or record of a previous case under the family assessment and services track that is relevant to the proceeding, the social services district shall include such information in the record of the investigation of the subsequent report of suspected child abuse or maltreatment a nd shall make that information available to the family court and the other parties for use in such proceeding provided, however, that the information included from the previous case under the family assessment and services track shall then be subject to all laws and regulations regarding confidentiality that apply to the record of the investigation of such subsequent report of suspected child abuse or maltreatment. The family court may consider the information from the previous case under the family assessment and services track that is relevant to such proceeding in making any determinations in the proceeding; and

(iv) a subject of the report may, at his or her discretion, present a report, records and information concerning such report and records from the family assessment and services track case, in whole or in part, in any proceeding under article ten of the family court act in which the subject is a respondent. A subject of the report also may, at his or her discretion, present a report, records and information concerning such report and records from the family assessment and services track, in whole or in part, in any proceeding involving the custody of, or visitation with the subject's children, or in any other relevant proceeding. In making any determination in such a proceeding, the court may consider any portion of the family assessment and service track report, records and any information concerning such report and records presented by the subject of the report that is relevant to the proceeding. Nothing in this subparagraph, however, shall be interpreted to authorize a court to order the subject to produce such report, records or information concerning such report and records, in whole or in part.

The Second Department has held that FAR reports should not be produced in response to a grand jury subpoena as a grand jury is not an entity to which FAR records may be made directly available per SSL §427-a(5)(d) . See *M. of McGuire v DiFiore*, 112 ad3d 630 (2nd Dept., 2013).

It is also noteworthy that there is no authority to publicly disclose the existence of a FAR report, or any information from such a report as part of a disclosure by a

Commissioner under SSL §422-a. See New York State Child Protective Services Manual Chapter 13- Section A- Page A-5.

An LDSS must not share information with a criminal justice agency from the record of any CPS report that was assigned to FAR. See New York State Child Protective Services Manual Chapter 13- Section A- Page A-3.

CPS Fair Hearing Decisions and FOIL

In *Lansner & Kubitscheck v NYS OCFS*, 64 Misc3d 438 (Supreme Court, Albany County, 2019) the court ruled that OCFS may not deny a FOIL request for redacted versions of indicated CPS case decisions. OCFS had denied the request based upon the FOIL exception found in Public Officers Law §87(2)(a), for records that are subject to confidentiality pursuant to Federal or other New York State law, saying that they are included with other CPS records that are confidential pursuant to Social Services Law §422(4)(A).

When a municipality claims the Public Officers Law §87(2)(a) exemption it must show that the records at issue do fall within the particular confidentiality statute. See *Matter of Capital Newspapers, Div. of Hearst Corp., v Burns*, 67 NY2d 562 (1986). In that case, the newspaper requested individual police personnel records, and the request was denied on the basis of the Public Officers Law §87(2)(a) exemption. However, the record that was ultimately required to be turned over was a "lost time" report, which the Court found was not part of the police personnel records defined by Civil Rights Law §50-a, thus not covered by that FOIL exemption. The Court in Lansner cited this case in its decision.

In the Lansner case, the Court found that the decisions, at least as maintained by OCFS, were not part of the "records" as defined by Social Services Law §422(4)(A). In doing so, the Court cited sections of the State Administrative Procedure Act, which provides for public inspection and copying of agency written final decisions, subject to redaction, as well as decisions of the Justice Center, issued pursuant to Social Services Law §494, which are publicly available, with redactions, on their web page. OCFS argued that the decisions that are "indicated" are maintained in the SCR's database, until the youngest child named in the report reaches age 28.

The Court also was asked to rule on the scope of redactions for the requested decisions. The Court ruled that names had to be redacted, as well as any direct quotes from CPS reports. Ages were not to be redacted. The Court left open other redaction issues, saying that they had to be decided on a case by case basis

As mentioned earlier, the Court did deny Lansner's request that the records be provided under the bona fide research project exception found in Social Services Law §422(4)(A)(h).

I think that a critical difference for the local districts might be where they keep the indicated fair hearing decisions. OCFS's argument was that they were automatically

part of the CPS record per 422(4)(A), which makes the initial report and anything else the local district or OCFS gets become part of the case record and thus subject to the specific statute exception. The Court said that the OCFS FH decisions are kept in their own database, and as such, the court also likened them to Justice Center decisions, which by their statute are available, with redactions.

It would be worthwhile to find out where your district keeps FH decisions- if they keep them in the case file, I think that they are subject to 422(4), and that the requestor should FOIL OCFS and not the local district. There's also the non-binding nature of the decision on the local districts, so you could argue that the decision was wrong and that no matter where they are kept, the decisions do fall within 422(4).

Assuming that a local district does keep its CPS fair hearing decisions in the CPS record, then those decisions should not be subject to FOIL, per SSL 422 and the FOIL exception contained in Public Officers Law §87(2)(a). The Court of Appeals decision in NYCLU v. NYPD, 32 NY3d 556 (2018) should be controlling. That case held that where there is a statute that describes the procedure for obtaining records, that is the procedure that is to be used, not some other procedure that someone dreams up to justify the production of the record. That is also a good principle to keep in mind when anyone comes asking for records or access to a database- unless there is a law that permits the disclosure or access, you can't just make an MOU or draft a confidentiality agreement, and that makes it okay to disclose or provide access. And, if there is legal authority to permit the disclosure or access, you have to follow any procedures set forth in the law or regulations before permitting the access or making the disclosure.

I have not located any OCFS directive or anything in the CPS Manual that where the local districts should place and "indicated" fair hearing decision when they receive them, but at least some of them put them in the case's CPS record, which I think would make them fall under SSL 422(4).

Child Fatality Review Reports

Recently, news agencies and others have become interested in receiving the details of child deaths, and the circumstances of any CPS involvement. Occasionally, attempts are made to obtain child fatality review reports from a local district via a Freedom of Information Law request.

The New York State Freedom of Information Law ("FOIL") is found in the Public Officers Law. Technically, any or all social services records may be subject to a FOIL request. Advisory opinions[7] often contain the following boilerplate language: "…first, as a general matter, the Freedom of Information Law is based upon a presumption of

[7] Interpretation of the FOIL falls under the purview of the New York State Committee on Open Government, which is part of the New York Department of State. The Committee on Open Government does not decide on FOIL requests that are contested, rather, it issues "advisory opinions," which are most often requested by people who have had their FOIL request denied.

access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law." Notwithstanding this, advisory opinions of the Committee on Open Government are just that—opinions. The Committee on Open Government cannot compel the record holding agency to disclose their records.

Under Public Officers Law §87(2) the most pertinent exceptions for a request made upon a social services district for a child fatality review report are records that:

> (a) are specifically exempted from disclosure by state or federal statute [*This is probably the most important one, relative to client case records, further discussion about this exception is set forth further in this section*];
>
> (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article [*This might also be mentioned along with the previous exception, in the context of a request for client records, but the statute-based one is probably better];*
>
> (g) are inter-agency or intra-agency materials which are not:
> i. statistical or factual tabulations or data;
> ii. instructions to staff that affect the public;
> iii. final agency policy or determinations; [*this might apply if the request is for a non-final version of the report that has been sent to the local district for comment]*
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government [*this might apply if the fatality review is not deemed to be an audit of the CPS handling of the case, so you might consider this one];*

Note here that in denying a FOIL request in whole or part, you are not limited to citing only one exception to the disclosure requirement, so you should cite all that apply.

As mentioned above, Public Officers Law §87(2)(a) permits the local district to deny access to records that "…are specifically exempted from disclosure by state or federal statute."

With regard to CPS records, the exemption from disclosure is found in SSL §422, which requires that CPS records are confidential and may not be disclosed except to the persons or agencies specifically listed in the statute. It would appear that the CPS records maintained by the local district, which would form part of the investigatory material for the child fatality review. would remain confidential and not subject to FOIL.

Also, with regard to the final child fatality review report, the only agency with the authority to release the report is OCFS, per SSL §20(5). The specific manner a report may be released to the public is set forth in subdivisions (b) and (c) of the law:

(b) Such report shall include (i) the cause of death, whether from natural or other causes, (ii) identification of child protective or other services provided or actions taken regarding such child and his or her family, (iii) any extraordinary or pertinent information concerning the circumstances of the child's death, (iv) whether the child or the child's family had received assistance, care or services from the social services district prior to such child's death, (v) any action or further investigation undertaken by the department or by the local social services district since the death of the child, (vi) as appropriate, recommendations for local or state administrative or policy changes, and (vii) written comments as may be provided by any local social services district referenced in such report, to the extent that such comments: (A) protect the confidentiality and privacy of the deceased child, his or her siblings, the parent or other person legally responsible for such child, any other members of such child's household and the source of any report of suspected child abuse or maltreatment, and (B) are relevant to the fatality reported and pertain to any of the provisions of subparagraph (i), (ii), (iii), (iv), (v) or (vi) of this paragraph, provided that any comments that pertain to subparagraphs (i), (ii), (iii), (iv) or (v) of this paragraph must be factually accurate. Such report shall contain no information that would identify the name of the deceased child, his or her siblings, the parent or other person legally responsible for the child or any other members of the child's household, but shall refer instead to the case, which may be denoted in any fashion determined appropriate by the department or a local social services district. **In making a fatality report available to the public pursuant to paragraph (c) of this subdivision, the department may respond to a child specific request for such report if the commissioner determines that such disclosure is not contrary to the best interests of the deceased child's siblings or other children in the household, pursuant to subdivision five of section four hundred twenty-two-a of this chapter.** Except as it may apply directly to the cause of the death of the child, nothing herein shall be deemed to authorize the release or disclosure to the public of the substance or content of any psychological, psychiatric, therapeutic, clinical or medical reports, evaluations or like materials or information pertaining to such child or the child's family.

(c) Twenty days prior to the release of the report the department shall forward the proposed report to each local social services district referenced in the report. Within ten days thereafter, each local social services district may provide written comments in accordance with subparagraph (vii) of paragraph (b) of this subdivision to the department in the form and manner required by the department to be included by the department within the report. No later than six months from the date of the death of such child, the department shall forward its report to the social services district, chief county executive officer, chairperson of the local legislative body of the county where the child's death occurred and the social services district which had care and custody or custody and guardianship of the child, if different. The department shall notify the temporary president of the senate and the speaker of the assembly as to the issuance of such reports and, in addition to the requirements of section seventeen of this chapter, shall submit an annual cumulative report to the governor and the legislature incorporating the data in the above reports and including appropriate findings and recommendations. **Such reports concerning the death of a child and such**

cumulative reports shall immediately thereafter be made available to the public after such forwarding or submittal.

It would appear that the requirement that the OCFS Commissioner make a best interests determination means that OCFS is the sole agency that may authorize the release of a fatality review report. Because of that, the exemption from disclosure provision of Public Officers Law §87(2)(a) should apply. The response might also include that the requesting person should be making their request to OCFS.

The OCFS most recent position on release of a child fatality review report is contained in its 2022 CPS Manual at Chapter 11, page B-2:

2. Sharing the Individual Child Fatality Report

Requirements

While a CFRT may write an IFCR, OCFS has final responsibility for the report and its contents, and only OCFS can issue the report [SSL §§20(5)(c) & 422-b(6)].

LDSS Review Prior to Finalizing the Report

Prior to issuance of a report, OCFS must submit a draft copy of the proposed report to each LDSS referenced in the report for review and comment.3 A purpose of this sharing is to provide the LDSS the opportunity to correct factual errors or to supply missing information.

In addition, the LDSS may submit comments on the draft report. Any such comments must be submitted within ten days of the receipt of the draft. [SSL §20(5)(c)]. These comments must protect the confidentiality and privacy of the deceased child, the child's family and household members, and the source of any report to the SCR; be relevant to the fatality and pertain to one of the factors that must be addressed in the fatality report; and be factually accurate [SSL §20(5)(b)(vii)]. Comments meeting these requirements must be included by OCFS in the final fatality report.

Distribution of the Final Report

Once the IFCR is final, but no later than six months after the death of the child, OCFS issues the report to the following officials [SSL §20(5)(c)]:

> The LDSS Commissioner of the county where the death occurred;
>
> The LDSS Commissioner who had care and custody, or custody and guardianship, of the child, if different from the LDSS Commissioner in the county where the child's death occurred;
>
> The chief executive officer of the county (in New York City, the Mayor of the City of New York) where the child's death occurred;

Outside of New York City, the chairperson of the local legislative body in the county where the child's death occurred; and

If the death occurred in New York City, the president of the New York City Council

OCFS must also notify the Temporary President of the State Senate and the Speaker of the State Assembly when it issues an IFCR.

OCFS also shares reports about fatalities that occur in New York City with the Public Advocate for the City of New York.

For reports prepared by a CFRT, OCFS must also forward copies of the report to all other CFRTs established under SSL §422-b, as well as to all citizen review panels established pursuant to SSL §371-b, and to the Governor.

Confidentiality / Release to the Public

When OCFS receives a request for a specific IFCR to be released to the public, OCFS may release the report if OCFS determines that such disclosure is not contrary to the best interests of the deceased child's surviving siblings or to other children in the deceased child's household [SSL §20(5)(b)].

Such a "best interests" determination must be made when there is either a request for the release of an IFCR or a more general, request for multiple reports that is not child-specific. With each request, OCFS must consider various factors including, but not limited to, the potential adverse effects of disclosure on the surviving siblings or other children in any deceased child's household.4 A "best interests" determination must also be made before releasing an IFCR prepared by OCFS to members of a CFRT.

These confidentiality protections do not preclude OCFS, acting in its supervisory role, from issuing a separate report and findings to the appropriate LDSS or VA that specifically identifies the pertinent parties.

Disclosure of an annual or individual child fatality report prepared by a local or regional fatality review team created pursuant is also governed by Social Services Law §20(5), with the authority to release residing with OCFS. Any meetings, reports, records, books, or papers created or obtained or maintained by a local or regional fatality review team, except for an annual report or individual fatality report, are confidential pursuant to Social Services Law §422-b(6), and are not open to the general public except via court order.

Applicable Law: SSL §372
SSL §422
SSL §412
SSL §422-a

SSL §422-b
SSL §427-a

Applicable Regs.: 18 NYCRR 432.7
18 NYCRR 432.13

FOSTER CARE RECORDS

Foster care records are specifically covered by SSL §372. SSL §372(3) and (4) state that foster care records are confidential, however they are subject to the provisions of CPLR article 31. Most often, the discovery of foster care records will take the form of a demand for discovery and production of documents (CPLR 3120), or a *subpoena duces tecum*. The Third Department emphasized that a hearing is required before the release of foster care records to a Court Appointed Special Advocate. *M. of Michelle HH.*, 18 AD3d 1075 (3rd Dept., 2005). The court also emphasized that any medical or mental health records that are contained in the foster care record must also be analyzed in the context of the confidentiality provisions in the Mental Hygiene Law and the HIPAA regulations.

In October, 2010, the Third Department ruled that CPS records that contain information relative to a child's foster care placement may be disclosed pursuant to the procedures of Social Services Law §372 (including a hearing on notice to all interested persons). See *Allen v. Ciannamea,* 77 A.D3d 1162 (3rd Dept., 2010).

Where DSS is a party in a Family Court proceeding, such as in a foster care review, termination of parental rights, or Article 10 extension of placement, the law guardian and respondent's attorney have discovery rights. See, *e.g.*, *M. of Leon RR*, 48 NY2d 117, 421 NYS2d 863 (1979).

The more rare, but still common, occurrence is where the DSS is not a party to the action, or actual litigation has not commenced yet. This often happens in custody and divorce cases, but also in the context of personal injury cases. In cases where DSS is not a party, the party seeking the records is obliged to obtain, on notice to DSS and all adverse parties, an order directing disclosure (CPLR 3120(b) and SSL §372).

In criminal matters, a *subpoena duces tecum* is the preferred method of obtaining foster care records. See *Matter of Roman,* 97 Misc.2d 782, 412 NYS2d 325 (Supreme Court, New York County, 1979). Note that in a criminal case, neither the prosecution or defense is now required to utilize the CPLR §2307 procedures to obtain a subpoena- see Subpoena Requirements For DSS Records- New York State Criminal Courts (*infra*).

In a civil case, if a party seeks a subpoena to obtain the records, DSS is still entitled to notice and to be heard pursuant to CPLR 2307. SSL §372(4)(a) provides that the

records can only be produced to those people authorized by OCFS, by a judge of the court of claims when such records are required for the trial of a claim, or by a judge of the family court when such records are required for the trial of a proceeding in such court, or by a justice of the supreme court, after a notice to all interested parties and a hearing. In *Quillen v. State*, 191 AD2d 31, 599 NYS2d 721 (3rd Dept., 1993), the Court ruled that, at a minimum, the persons to be notified are the agency involved, the Commissioner of Social Services and the individuals whose records are sought. In addition, SSL §372(3) requires notice to the child, the parent or guardian and, if the child is still a minor, the child's law guardian. The Court also ruled that the hearing should take the form of an *in camera* review of the records and then, if the records were determined to be relevant, the parties asserting confidentiality would have an opportunity to be heard why the need for confidentiality outweighs the need for use of the records. Another significant aspect of this statute is that it does not allow village, town, city, county, surrogate or administrative judges to rule on the release of foster care records, even if the matter for which they are sought is before the court. I read CPLR §2307 and SSL §372 together, and would that the subpoena be obtained on notice at least to DSS, with an opportunity for DSS to at least file responding papers, or be heard before the subpoena is issued. When a court has ordered production of the record, it is usually provided to the court for an *in camera* inspection. When the Court receives the records, it should actually conduct the *in camera* review before releasing the records. See *Llorente v. City of New York*, 38 AD3d 617 (2nd Dept., 2007). In K.B. v SCO Family of Serv., 159 AD3d 416 (1st Dept., 2018) the Court held that while the trial court had properly ordered that the records be produced to the court for *in camera* inspection that it should not have required redaction of the identities of LDSS caseworkers, and mental health and other professionals who the plaintiff wished to interview to see if they had personal knowledge of the issues in the case. The First Department found that the defendant agency had not raised any privacy interests of those individuals that would warrant redaction.

A grand jury may issue a subpoena for foster care records via the district attorney, without regard to the mandates of CPLR 2307, SSL §372, or CPLR 4508 (social worker/client privilege). See *Matter of Special Investigation 1198/82*, 118 Misc2d 683, 461 NYS2d 186 (Supreme Court, Queens County, 1983). Note that this is different from what SSL§422 says about a grand jury obtaining CPS records or what SSL §473-e says about a grand jury obtaining APS records.

If the child or such child's parent or guardian is not a party to the litigation, the notice for discovery or notice of motion must be served on the parent, guardian or child, and if the child is still a minor, on the child's law guardian. Those persons may appear in the action with regard to the discovery of the foster care records. SSL §372(3). See also *Catherine C. v. Albany County DSS,* 38 AD3d 959, 832 NYS2d 99 (3rd Dept., 2007)

Where no action is pending, the parent, relative or legal guardian of the child, or an authorized agency may apply, on notice to DSS, to the supreme court for an order directing production of the records. SSL §372(3).

18 NYCRR 441.7 is the regulation pertaining to foster care records, however, it makes no reference to confidentiality. 18 NYCRR 357.3, which is the regulation that addresses the confidentiality of DSS records generally, does provide some specific references to foster care records regarding disclosure of information to foster parents or relatives with whom the child is placed. 18 NYCRR 357.3(b), (c), and (d).

18 NYCRR 443.8, the regulation which requires authorized agencies to perform criminal history record checks with the Division of Criminal Justice Services and the Federal Bureau of Investigation regarding any prospective foster parent and each person over the age of 18 who is currently residing in the home of such prospective foster parent before the foster parent is finally approved or certified for the placement of a foster child, does add additional confidentiality to those records which the authorized agency receives in response to the checks:

> (h) Confidentiality.
>
> (1) Any criminal history record information provided by the Division of Criminal Justice Services or the Federal Bureau of Investigation, and any summary of the criminal history record provided by the Office of Children and Family Services to an authorized agency pursuant to this section, is confidential and is not available for public inspection.
>
> (2) Nothing in this subdivision prevents an authorized agency, the Office of Children and Family Services or other State agency referenced in paragraph (a) of subdivision two of section 378-a of the Social Services Law from disclosing criminal history information to any administrative or judicial proceeding relating to the denial or revocation of a foster parent's certification or approval or the foster child's removal from the home.
>
> (3) Where there is a pending court case, the authorized agency which received the criminal history record summary from the Office of Children and Family Services must provide a copy of such summary to the Family Court or Surrogate's Court.

In 2014 the Federal “Preventing Sex Trafficking and Strengthening Families Act’’ was enacted which amended Federal law to require that foster children who are identified as being a sex trafficking victim be reported to law enforcement and that foster children who are missing from placement to be reported to both law enforcement and the National Center for Missing and Exploited Children. Subsequently, OCFS issued regulations at 18 NYCRR 431.8 as well as 16 OCFS ADM 09 which provides guidance.

Access to Records by a Former Foster Child

In 2006, a regulation was promulgated (18 NYCRR 428.8) that permits a former foster to child to receive access to his or her own foster care records and/or obtain copies or summaries of those records.

It is important to note here that the regulation defines “former foster child” to mean a person 18 years of age or older, who has been discharged from foster care on either a trail or final basis and was not adopted. If the former foster child was adopted, the law related to adoption records, discussed *infra* applies.

An authorized agency (which could include the local district or and agency with whom the foster child was placed) must grant the former foster child's request for access to his or her foster care record. The former foster child is entitled to receive all items in the foster care record except for confidential HIV-related information concerning any person other than the former foster child.

The authorized agency may choose any of the following methods of access:

(1) a summary statement containing the requested information;
(2) a copy of the entire foster care record;
(3) a copy of the portions of the record containing the requested information;
(4) a personal review of the applicable records by the former foster child within the agency facility, when mutually convenient to the authorized agency and the former foster child; or
(5) any combination of the above.

The former foster child must submit a written request detailing the specific information sought and include a copy of a document verifying the identity of the former foster child such as a current valid driver's license or other commonly accepted form of identification which provides proof of the name and date of birth of the former foster child. Nothing precludes the former foster child from requesting all available agency foster care records that pertain to the former foster child.

Upon the receipt by an authorized agency of a written request from a former foster child for information concerning the former foster child, the authorized agency must verify the identity and age of the former foster child by reviewing the submitted identification documentation; the authorized agency must search its foster care records to determine whether a foster care record exists for such a person.

Within 30 days of the receipt of the written request, the authorized agency must provide the former foster child with the requested information or a written explanation of the delay including the date the information will be provided.

An authorized agency may impose reasonable and customary charges, not to exceed the actual costs incurred by the authorized agency, for making copies of and/or mailing case record documents. No charge may be imposed for providing personal review of the records or preparing a summary.

Note that nothing in the statutes or regulations permit the release of foster care records to a third party based upon a "release," "authorization," "consent," or anything else of the like.

Applicable Law: SSL §372
42 USC 671(a)(34)
42 USC 671(a)(35)

Applicable Regs.: 18 NYCRR 441.7
18 NYCRR 357.3
18 NYCRR 428.8
18 NYCRR 431.8
18 NYCRR 443.8

ADOPTION RECORDS

It is not completely clear which statute applies to this issue. Two statutes are applicable on adoption issues: SSL §372 and Domestic Relation Law §114. It is the position of OCFS that DRL §114 is controlling, but there is no definitive statute or case law on this point.

SSL §372 covers foster care records (of which adoption records are arguably a subset) but does not refer to adoption records specifically. As previously discussed, these records may only be disclosed by court order. This will usually require a motion to be made on notice to DSS and others in the Supreme Court.

DRL §114 provides that the records of the adoption court are to be sealed after an order of adoption is made. These records may only be disclosed by order of the adoption court or supreme court for good cause shown after notice is given to the adoptive parents and to other additional persons as the court may direct. However, the statute makes no reference to agency records, whether related to the adoption or prior foster care.

What is clear is that records related to adoptions are confidential and may not be disclosed without an appropriate court order. The statutes may differ on which court hears the motion, but it is clear that courts that have considered the issue have taken a fairly conservative view on releasing records concerning adopted children. The key is to not just give in easily and allow access to adoption records without a court hearing before the appropriate court. It is also important to make sure that all other persons who are arguably entitled to notice are notified. You certainly don't want to have to later defend yourself for not ensuring that a needed person was notified or for not making a necessary argument. If everyone is notified, they can make their own arguments.

Regardless of which statute is controlling, the test should probably be the good cause test of DRL §114. SSL §372 does not set forth a test, stating only that a disclosure order may be granted only after notice to all interested persons and a hearing. In the absence of specific statutory guidance, it seems appropriate to argue that the legislative intent embodied in DRL §114 should be applied to a request for access to agency adoption or foster care records under SSL §372.

Courts that have considered the issue have taken a fairly conservative view on releasing records concerning adopted children. In *Wise v. Battistoni*, 208 AD2d 755, 617 NYS2d 506 (2nd Dept., 1994) the Court dismissed a petition brought by a father who had surrendered his child for adoption, finding that he could not show that disclosure was "proper" under SSL §372.

Since an adoption records request might also contain a request to see the court file concerning the adoption, the following discusses the confidentiality of the court file. Upon the making of an order of adoption, the court file is sealed under Domestic Relations Law (DRL) §114 and may only be inspected upon order of the judge or surrogate of the court in which the order of adoption was made or of a justice of the supreme court. The order may only be granted upon a showing of "good cause," and on notice to the adoptive parents and to such additional persons as the court may direct. DRL §114(2). Unfortunately, "good cause" is decided on a case-by-case basis. As stated by the Court of Appeals:

> By its very nature, good cause admits of no universal, black-letter definition. Whether it exists, and the extent of disclosure that is appropriate, must remain for the courts to decide on the facts of each case. *Matter of Linda F. M. v. Department of Health of City of New York*, 52 NY2d 236, at 240, (1981).

In the *Linda F. M.* case, the Court of Appeals upheld the denial of the information request where the proffered "good cause" was the petitioner's desire to learn of her ancestry. The *Linda F. M.* decision also endorsed limited disclosure in certain circumstances, for example, in situations where the records were requested for a health-related purpose, the relevant medical information could be disclosed without revealing other material such as the identity of the biological parents. 52 NY2d, at 240 (fn. 2). This idea was subsequently adopted by the legislature when it enacted SSL §373-a which provides that the medical histories of the child and the biological parents (with identifying information eliminated) can be provided to the adoptive parents. This information can include HIV/Aids information, provided that the adoptive parents do not re-disclose that information. 18 NYCRR 421.2(d). This disclosure can be made without court order.

In *Matter of Baby Boy K*., 183 Misc.2d 249, 701 NYS2d 600 (Broome County Family Court, 1999) the Family Court found that the application for access and inspection of adoption records under DRL §114(4) was reserved to the adoptive child and was not available to the biological parent. On appeal, the Third Department reversed and held that a biological parent could make an application pursuant to DRL §114(4), but also

that the Court could in those situations order that the medical information submitted by the biological parent could be conveyed to the adoptive parents or adoptee by an intermediary, without disclosing the identity of the parties. *Matter of Baby Boy SS*., 276 AD2d 226, 719 NYS2d 311 (3rd Dept., 2001).

DRL §114(4) does provide that good cause for disclosure or access to and inspection of sealed adoption records may be established on medical grounds via certification from a physician licensed to practice medicine in the state of New York that access to the records is required to address a serious physical or mental illness. The certification shall identify the information required to address such illness.

The Courts have been quite stringent in the application of the good cause requirement when physician affidavits are offered. In *M. of Timothy AA*, 73 AD3d 1390 (3rd Dept., 2010) the Court found that physician affidavits that stated that having access to the adoptee's biological family medical histories would be "very helpful" and "should assist" the adoptee's physician's in caring for the adoptee and his children did not establish that the information was required to address a serious physical or mental illness. In *M of Dennis*, 34 Misc3d 1219(A) Family Court, Queens County, 2012) the Court dismissed the application on the basis that a medical affidavit from the adoptee's treating psychiatrist did not state that the information was to address a serious physical or mental illness or specify what information was required to treat the illness.

The courts seem to be continuing to maintaining a high standard for "good cause." In *Matter of Darlene TT.*, 179 AD3d 1185 (3rd Dept., 2020) the Court upheld the dismissal of a petition for the unsealing of adoption records where the petitioner wished to learn the identity of her biological father, who she alleged, was a convicted murderer. Her basis for a finding of "good cause" was her belief that her father or his family may still hold anger against the petitioner and her mother. The Third Department, although upholding the dismissal of the petition noted that the dismissal was without prejudice and that perhaps a "more robust application meeting the standard may yet be made."

Occasionally, other statutes can impact on an application for disclosure of adoption information. In *Matter of Adoption of Rebecca*, 158 Misc2d 644, 601 NYS2d 682 (Surrogate's Court, Rensselaer Co., 1993), the court found good cause for the disclosure of adoption information where the adoptive child was attempting to verify membership of a particular tribe. The court found that the provisions of the Indian Child Welfare Act applied but, rather than disclose the information to the petitioner, the court directed that the information be given to the tribal administrator with a request for confidentiality.

A grand jury is entitled to subpoena adoption records without the necessity of obtaining a court order. *Matter of Grand Jury Subpoena Duces Tecum* 58 AD2d 1, 395 NYS2d 645 (1St Dept., 1977).

Applicable Law: DRL §114
SSL §372
SSL §373-a

Applicable Regs.: 18 NYCRR 421.2

PREVENTIVE SERVICES

Preventive services are discussed in SSL §§409 and 409-a. SSL §409 defines "preventive services," as being supportive and rehabilitative services provided, in accordance with the provisions of the Social Services Law and OCFS regulations, to children and their families for the purpose of: averting an impairment or disruption of a family which will or could result in the placement of a child in foster care; enabling a child who has been placed in foster care to return to his family at an earlier time than would otherwise be possible; or reducing the likelihood that a child who has been discharged from foster care would return to such care.
SSL §409-a(7) provides that preventive services information governed by this section may be released by the department, social services district or other provider of preventive services to a person, agency or organization for purposes of a bona fide research project. Identifying information shall not be made available, however, unless it is absolutely essential to the research purpose and the department gives prior approval. Information released pursuant to this subdivision shall not be re-disclosed except as otherwise permitted by law and upon the approval of the department.

SSL §409-a(9) permits records relating to children be made available to officers and employees of the state comptroller, or of the city comptroller of the city of New York, or of the county officer designated to perform the auditing function in any county outside of New York City, for purposes of a duly authorized performance audit. Release of records under this section requires that such comptroller or officer shall have certified to the local district that they have procedures developed in consultation with OCFS to limit access to client-identifiable information to persons requiring such information for purposes of the audit, that such persons shall not use such information in any way except for purposes of the audit and that appropriate controls and prohibitions are imposed on the dissemination of client-identifiable information obtained in the conduct of the audit. Information pertaining to the substance or content of any psychological, psychiatric, therapeutic, clinical or medical reports, evaluations or like materials or information pertaining to such child or the child's family shall not be made available to such officers and employees unless disclosure of such information is absolutely essential to the specific audit activity and the department gives prior written approval. The statute also sets forth penalties for misuse of records obtained as well as making it a crime for any person given access to information pursuant to this subdivision who released data or information to persons or agencies not authorized to receive such information.

The statute does not further discuss the confidentiality of preventive services records.

However, 18 NYCRR 423.7 states that:

(a) At the time of application for mandated or nonmandated preventive services, before individual identifiable information is collected and recorded, the local social services district or other authorized agency providing services shall notify the applicant for preventive services in writing of:

(1) the funding of preventive services through public revenues;
(2) the applicable statutes and regulations regarding the collection and disclosure of individual identifiable preventive services records; and
(3) the service provider's procedures and practices in regard to record maintenance and access to client specific records.

(b) All records established and maintained pursuant to titles 4 and 4-a of article 6 of the Social Services Law of applicants for and recipients of preventive services shall be confidential and shall be open to the inspection of only:

(1) the New York State Department of Social Services;
(2) the social services district;
(3) a preventive service agency, as defined in section 423.2(a) of this Part, or an authorized agency, as defined in subdivision (a) of section 371.10 of the Social Services Law, providing services to the child or other family members;
(4) any person or entity upon an order of a court of competent jurisdiction; or
(5) any other person or entity providing or agreeing to provide services to the child or the child's family upon the execution of a written consent by the child or the child's parent in accordance with subdivision (e) of this section.

(c) In addition to those granted access pursuant to subdivision (b) of this section, records relating to the provision of preventive services pursuant to title 4 of article 6 of the Social Services Law, other than those established and maintained pursuant to section 409-f of the Social Services Law, shall be available at any reasonable time to an employee or official of a Federal, State or local agency for the purpose of conducting a fiscal audit where said records are necessary for the conducting of the fiscal audit.

(d) An agency or person given access pursuant to subdivisions (b) and (c) of this section to the names or other information identifying the applicants for and recipients of preventive services shall not divulge or make public such information except where authorized by a court of competent jurisdiction or upon the execution of a written consent by a parent or a child in accordance with the provisions of subdivision (e) of this section.

(e)

(1) A child with the capacity to consent or such child's parent may authorize the disclosure of client identifiable preventive services

information to a person or entity providing or agreeing to provide services to the child or such child's family by executing a written consent.

(2) A parent may consent to the release of client identifiable preventive services information concerning the parent and the parent's family, including any children in the family. A child may consent to the release of client identifiable preventive services information about himself or herself where the child's parent is unavailable or lacks the capacity to consent and the child is determined to have the capacity to consent.

(3) A consent authorizing disclosure of client identifiable preventive services information in accordance with this subdivision must satisfy the following procedural requirements:

(i) The consent must be in writing and voluntarily executed.

(ii) The consent must be dated any specify the person or entity to which disclosure is authorized, and whether or not redisclosure of the information by such person or entity is permitted. If redisclosure is permitted, any limitations on redisclosure must be specified.

(iii) The consent must specify what information may be disclosed.

(iv) The consent must identify the purpose of the disclosure and any limitations on the use of the information by the person or entity.

(v) The consent must specify a time period during which the consent is to be effective or a date or event certain upon which the consent will expire.

(vi) The consent must state that the person executing the consent may terminate his or her authorization at any time.

(vii) A copy of the consent must be given to the person who executed it.

(4) For the purpose of this subdivision, *the capacity to consent* means an individual's ability, determined without regard to such individual's age, to understand and appreciate the nature and consequence of a proposed action, treatment or procedure and to make an informed decision concerning such action, treatment or procedure.

(5) For the purpose of this subdivision, a *parent* includes a natural parent, adoptive parent, stepparent, guardian, or caretaker with whom a child resides.

Like for other DSS records, a subpoena or other type of order for preventive services records must be obtained on notice to DSS, and must be issued by a judge.

Applicable Law: SSL §409
SSL §409-a

Applicable Regs.: 18 NYCRR 423.7

CHILD SUPPORT ENFORCEMENT*

General Rule:

As a general rule, child support enforcement records are confidential pursuant to SSL §111-v, 42 USCA 654(26), and 45 CFR 303.21. However, there are also specific limitations attached to different sources of information (i.e., federal tax return information, FIDM information). Information obtained by the child support worker or program is to be maintained in a confidential manner and shall not be disclosed except for the purpose of, and to the extent necessary to, establish paternity, or establish, modify or enforce an order of support, for administration of the child support program, or as specifically authorized by other laws. SSL §111-v(5) states that the safeguards established in the section apply to local social services districts and contractors as well as to the State agency. Unauthorized disclosure of information can result in employee disciplinary proceedings, civil liability, and prosecution as a class A misdemeanor. SSL §111-v(2)(d), (3), (4).

The federal government adopted new regulations effective in 2010. 45 CFR 303. 21 and 307.13. These regulations attempted to pull all of the rules for different sources of information into one place.

The New York regulation related to the confidentiality of child support records is found in 18 NYCRR 347.19:

Section 347.19. Use and disclosure of confidential information and credit reporting

(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.

(2) Except as provided in subparagraphs (i) and (ii) of this paragraph, Office and CSEU employees may access, use or disclose information and data obtained in connection with the performance of functions under title IV-D of the federal Social

Security Act to the extent necessary to perform their duties within the child support program. The Office or CSEU shall monitor use of and access to the automated system to prevent unauthorized use or access by its employees or contractors.

(i) Access to and use of any information from the Internal Revenue Service, including federal tax return information, is restricted as specified in the Internal Revenue Code.

(ii)

(*a*) The CSEU shall prohibit disclosure of location information by entry of a family violence indicator, if requested by any person, where that person provides reasonable evidence of domestic violence or child abuse against a party or the child and that the disclosure of such information could be harmful to the party or the child, including but not limited to evidence that:

(*1*) The person resides or has resided in a domestic violence shelter or is receiving non-residential domestic violence services;
(*2*) A temporary or final protective order has been entered;
(*3*) The person is enrolled in an address confidentiality program;
(*4*) The person provides a domestic violence or child abuse incident report or police report which describes domestic violence or child abuse;
(*5*) A court has determined that contact with the other party creates a risk of physical or emotional harm to the person or child;
(*6*) A good cause exemption has been issued due to domestic violence; or
(*7*) A family violence option waiver is granted by the social services district.

(*b*) As used in this subparagraph, location information shall include residential address, employer name, employer address, county of residence or employment, or other information identifying an employer, educational institution, or residence of an individual.

(*c*) Upon request by any authorized person for location information from an account or case where a family violence indicator has been entered, the social services district shall advise that the location information cannot be provided absent a determination by a court of competent jurisdiction that disclosure to any other person of that information would not be harmful to a party, parent or child.

(*d*) Notice of entry or deletion of a family violence indicator shall be transmitted to the Federal Case Registry within five (5) days of receipt of information which would cause entry or deletion of an indicator.

(iii) All new employees of the Office or of the CSEU or social services district with access to child support information shall receive training in the permitted use, disclosure, and safeguarding of this information, as well as the penalties for its misuse. All employees of the Office or of the CSEU or social services district with access to child support information shall receive periodic training regarding these subjects.

(3) The Office or CSEU may disclose the following information to individuals who are parties to a support order being collected or enforced by a CSEU except where disclosure is otherwise prohibited by law or pursuant to subparagraph (2)(ii) of this subdivision:

(i) A party to the support order may obtain disclosure of any of his or her confidential information, information regarding case status and pending court appearances, and payment histories, except that information regarding an investigation of the parent or guardian for fraud or criminal prosecution shall not be disclosed;

(ii) A custodial parent or guardian may obtain information regarding current or pending support proceedings or processes and disclosure of information of the noncustodial parent, including location, employment, income, and assets, but only to the extent necessary to prepare for an administrative or court proceeding or for other child support purposes; or

(iii) A parent or guardian may grant written authorization to a third person, including an attorney, translator or legislator, to obtain disclosure of such information as he or she is entitled to obtain. The written authorization shall be valid for one year from the date signed or the date it is received by the CSEU, whichever is earlier, or until revoked by the parent or guardian in writing filed with the Office or CSEU.

(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.

(ii) Notwithstanding anything in this section to the contrary, information obtained from the following sources may only be used for the purpose of, and to the extent necessary to, establish parentage, establish, modify, or enforce an order of support or for the administration of the child support program:

(*a*) Records or information of other state and local agencies which may not be re-disclosed pursuant to state or federal law;

(*b*) Business or financial records of corporations, companies or other entities;

(*c*) Records of financial institutions and utility or cable companies;

(*d*) Use and disclosure of federal tax return information is restricted as specified in the Internal Revenue Code, and shall not be otherwise re-disclosed absent independent verification; and

(*e*) Information obtained from financial institution data matches shall not be disclosed outside the administration of the child support program.

(iii) Notwithstanding any other provision of this section, authorized disclosures under this paragraph shall be subject to the following limitations:

(*a*) Information in the automated system obtained from the national or State directory of new hires or Federal or State case registry may be disclosed to agencies administering plans or programs under title IV-B and IV-E of the Federal Social Security Act to locate parents, alleged parents, or intended parents for the purposes of establishing parentage or establishing parental rights with respect to a child.

(*b*) Information obtained from the national directory of new hires or federal or state case registry may be disclosed to agencies administering plans or programs under titles IV-A, IV-B, IV-D and IV-E of the federal Social Security Act for the purpose of assisting that program to carry out its responsibilities of administering title IV-A, IV-B, IV-D and IV-E programs.

(*c*) Information regarding the employee's name, Social Security number and address and the employer's name, address, and federal employer identification number obtained from the state directory of new hires may be disclosed to agencies administering plans or programs under title IV-A of the federal Social Security Act for the purpose of verifying income and eligibility.

(*d*) For purposes of this section, “independent verification” is the process of acquiring and confirming information through the use of a secondary source. The information from the secondary source, which verifies the original information, may only be released for purposes permitted by and to persons or entities authorized to receive the information under federal and state law and these regulations.

(5)

(i) If information is requested by court-issued subpoena, the Office or the CSEU shall oppose release of the information unless:

(*a*) Disclosure is not prohibited by law;

(*b*) The party requesting the information is entitled to disclosure of the information requested without resort to legal process;

(*c*) The subpoena is accompanied by a written consent to release of the information by the person or persons whose information is the subject of the request; or

(*d*) Disclosure is required by other provisions of law.

(ii) If disclosure is not authorized, the Office or CSEU shall move to quash the subpoena, or request that the child support agency in the state of the court issuing the subpoena take like steps to prevent the disclosure of the information. In instances where disclosure is prohibited due to the existence of a family violence indicator, the CSEU shall move that the court, pursuant to federal law, hold a hearing to determine if disclosure could result in harm to a family member or former family member, on notice to that individual. In such cases, the information will only be released to the court.

(6) Any person who discloses or uses child support information in violation of law or regulation shall be subject to legal sanctions for such disclosure, including:

(i) A civil action pursuant to section 111-v (3) of the social services law by any person who incurs damages due to the improper use or disclosure;

(ii) If willful, referral for criminal prosecution pursuant to section 111-v (4) of the social services law and/or for official misconduct pursuant to section 195.00 of the Penal Law. Improper disclosure of federal tax return information may be subject to additional federal criminal penalties; and

(iii) Administrative penalties, including dismissal from employment.

(7) Security, confidentiality and compliance for information and data flowing through, accessed and/or utilized by non-state computerized systems.

(i) Information integrity, security and compliance. The CSEU shall have safeguards, protocols and policies in place protecting the integrity, accuracy, completeness of, access to, and use of information and data in any social services district computerized system, as well as meeting all compliance requirements. As used herein, computerized system means any system, network, hardware, software, program, or application which stores, produces, utilizes, manages, processes, accounts for, transmits, or monitors information or data used by the CSEU or any employee, agent, contractor or subcontractor in carrying out the CSEU's duties.

(ii) All computerized systems shall meet the applicable security and compliance requirements of federal and state law, regulation, and policy, including but not limited to requirements for the security of federal tax return information. The Office shall establish security and compliance controls, standards, and policies as may be applicable to all computerized systems and the handling of data subject to the requirements in this subdivision and notify the CSEU by administrative directive.

(iii) The Office and/or its agents will audit, review, assess and inspect the planning, design, development, installation, provisioning and deprovisioning of users, enhancement and operation of computerized systems and the policies and procedures involved in the handling of data subject to the requirements in this subdivision to determine the extent to which they meet the requirements of this section.

(iv) The Office may require the CSEU to submit and implement a corrective action plan to correct any deficiencies.

(b) State Parent Locator Service.

(1) State parent locator service. The Office shall maintain a State parent locator service to submit requests to the Federal parent locator service and to provide location information to authorized persons for authorized purposes.

(i) For cases receiving child support services under title IV-D of the Social Security Act. The State parent locator service shall access the Federal parent locator service and other sources of information and records within the State or other states, if available, for locating custodial and noncustodial parents, alleged parents, or intended parents, or children for the purpose of establishing parentage, for establishing, modifying or enforcing child support obligations, or for the administration of the child support program under title IV-D of the Social Security Act.

(ii) For other individuals and purposes authorized under title IV-D of the Social Security Act.

(*a*) The Office and CSEU shall access State parent locator service and release information from the Federal parent locator service only if disclosure is authorized under title IV-D of the Social Security Act.

(*b*) The Office and CSEU shall access State parent locator service and release information from other state sources of information and records only if disclosure is authorized under title IV-D of the Social Security Act, and not otherwise prohibited by State law or regulation. Information may only be released upon the request of authorized persons specified in paragraph (2) of this subdivision, for authorized purposes specified in paragraph (3) of this subdivision.

(*c*) The Office and CSEU shall not release information from the automated system, state or federal tax return information, or financial institution data match information, nor forward a request for such information to another State child support agency.

(*d*) The Office and CSEU need not make subsequent location attempts if locate efforts fail to find the individual sought.

(*e*) The Office and CSEU shall only access the State parent locator service in conjunction with a request for information from the Federal parent locator service.

(2) Authorized persons. The State parent locator service shall accept requests for locate information only from the following authorized persons/entities:

(i) Any State or local agency or official providing child and spousal support services pursuant to the state plan under title IV-D of the Social Security Act;

(ii) A court that has authority to issue an order or to serve as the initiating court in an action to seek an order against a noncustodial parent for the support and maintenance of a child, or any agent of such court;

(iii)

(*a*) the custodial parent, legal guardian, or the attorney of the child or caretaker relative having custody of a child who is not receiving assistance under title IV-A of the Social Security Act, but only if the individual:

(*1*) attests that the request is being made to obtain information on, or to facilitate the discovery of, the location of any individual for the purpose of establishing parentage, or establishing, modifying, or enforcing child support obligations;

(*2*) Attests that any information obtained through the Federal or State parent locator service shall be used solely for these purposes and shall be otherwise treated as confidential;

(*3*) For a child not receiving assistance under title IV-D of the Social Security Act, provides evidence that the requestor is the custodial parent, legal guardian, caretaker relative with custody, or attorney of the child; and

(*4*) Pays the fee required for Federal parent locator service and an additional fee as set forth by the Office based on actual or standardized costs for each search of the State parent locator service.

(*b*) Requests under this subparagraph shall be submitted on forms designated by the Office. Copies of the request, attestation, and supporting evidence shall be retained for a period of three years.

(iv) A court, authorized agent or attorney of a state which has an agreement in connection with parental kidnapping, child custody or visitation cases meeting the requirements of federal law. Requests from such courts, agents or attorneys shall be made solely in the manner proscribed by the Office; or

(v) A State agency that is administering a program operated under a State plan under titles IV-B or IV-E of the Social Security Act.

(3) Authorized purposes for requests and scope of information provided. The State parent locator service shall obtain and disclose the information set out below, subject to the privacy safeguards required under title IV-D of the Social Security Act and the Social Services Law, only for the following purposes:

(i) To locate an individual with respect to a child in a support or parentage proceeding (whether receiving services pursuant to title IV-D of the Federal Social Security Act or not) or a case under titles IV-B or IV-E of the Social Security Act. The State parent locator service shall locate individuals for the purpose of establishing parentage, or establishing, modifying, or enforcing child support obligations, for the administration of the child support program under title IV-D of the Social Security Act, or for determining who has or may have parental rights with respect to a child. For these purposes, only information available through the Federal or State parent locator services may be provided. This information is limited to Social Security number(s), most recent address, employer name and address, employer identification number, wages or other income from, and benefits of, employment, including rights to, or enrollment in, health care coverage, and asset and debt information.

(ii) To assist state or local agencies in carrying out their responsibilities under programs established pursuant to titles IV -D, IV -A, IV -B, and IV -E of the Social Security Act. In addition to the information that may be released pursuant to subparagraph (i) of this paragraph, State parent locator service information may be disclosed to agencies administering programs pursuant to titles IV -D, IV -A, IV -B, and IV -E of the Social Security Act for the purpose of assisting these agencies to carry out their responsibilities to administer such programs,

including information to locate an individual who is a child or a relative of a child in a case under title IV -B or IV -E. For purposes of this section, “relative” of a child is a person related to such child by blood, marriage or adoption. Information that may be disclosed about relatives of children involved in title IV -B and IV -E cases is limited to name, Social Security number(s), most recent address, employer name and address and employer identification number.

(iii) To locate an individual sought for the unlawful taking or restraint of a child or for child custody or visitation purposes. The State parent locator service shall locate individuals for the purpose of enforcing state law with respect to the unlawful taking or restraint of a child or for making or, upon request by a court of competent jurisdiction, enforcing a child custody or visitation determination. This information is limited to the most recent address and place of employment of a parent or child.

(c) Credit Bureau Reporting

(1) Information regarding the amount of support arrears/past due support owed by the respondent must be reported to consumer reporting agencies and must indicate the name of any respondent who owes support arrears/past due support and the amount of the delinquency. Information shall not be made available to a consumer reporting agency that the Office determines does not have sufficient capability to systematically and timely make accurate use of the information, or to an entity that has not furnished evidence satisfactory to the Office that the entity is a consumer reporting agency. In determining whether a consumer reporting agency lacks sufficient capability to systematically and timely make accurate use of such information, the Office may require such agency to demonstrate its ability to comply with the provisions of section 380-j of the General Business Law.

(2) At least 10 days prior to reporting the information to a consumer reporting agency, the local department or appropriate child support enforcement/support collection unit hereafter “SCU” must provide notice to the respondent stating that:

(i) The SCU proposes to release the information to consumer reporting agencies;

(ii) Federal and State law permit such release;

(iii) Release of the information can be prevented by payment of the total amount of support arrears/past due child support owed;

(iv) If the support arrears/past due support amount indicated in the notice is paid in part or in full after the release, the appropriate consumer reporting agencies will be so notified; and

(v) The procedures for contesting release of the information set out in paragraph (3) of this subdivision.

(3) If the respondent believes that there is a mistake of fact in the amount of the support arrears/past due support indicated in the notice or in the identity of the respondent or that the order of support does not exist or has been vacated, a review of the account can be requested and the SCU must complete such review as soon as practicable and notify the respondent of the results, in writing.

(i) In order to obtain review of the account, the respondent must contact the SCU by using the address provided in the notice and comply with any requests for information.

(ii) Prior to submitting any written documentation in connection with the review of the account, the respondent or his/her representative may obtain and review a copy of the SCU payment records relating to the account.
(iii) The SCU may not release the information to consumer reporting agencies until after the review of the account, provided such release is still appropriate.
(iv) In connection with the review of the account, the respondent may be represented by an attorney or assisted by another person.
(v) The respondent may submit written documentation in support of his/her claim, including a written explanation of why the proposed release of information to consumer reporting agencies should not occur.
(vi) The decision of the SCU will be based solely upon consideration of the court orders, SCU records and any written documentation submitted by the respondent in connection with the review of the account.
(vii) The SCU must complete such review as soon as practicable and notify the respondent of the results, in writing.

The text of the above regulation should be reviewed in conjunction with the following discussion.

In general, child support information may be used or disclosed for child support purposes. Child support workers are permitted to access and use child support information to the extent necessary to perform their duties. There are two principal limitations on the use and disclosure of child support information for child support purposes:

1. The social services law prohibits release of location or employment information in circumstances where the physical or emotional wellbeing of a party or the child may be put at risk. SSL 111-v 2. (2)(a)(2), (3). Examples would be situations in which there is an order of protection, or the issue of family violence or good cause has been raised by a party.
2. IRS information may not be redisclosed except as permitted by federal law. 26 USCA 6103(L)(6), (8).

<u>FPLS/SPLS</u>

The state and federal parent locator services contain confidential location and employment information. Information received from the FPLS or SPLS may only be disclosed to authorized persons for authorized purposes. 42 USCA 653, 663: 45 CFR 302.35. The rules are specific about what information may be disclosed for each purpose. For example, the IV-E unit (foster care), for the purpose of establishing parentage, may receive an individual's name, SSN, most recent address, employer name and address, employer identification number, wages or other income and benefits of employment, including health care coverage, and asset and debt information. However, if the IV-E unit's purpose is to locate a relative for kinship foster care, the information is limited to name, SSN, most recent address, employer name and address and employer identification number. The 2010 amendments to the

federal regulations did not significantly change the definitions of authorized purposes or authorized persons. One major change was that custodial parents, guardians, and attorneys and agents for the child will need to attest to their eligibility to receive the information and pay a fee.

Third Party Disclosure

Child support information may not be disclosed to third parties without 1) a written authorization from a parent; or 2) specific statutory authorization. For example, law enforcement agencies could receive information for the purpose of enforcing child support obligations or investigation of fraud related to the IV-D or IV-A programs, but not to locate fugitives from justice. Media organizations may receive statistical tabulations but not specific case information. A parent may only authorize a third party to receive the information that the parent could receive.

A subpoena for child support records is subject to the requirements of CPLR 2307 (a request for the subpoena is to be made on notice to the CSEU), and the court should consider the State and Federal law before issuing such a subpoena. *Jenkins v McKinney***,** 34 Misc.3d 1201(A) (Civil Court, City of New York, 2011)

Disclosure to Other Governmental Agencies or Program

The issue of sharing information with other state agencies is complicated by state and federal laws limiting disclosure of child support information based on the source of that information. As a general rule, the CSEU may disclose information to specified DSS agencies **as necessary** to carry out their agency functions under plans or programs under titles IV (i.e., TANF and foster care), XIX (MA), or XXI (Child Health Plus) of the federal Social Security Act, and SNAP. However, information exchanges must be based on agreements setting out the frequency, scope, and manner of information exchanges, and the limitations on use and re-disclosure of child support information. Child support information may not be re-disclosed unless authorized by law and may only be used for the purpose for which it is provided. In addition, child support information from the following sources may not be shared at all:

Records or information of other state and local agencies which may not be re-disclosed pursuant to state or federal law (i.e., state tax data);

Business or financial records of corporations, companies or other entities;

Records of financial institutions and utility or cable companies;

federal tax return information, unless independently verified; and

Information obtained from financial institution data matches.

There are a few other specific rules:

Information from the national or state directory of new hires in CSMS/ASSETS may be disclosed to title IV-B and IV-E agencies to locate parents or putative fathers for the purposes of establishing paternity or establishing parental rights with respect to a child.

Information from the national directory of new hires or federal or state case registry may be disclosed to agencies administering plans or programs under titles IV-A, IV-B, IV-D and IV-E of the federal Social Security Act for purposes related to administration of those programs.

An employee's name, SSN and address, employer's name, address, and federal employer identification number obtained from the state directory of new hires may be disclosed to the IV-A agency for the purpose of verifying income and eligibility.

Applicable Law and Regulations:

General rules: 42 USCA 654(26); SSL 111-v; 18 NYCRR 347.19; 45 CFR 303.21

Records of State and local government agencies, public utilities and cable companies, and financial institutions: 42 USCA 666(c)(1)(D); SSL 111-b(4),111-s

CSMS/ASSETS rules: 42 USCA 654A(d); 42 CFR 307.13; SSL 111-v

FPLS/SPLS: 42 USCA 653; 42 USCA 663; 45 CFR 302.35

Federal and State Tax Return Information: 26 USCA 6103(L)(6), (8); Tax Law §171-l; Tax Law 1825; SSL §111-b (13)(b)

State and Federal New Hires: 42 USCA 653(i), 653A; SSL 111-m

Financial Institution Date Match (FIDM): 42 USCA 666(a)(17); 42 USCA 669a(b); SSL 111-o

Federal and State Case Registry: 42 USCA 653(h), 42 USCA 666(c)(2)(A); SSL 111-b(4-a)(c)

*Thanks to Brian Wootan, Esq., OTDA Counsel, for the 2016 revisions to this section.

PUBLIC ASSISTANCE

Generally

Social Services Law §136 contains the general New York State Law provisions related to the confidentiality of social services records, particularly public welfare records. The statute reads as follows:

1. The names or addresses of persons applying for or receiving public assistance and care shall not be included in any published report or printed in any newspaper or reported at any public meeting except meetings of the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town; nor shall such names and addresses and the amount received by or expended for such persons be disclosed except to the commissioner of social services or his authorized representative, such county, city or town board or body or its authorized representative, any other body or official required to have such information properly to discharge its or his duties, or, by authority of such county, city or town appropriating board or body or of the social services official of the county, city or town, to a person or agency considered entitled to such information. However, if a bona fide news disseminating firm or organization makes a written request to the social services official or the appropriating board or body of a county, city or town to allow inspection by an authorized representative of such firm or organization of the books and records of the disbursements made by such county, city or town for public assistance and care, such requests shall be granted within five days and such firm or organization shall be considered entitled to the information contained in such books and records, provided such firm or organization shall give assurances in writing that it will not publicly disclose, or participate or acquiesce in the public disclosure of, the names and addresses of applicants for and recipients of public assistance and care except as expressly permitted by subdivision four. If such firm or organization shall, after giving such assurance, publicly disclose, or participate or acquiesce in the public disclosure of, the names and addresses of applicants for or recipients of public assistance and care except as expressly permitted by subdivision four, then such firm or organization shall be deemed to have violated this section and such violation shall constitute a misdemeanor. As used herein a news disseminating firm or organization shall mean and include: a newspaper; a newspaper service association or agency; a magazine; a radio or television station or system; a motion picture news agency.

2. All communications and information relating to a person receiving public assistance or care obtained by any social services official, service officer, or employee in the course of his or her work shall be considered confidential and, except as otherwise provided in this section, shall be disclosed only to the commissioner, or his or her authorized representative, the commissioner of labor, or his or her authorized representative, the commissioner of health, or his or her authorized representative,

the welfare inspector general, or his or her authorized representative, the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town or its authorized representative or, by authority of the county, city or town social services official, to a person or agency considered entitled to such information. Nothing herein shall preclude a social services official from reporting to an appropriate agency or official, including law enforcement agencies or officials, known or suspected instances of physical or mental injury, sexual abuse or exploitation, sexual contact with a minor or negligent treatment or maltreatment of a child of which the official becomes aware in the administration of public assistance and care nor shall it preclude communication with the federal immigration and naturalization service regarding the immigration status of any individual.

3. Nothing in this section shall be construed to prevent registration in a central index or social service exchange for the purpose of preventing duplication and of coordinating the work of public and private agencies.

4. No person or agency shall solicit, disclose, receive, make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of, any information relating to any applicant for or recipient of public assistance or care for commercial or political purposes. Nothing in this or the other subdivisions of this section shall be deemed to prohibit bona fide news media from disseminating news, in the ordinary course of their lawful business, relating to the identity of persons charged with the commission of crimes or offenses involving their application for or receipt of public assistance and care, including the names and addresses of such applicants or recipients who are charged with the commission of such crimes or offenses.

5. A social services official shall disclose to a federal, state or local law enforcement officer, upon request of the officer, the current address of any recipient of family assistance, or safety net assistance if the duties of the officer include the location or apprehension of the recipient and the officer furnishes the social services official with the name of the recipient and notifies the agency that such recipient is fleeing to avoid prosecution, custody or confinement after conviction, under the laws of the place from which the recipient is fleeing, for a crime or an attempt to commit a crime which is a felony under the laws of the place from which the recipient is fleeing, or which, in the case of the state of New Jersey, is a high misdemeanor under the laws of that state, or is violating a condition of probation or parole imposed under a federal or state law or has information that is necessary for the officer to conduct his or her official duties. In a request for disclosure pursuant to this subdivision, such law enforcement officer shall endeavor to include identifying information to help ensure that the social services official discloses only the address of the person sought and not the address of a person with the same or similar name.

A noteworthy observation is that the first, second, and fourth sections refer to information relating to applicants or recipients of “public assistance,” while section five refers only to recipients of “family assistance or safety net assistance.” “Public

Assistance" under New York State Law, actually has two definitions found in Social Services Law §2:

> 18. Public assistance and care includes family assistance, safety net assistance, veteran assistance, medical assistance for needy persons, institutional care for adults and child care granted at public expense pursuant to this chapter.
>
> 19. Public assistance refers to family assistance, safety net assistance and veteran assistance.

Given the first definition, it appears that while the first four parts of SSL §136 apply to the Medicaid, Safety Net, and Family Assistance programs, the fifth section does not apply to the Medicaid program. Also, there is no mention of the SNAP program in either definition of "public assistance" or in SSL §136.

Like many other New York State statutes related to the confidentiality of social services client records, SSL §136 contains sections that were enacted to conform with Federal statutory requirements. There are separate Federal statutes and regulations for Family Assistance, Medicaid, and for the Supplemental Nutritional Assistance Program ("SNAP"). There are some differences between what the Federal statutes and/or regulations require with regard to applicant/recipient information, as well as differences between the Federal and New York State law. These differences create problems in the context of confidentiality when trying to figure out whether the law permits the disclosure of records to various individuals or entities. The following are some of the relevant statutes and regulations with some of the issues raised by the differences found in them.

Family Assistance:

Federal law includes requirements for each State plan, including requirements for the confidentiality of information. 42 USC 602(a)(1)(A) requires that the State plan:

> (iv) Take such reasonable steps as the State deems necessary to restrict the use and disclosure of information about individuals and families receiving assistance under the program attributable to funds provided by the Federal Government.

Federal regulations expand upon these restrictions, including restrictions on disclosure on information to law enforcement. 45 CFR. §205.50 (Safeguarding information for the financial assistance programs) says:

(a) State plan requirements. A State plan for financial assistance under title IV–A of the Social Security Act, must provide that:

> **(**1) Pursuant to State statute which imposes legal sanctions:

(i) The use or disclosure of information concerning applicants and recipients will be limited to purposes directly connected with:

(A) The administration of the plan of the State approved under title IV–A, the plan or program of the State under title IV–B, IV–D, IV–E, or IV–F or under title I, X, XIV, XVI(AABD), XIX, XX, or the Supplemental Security Income (SSI) program established by title XVI. Such purposes include establishing eligibility, determining the amount of assistance, and providing services for applicants and recipients.

(B) Any investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any such plans or programs.

(C) The administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need.

(D) The verification to the Employment Security Agency, or other certifying agency that an individual has been an AFDC recipient for at least 90 days or is a WIN or WIN Demonstration participant pursuant to Pub.L. 97–34, the Economic Recovery Tax Act of 1981.

(E) Any audit or similar activity, e.g., review of expenditure reports or financial review, conducted in connection with the administration of any such plan or program by any governmental entity which is authorized by law to conduct such audit or activity.

(F) The administration of a State unemployment compensation program.

(G) The reporting to the appropriate agency or official of information on known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child receiving aid under circumstances which indicate that the child's health or welfare is threatened.

(ii) The State agency has authority to implement and enforce the provisions for safeguarding information about applicants and recipients:

(iii) Disclosure of any information that identifies by name or address any applicant or recipient to any Federal, State, or local committee or legislative body other than in connection with any activity under paragraph (a)(1)(i)(E) of this section is prohibited.

(iv) Publication of lists or names of applicants and recipients will be prohibited. Exception. In respect to a State plan for financial assistance

under title I, IVA, X, XIV, or XVI (AABD) of the Social Security Act, an exception to this restriction may be made by reason of the enactment or enforcement of State legislation, prescribing any conditions under which public access may be had to records of the disbursement of funds or payments under such titles within the State, if such legislation prohibits the use of any list or names obtained through such access to such records for commercial or political purposes.

(v) The State or local agency responsible for the administration of the State plan has authority to disclose the current address of a recipient to a State or local law enforcement officer at his or her request. Such information is disclosed only to law enforcement officers who provide the name and Social Security number of the recipient and satisfactorily demonstrate that:

(A) The recipient is a fugitive felon (as defined by the State);

(B) The location or apprehension of such felon is within the law officer's official duties; and

(C) The request is made in the proper exercise of those duties.

Note here that the "fleeing felon" confidentiality exception differs from the Social Services Law §136(5) as it does not include "…or has information that is necessary for the officer to conduct his or her official duties."

Another section of SSL §136(1) is devoted to the examination of records of disbursements made by DSS for public assistance and care by a "*bona fide* news disseminating firm." There must be a written request from the firm and it must be granted within five (5) days, provided that the firm provides written assurance before seeing the records that it will not publicly disclose or acquiesce in the public disclosure of the names and addresses of the applicant/recipient (A/R). See also 18 NYCRR 357.3(g). The only exception to the disclosure of names if found in SSL §136(4) which allows disclosure of the identities of people charged with crimes related to their application or receipt of public assistance. My reading of SSL §136 is that disclosure of public assistance records to a news firm is limited to disbursements only. In 1998, A Supreme Court Justice interpreted SSL §136(1) to entitle a newspaper to examine records for the names and addresses of public assistance recipients, provided that the newspaper does not publicly disclose the information. The newspaper would be permitted to contact the A/R. *New York Times Co. v. City of New York*, 176 Misc2d 872, (Sup. Ct., N. Y. Co., 1998).

Regulations pertaining to the confidentiality of public assistance records are found in 18 NYCRR 357. While that regulation applies to all DSS records generally, it is specifically applied to public assistance records. 18 NYCRR 357.1(a) indicates that the information that is to be kept confidential is all information secured by the agency whether or not it is contained in the written record.

18 NYCRR 357.3 gives the bases upon which confidential information may be disclosed. You need to sift through this regulation to find the parts that apply to public assistance information, as the regulation does contain sections pertaining to adoption and foster care records. There are basically three groups to whom public assistance information can be disclosed.

The A/R or his authorized representative may examine their case record at any reasonable time upon reasonable notice to the district. 18 NYCRR 357.3[c](1). The material may be copied. The A/R or representative is not entitled to see material that is maintained separate from the public assistance file for the purposes of criminal prosecution and referral to the district attorney's office, or material that is contained in the county attorney or social service attorney's files. 18 NYCRR 357.3[c](1)(ii).

Information may also be released to a person, a public official or other social agency from whom the A/R has requested service when it may be assumed that the A/R has requested the inquirer to obtain the information and the information is related to the service requested. 18 NYCRR 357.3[c](2). However, 18 NYCRR 357.2(a) states that the disclosures may only be made for purposes directly connected to the administration of public assistance. One example of this is with regard to current or former A/Rs who have applied for SSI or SSD benefits. If their representative requests DSS medical (employability) forms they may be provided for their use in the SSI/SSD claim, as the award of those Federal benefits would be an alternative resource to public assistance.

DSS may also disclose information to federal, state or local officials, pursuant to 18 NYCRR 357.3(e). This section includes grand juries, law enforcement officers and administrative staff of public welfare agencies. Again, 18 NYCRR 357.2(a) states that the disclosures may only be made for purposes directly connected to the administration of public assistance, so you would have to keep that in mind, as well as the authority for, and limits on, disclosure to law enforcement agencies found in SSL §136(5).

Also, 45 CFR 205.36 requires that if the State plan utilizes a statewide management information system that it must be designed to provide for security against unauthorized access to, or use of, the data in the system. See section on WMS, *infra.*

Title 4-b of the Social Services Law (SSL §§409-i-409-n) obliges the local districts to offer and provide case management and other services to adolescent parents. SSL §409-j(6) makes case records developed for this Title confidential and subject to SSL §136 and related regulations.

Another issue that occasionally comes up is whether the records of applicants for public assistance, who were found to be ineligible for assistance, have the same level of confidentiality as those of applicants who are found to be eligible. The NYS Attorney General's Office issued an opinion, way back in 1941, just after the Federal Social Security Act went into effect, that says that they do:

> An additional specific inquiry is made as to whether the provisions of Section 136 of the Social Welfare Law dealing with the "protection of public welfare records" covers not only those who have received public assistance but also cases where application has been made for public assistance but assistance was not given because need or other eligibility factors were not established. The whole beneficent purpose of that section would be thwarted were it to be construed as restricted only to those persons who have received public assistance. For example, such a strained construction would result in no protection to a communication or information received from an applicant for public assistance prior to his receipt thereof. Such a limited view would practically nullify the legislative intent as evidenced in the title of the section itself "Protection of Public Welfare Records." In any event, the section expressly protects "all communications ... obtained by any public welfare official or employee in the course of his work ...." 1941 N.Y. Op. Atty. Gen. No. 340

Although the statute itself reads that the records of both applicants and recipients are confidential, the above Opinion might be of some use if there is an argument made that the confidentiality as to an applicant's information lasts only for as long as the application is pending. Per the Opinion, the confidentiality continues after the eligibility determination.

The confidentiality of public assistance records continues after the death of the applicant/recipient. In *Kivisto v. NYC Human Resources Admin*., 92 AD3d 525 (1st Dept., 2012), the petitioner's FOIL request for certain documents concerning Medicaid payments made on behalf of a deceased public assistance recipient was dismissed. In affirming the dismissal, the First Department held that:

> HRA's determination denying petitioner's FOIL request was not affected by an error of law. Indeed, the agency demonstrated that the requested documents are confidential and exempt from disclosure by Social Services Law §§ 136, 367–b(4) and 369(4). Petitioner's argument that the confidentiality of the information did not survive the deceased's death is unavailing.
> Citations omitted.

18 NYCRR 357.3(f)(1) states that a public welfare agency should immediately consult its legal counsel upon receipt of a subpoena for public assistance records. This section and the rest of this portion of the regulation speak in terms of a subpoena granted *ex parte* and tell you what to do in response to the subpoena, but, since CPLR 2307 obliges the subpoena to be obtained on motion with notice to DSS, it would probably be better to plead the confidentiality of the records at the time the subpoena application is made. 18 NYCRR 357.3(f)(3) indicates that the agency is governed by the final order of the court after the plea of confidentiality is made. The court is not obliged to make findings of necessity as it must for CPS records, so often a judicially

issued subpoena is honored even if it is obtained *ex parte*, provided that it is for public assistance records only.

A worthwhile reference for OTDA policy on records confidentiality is 18-LCM-10-T, "Use and Safeguarding of Protected Information," with the most recently released version being sated June 4, 2020. Particular emphasis is given to electronic information that may be in an OTDA or local district application, system, network, or database. Guidance is provided on incident reporting and a list of legal and regulatory references is provided.

Medicaid

While Medicaid is a form of public assistance[8] and is subject to the statutes and regulations set forth above, it also is subject to other sections of the Social Services Law, and is regulated by the New York State Department of Health.

The Federal law related to Medicaid primarily limits the disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the Medicaid program:

> 42 USC. §1396a State plans for medical assistance
>
> (a) Contents
>
> A State plan for medical assistance must--
>
> (7) provide--
>
> (A) safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with--
>
> (i) the administration of the plan; and
>
> (ii) the exchange of information necessary to certify or verify the certification of eligibility of children for free or reduced price breakfasts under the Child Nutrition Act of 1966 and free or reduced price lunches under the Richard B. Russell National School Lunch Act, in accordance with section 9(b) of that Act, using data standards and formats established by the State agency;
>
> 42 CFR §431.301 State plan requirements.
>
> A State plan must provide, under a State statute that imposes legal sanctions, safeguards meeting the requirements of this subpart that restrict the use or

[8] See SSL §2(18). Note, however that SSL §2(19) has a slightly different definition.

disclosure of information concerning applicants and beneficiaries to purposes directly connected with the administration of the plan.

The Federal regulations also speak to the “purposes directly connected with the administration of the plan”:

> 42 CFR §431.302 Purposes directly related to State plan administration.
>
> Purposes directly related to plan administration include—
>
> (a) Establishing eligibility;
>
> (b) Determining the amount of medical assistance;
>
> (c) Providing services for beneficiaries; and
>
> (d) Conducting or assisting an investigation, prosecution, or civil or criminal proceeding related to the administration of the plan.

New York State Department of Health agency directive, GIS 00 MA/22, dated October 16, 2000 states that the administration of the program includes four activities: 1) establishing eligibility; 2) determining the amount of medical assistance; 3) providing services for recipients; and 4) fraud and abuse activities.

The Federal regulations also define the types of information that, at a minimum, must be protected:

> 42 CFR §431.305 Types of information to be safeguarded.
>
> (a) The agency must have criteria that govern the types of information about applicants and beneficiaries that are safeguarded.
>
> (b) This information must include at least—
>
> (1) Names and addresses;
>
> (2) Medical services provided;
>
> (3) Social and economic conditions or circumstances;
>
> (4) Agency evaluation of personal information;
>
> (5) Medical data, including diagnosis and past history of disease or disability; and
>
> (6) Any information received for verifying income eligibility and amount of medical assistance payments (see § 435.940 through § 435.965 of this subchapter). Income information received from SSA or the Internal Revenue Service must be safeguarded according to the requirements of the agency that furnished the data, including section 6103 of the Internal Revenue Code, as applicable.

(7) Any information received in connection with the identification of legally liable third party resources under § 433.138 of this chapter.

(8) Social Security Numbers.

SSL §367-b

4. Information relating to persons applying for or receiving medical assistance shall be considered confidential and shall not be disclosed to persons or agencies other than those considered entitled to such information in accordance with section one hundred thirty-six when such disclosure is necessary for the proper administration of public assistance programs.

Under these statutes it appears that records could be released where the disclosure is "necessary for the proper administration of public assistance programs." Note here that there is no "fleeing felon" exception for disclosure to law enforcement.

Medicaid records are also subject to HIPAA, and are treated more extensively in the HIPAA discussion, infra.

Domestic Violence Records

The Domestic violence option provides waivers to some public assistance eligibility requirements.

Information obtained is confidential pursuant to SSL §349-a(1) this statute does not go into particulars. 98 ADM-3 advises local districts on various aspects of the domestic violence option, including confidentiality. In addition to a general reference to Social Services Law §136, 98 ADM-3 also issues some confidentiality guidelines specific to domestic violence cases. This includes the domestic violence liaison maintaining a separate file for their cases. Information in domestic violence files may only be released when it is required to be disclosed by law, or unless it is authorized by the client. Local district employees may only have access to this information if their specific job responsibilities cannot be accomplished without such access.

Regulations also address confidentiality for both residential programs (18 NYCRR 452.10) and nonresidential services (18 NYCRR 462.9) for victims of domestic violence.

SSL §459-h states that the street address of any residential program providing domestic violence services is confidential and may only be disclosed to persons designated by the NYCRR.

SNAP Records

The Federal statute related to the disclosure of SNAP information contains a number restrictions:

> 7 USC 2020(e) (Requisites of State plan of operation)
>
> (8) safeguards which prohibit the use or disclosure of information obtained from applicant households, except that--
>
> (A) the safeguards shall permit--
>
> (i) the disclosure of such information to persons directly connected with the administration or enforcement of the provisions of this chapter, regulations issued pursuant to this chapter, Federal assistance programs, or federally-assisted State programs; and
>
> (ii) the subsequent use of the information by persons described in clause (i) only for such administration or enforcement;
>
> (B) the safeguards shall not prevent the use or disclosure of such information to the Comptroller General of the United States for audit and examination authorized by any other provision of law;
>
> (C) notwithstanding any other provision of law, all information obtained under this chapter from an applicant household shall be made available, upon request, to local, State or Federal law enforcement officials for the purpose of investigating an alleged violation of this chapter or any regulation issued under this chapter;
>
> (D) the safeguards shall not prevent the use by, or disclosure of such information, to agencies of the Federal Government (including the United States Postal Service) for purposes of collecting the amount of an overissuance of benefits, as determined under section 2022(b) of this title, from Federal pay (including salaries and pensions) as authorized pursuant to section 5514 of Title 5 or a Federal income tax refund as authorized by section 3720A of Title 31;
>
> (E) notwithstanding any other provision of law, the address, social security number, and, if available, photograph of any member of a household shall be made available, on request, to any Federal, State, or local law enforcement officer if the officer furnishes the State agency with the name of the member and notifies the agency that--
>
> (i) the member--
>
> (I) is fleeing to avoid prosecution, or custody or confinement after conviction, for a crime (or attempt to commit a crime) that,

under the law of the place the member is fleeing, is a felony (or, in the case of New Jersey, a high misdemeanor), or is violating a condition of probation or parole imposed under Federal or State law; or

(II) has information that is necessary for the officer to conduct an official duty related to subclause (I);

(ii) locating or apprehending the member is an official duty; and

(iii) the request is being made in the proper exercise of an official duty; and

(F) the safeguards shall not prevent compliance with paragraph (15) or (18)(B) or subsection (u);

Federal regulations found in 7 CFR 272.1(c) reiterate the statute, but note the differences regarding fleeing felons. Per the regulation, SNAP recipient information may be disclosed only to:

1. Persons directly connected with the administration or enforcement of the program or other federal assistance programs or federally assisted state programs that provided assistance on a means tested basis or general assistance programs that are subject to joint processing requirements
2. Persons directly connected with the administration or enforcement of the programs which are required to participate in the state income and eligibility verification system
3. Persons directly connected with the verification of immigration status of aliens applying for food stamps
4. Persons directly connected with the administration of child support
5. The Comptroller General of the United States
6. Law enforcement officials, upon written request, for the purpose of investigation of a violation of the Food Stamp Act or regulations
7. Law enforcement officials, upon written request, to request the address, social security number and photograph of a household member who is a fleeing felon
8. Local schools who administer the National School Lunch Program, for the purpose of certifying the eligibility of children for that program

A responsible household member, their authorized representative or a person acting on its behalf may make a written request to review the file, although the agency may withhold the names of persons who have disclosed information about the household without the household’s knowledge or the nature and status of pending criminal prosecutions.

18 NYCRR 387.2(j), the New York State regulation related to the confidentiality of SNAP records says that the local district must:

> (j) restrict the use or disclosure of information obtained from applicant households to persons directly connected with the administration and enforcement of the food stamp program, other Federal assistance programs, and federally assisted State programs providing assistance on a means-tested basis to low-income households. Notwithstanding any other provision of law, the address, social security number, and if available, photograph of any member of a household must be made available, on request, to any Federal, State, or local law enforcement officer if the officer furnishes the social services district with the name of the member and notifies the social services district that:
>
> (1) the member:
>
> (i) is fleeing to avoid prosecution, or custody or confinement after conviction, for a crime or an attempt to commit a crime, that, under the law of the place the member is fleeing, is a felony or, in the case of the State of New Jersey, a high misdemeanor;
>
> (ii) is violating a condition or probation or parole imposed under Federal or State law; or
>
> (iii) has information that is necessary for the officer to conduct an official duty related to subparagraph (i) of this paragraph;
>
> (2) locating or apprehending the member is an official duty; and
>
> (3) the request is being made in the proper exercise of an official duty;

Note here, that with regard to the “fleeing felon” section of each, the regulations are consistent, except that under the New York regulation, that it appears that law enforcement may request information about a SNAP recipient who has information necessary for the officer to attempt to locate a fleeing person, but not someone who is violating probation or parole.

Another complication is found in the Supplemental Nutritional Assistance Program Source Book, which does not include a “fleeing felon” at all[9]:

E. Records

[9] SNAP Source Book SECTION 3 RESPONSIBILITY OF LDSS
New York State Office of Temporary & Disability Assistance 3 - 9

POLICY

Each local district shall:

2. Restrict the use or disclosure of information obtained from applicant households to:

a. Persons directly connected with the administration and enforcement of:

(1) The Food Stamp Act or regulations;

(2) Other Federal assistance programs; or

(3) Federally assisted State programs which provide assistance on a means tested basis to low-income individuals.

(4) The establishment, monitoring and collection of overissuance claims

NOTE: Items 2 and 3 refer to programs such as FA, Medicaid, SSI, SNA, EAF and EAA.

b. Employees of the Comptroller General's Office of the United States for audit examination authorized by any other provision of law; and

c. Local, state or federal law enforcement officials, upon their written request, for the purpose of investigating an alleged violation of the Food Stamp Act or regulations. The written request shall include the identity of the individual requesting the information, and his authority to do so, the violation being investigated and the identity of the person on whom the information is requested.

Applicable Law:	SSL §136 SSL § 367-b SSL § 369 SSL §349-a(1) SSL §409-j(6) SSL §459-g 7 USC 2020(e) 42 USC. §1396a
Applicable Regs:	18 NYCRR 357 18 NYCRR 387.2(j), 18 NYCRR 452.10 18 NYCRR 462.9 7 CFR 272.1(c) 42 CFR §431.301-305
Agency Directives:	03 LCM 8

10 LCM 17
18 LCM 10-T

Confidentiality of ERAP Records

The Federal Emergency Rental Assistance Program ("ERAP") was enacted in In December 2020, when Congress passed the Emergency Coronavirus Relief Act. A second set of Federal legislation was enacted in March 2021 to continue the rental assistance program The legislation allocated billions of dollars for emergency rental assistance, which was to be provided to the States for distribution by the States themselves or by political subdivisions of the States. In New York, some counties opted to receive and distribute these funds directly, while other either opted to, or were required to have their funds distributed by OTDA.

For records confidentiality purposes, the initial legislation contained a section[10] that requires grantees to report to the Secretary of the Treasury:

- (A) the number of eligible households that receive assistance from such payments;
- (B) the acceptance rate of applicants for assistance;
- (C) the type or types of assistance provided to each eligible household;
- (D) the average amount of funding provided per eligible household receiving assistance;
- (E) household income level;
- (F) the average number of monthly rental or utility payments that were covered by the funding amount that a household received

The Federal legislation also requires that each report under the subsection shall disaggregate the information relating to households provided under subparagraphs (A) through (F) by the gender, race, and ethnicity of the primary applicant for assistance in such households.

The Federal legislation also contains privacy requirements. Each eligible grantee that receives a payment under this section was required to establish data privacy and security requirements for the information required to apply for funds that:

- (i) include appropriate measures to ensure that the privacy of the individuals and households is protected;
- (ii) provide that the information, including any personally identifiable information, is collected and used only for the purpose of submitting the required reports to the Treasury Secretary; and
- (iii) provide confidentiality protections for data collected about any individuals who are survivors of intimate partner violence, sexual assault, or stalking.

[10] TITLE V—BANKING Subtitle A—Emergency Rental Assistance SEC. 501. EMERGENCY RENTAL ASSISTANCE. (g) REPORTING REQUIREMENTS.

New York established its distribution plan for the ERAP funding with the enactment of the COVID-19 emergency rental assistance program 2021, which is found in S2506c/A3006-c, Part BB, Subpart A, at §6(3).

(b) Any documentation or information provided to the statewide application, eligibility worker, hotline or community based organization, or obtained in the course of administering the emergency rental assistance program or any other assistance program shall be kept confidential and shall only be used for the purposes of determining eligibility, for program administration, avoiding duplication of assistance, and other uses consistent with State and federal law.

(c) Any portion of any record retained by the commissioner in relation to an application pursuant to this chapter that contains the photo image or identifies the social security number, telephone number, place of birth, country of origin, place of employment, school or educational institution attended, source of income, status as a recipient of public benefits, the customer identification number associated with a public utilities account, medical information or disability information of the holder of, or applicant for, is not a public record and shall not be disclosed in response to any request for records except: (i) to the person who is the subject of such records; or (ii) where necessary to comply with State and federal law.

Sub-section (b) was amended on September 2, 2021 (S6853) to add that the documentation or information may be used by the New York State Office of Court Administration so that a court may determine whether a litigant in a proceeding has applied for or been granted assistance from the ERAP for the purposes of ensuring the availability for the eviction protections provided by the State ERAP legislation.

I did not see any reference to SSL 136 or the 18 NYCRR 357 sections of regulations which pertain to the confidentiality of public assistance records, so I don't know that there is authority to provide statistical or other information to a County Executive, Board of Supervisors, County Legislature, etc., as there would be for any other type of public assistance program that is administered by a local district. To the extent that a local district's public assistance operation administered this program or received information from the ERAP, I believe that such information would be subject to both the confidentiality related to temporary assistance records and the confidentiality requirements of the Federal and State law related to the ERAP.

WMS Records

WMS (Welfare Management System) is the State sponsored computer program designed to receive, maintain and process information relating to individuals who have applied for, or are in receipt of, any form of public assistance benefits. Under the auspices of SSL §21, all local social services districts are mandated to use WMS. Regulations contained at 18 NYCRR §655.1 state that all local districts shall transmit demographic and eligibility data to WMS and shall utilize the functions and outputs of WMS in registering and evaluating applications for all types of public assistance,

including social services. The local districts are responsible for maintaining the accuracy and keeping current all data inputted into WMS.

SSL §21(3) states that WMS information is confidential and may only be provided to persons or agencies considered entitled to such information pursuant to SSL §136.

A further limitation upon WMS access can also be gleaned from SSL §21(1) which states that WMS is designed "for the purpose of providing individual and aggregate data to such districts to assist them in making eligibility determinations and basic management decisions, to the department to assist it in supervising the local administration of such programs, and to the governor and the legislature as may be necessary to assist in making major administrative and policy decisions affecting such programs.

In recent years, at least one local district has received requests from both other county agencies and private agencies to be allowed access to WMS terminals. Those requests have been denied due to limitations found in SSL §21 placed on access to WMS. There is one unreported case where both State (OTDA, OCFS, and DOH) and Federal agencies (USDA and HHS) intervened in a Federal case where plaintiffs requested that an LDSS utilize WMS to find addresses for potential class members in a class action lawsuit. See *In Re Nassau County Strip Searches*, 2017 WL3189870 (USDC EDNY, 2017). I would suggest that if you receive a similar request or subpoena that you should notify these State and Federal agencies immediately.

Applicable law: SSL §21

Applicable regs.: 18 NYCRR §655.1

YOUTH DETENTION

County juvenile detention facilities are authorized under Executive Law (EL) Art. 19-g and County Law (CL) §218-a. Under these statutes, and Social Services Law (SSL) §§462(2)(a) and (c), youth detention facilities, operated by counties, or by other entities for detained youth on behalf of counties. are governed by the regulations of the Division For Youth (now, the Office of Children and Family Services). The "DFY" statutes and regulations have not yet been completely converted to "OCFS" statutes and regulations, so the "DFY" statutes and regulations still apply. At the outset, it is worth noting that County Law §218-a requires that each county designate a county department as the county agency responsible for PINS and Juvenile Delinquency detention. For example, Monroe County has designated its social services division for this function. Other counties have designated other departments as the responsible agency. So, "detention records" are not, "social services" records, even though your local district may be tasked with administering the youth detention programs in your county. A further complication is that under the Raise the Age legislation, a new class of detention, Specialized Secure, was created, along with separate regulations from those for non-secure and secure detention.

Another complicating factor is that while not every county has its own youth detention facilities, each county is required to provide for such detention, which could include contracting in some fashion with another county. I think that the confidentiality requirements that apply to the actual detention facilities probably apply to the counties that don't have facilities but have their youth detained in other counties.

This section might not apply to your county if your LDSS is not the agency in your county that is designated as the county agency for youth detention, although it might have some value if you need to obtain detention records for a youth who you are providing services for.

SECURE DETENTION

My understanding is that children in detention are not in foster care. This issue came up several years ago in the context of non-secure detention, and at that point and subsequently, OCFS counsel confirmed that detention is not foster care. Notwithstanding that, the Division for Youth (now part of OCFS) did retain, by reference in a regulation, SSL §372 as the designated statute for detention records. Over the years, I have had some reservations with that statute being the general governing confidentiality law for detained children. 9 NYCRR 180-1.12(c)(2)(v) does states that records and reports maintained by a facility related to "children under the jurisdiction of the division" shall be confidential pursuant to SSL §372 and 9 NYCRR 168.7.

I have suggested that Exec. Law 501-c would be a more appropriate confidentiality statute for detention records in that it would draw a line between detention and foster care. When viewed in a historical context, SSL §372 should no longer apply. 9 NYCRR 180-1.12(c)(2)(v), which was effective March 30, 1979, refers to SSL §372. In 1992, the Legislature added Exec. Law §501-c. This is the statute that now governs confidentiality of DFY records. The statute specifically carved DFY records out of SSL §372, and in fact the legislation repealed portions of SSL §372 that referred to DFY records. I suggest that 9 NYCRR 180-1.12(c)(2)(v) should have been amended to refer to Exec. Law §501-c, as that would have made a clear distinction between foster care and detention records.

The confidentiality laws and regulations of division for youth records are found in EL §501-c and 9 NYCRR 168.7. Note that these two documents do not track each other very well and to some extent are not consistent with each other. Both state as a general rule, that DFY records are confidential and may not be disclosed except to certain authorized persons and/or on certain conditions.

There is a seeming inconsistency between EL §501-c and 9 NYCRR 168.7. EL §501-c provides that DFY records are confidential and they can only be examined by persons authorized by (i) the division pursuant to its regulations; (ii) a judge of the court of claims when such records are required for a preceding in such court; or (iii) a federal court judge or magistrate, a justice of the supreme court, a judge of the county court or family court, or a grand jury when such records are required for a proceeding in that court or grand

jury. No person so authorized by (i-iii) above shall divulge the information unless authorized by (i)-(iii) above. There are several other exceptions contained in EL §501-c that will be discussed later. 9 NYCRR 168.7(1) authorizes records to be disclosed pursuant to Supreme Court orders made under SSL §372. The problem with this is that SSL §372 pertains to foster care records, which, as discussed below, we do not believe DFY records to be. It may be that 9 NYCRR 168.7(1) is just a mechanism to allow disclosure of DFY records to courts not covered by El §501-c. These would include town, village and city courts, and perhaps administrative proceedings such as parole hearings or fair hearings. SSL §372(4)(a) authorizes a justice of the supreme court to authorize access to foster care records.

In any event, inasmuch as a children's detention center is part of a municipality, any subpoena for children's center records must be done on motion, with notice to the County, under the authority of CPLR 2307.

In terms of non-subpoena requests for information, consult EL §501-c and 9 NYCRR 168.7. Please note well that EL §501-c(1)(b) states that you may not even acknowledge that a youth was in your custody, except as allowed under EL §501-c(1)(a). See also 9 NYCRR 168.7(b) which states that unless you receive a request that is included in one of the confidentiality exemptions, the correct response shall be "We are not authorized by law to disclose whether or not any individual was ever under our jurisdiction."

Notwithstanding that "detention" is not the same, or equivalent to "foster care," 9 NYCRR 168.7(a)(1) does state that DFY records must be disclosed pursuant to Supreme Court order as authorized by SSL §372. SSL §372(3) is the statutory mechanism for discovery of foster care records via the discovery devices contained in Article 31 of the CPLR. 9 NYCRR 168.7(a)(5) specifically prohibits DFY from making records available to the probation department under the provisions contained in SSL §372(3). SSL §372(4)(a) allows a Supreme Court justice to authorize disclosure of foster care records. As discussed above, this procedure requires notice to all interested persons and a hearing. It is our opinion that SSL §372 should be construed, as to detention records, as only a means to obtain the record, not as authority for the proposition that "detention" is "foster care." As discussed above, the legislative history of SSL 372 bears this out.

One of the agencies that most frequently seek information from detention is the probation department. This is often done to prepare social investigations for the family court, but is also done as part of the adjustment process in delinquency cases. The law and regulations draw very sharp distinctions in terms of the stage of a delinquency proceeding at which a detention center may release information to a probation department. There is nothing that I could find that might authorize a children's detention center to release information to the probation department prior to a finding, except for perhaps FCA §308.1(1). FCA §308.1(1) states that "Rules of court shall authorize and determine the circumstances under which the probation service may confer with … other interested persons concerning the advisability of requesting that a petition be filed." There are two regulations that apply to FCA §308.1. 22 NYCRR 205.23(a) states that the adjustment process shall include anyone listed in 22 NYCRR 205.22. 22 NYCRR 205.22(a) states that the Probation Department shall conduct preliminary conferences

with the potential respondent and "other interested persons" concerning the advisability of filing a petition and to gather information to help determine whether adjustment is appropriate. 22 NYCRR 205.22(d)(2) states that "the probation service is not authorized to and cannot compel any person to appear at any conference, produce any papers or visit any place." My view is that this section means that otherwise confidential information, from any source, is not available by the invocation of FCA §308.1, especially since EL §501-c does not make any exceptions for pre-fact finding probation investigations.

However, under EL §501-c(1)(a)(iii), a family court judge could authorize probation to receive this information. It might be appropriate to try to get probation, the juvenile prosecutors, the law guardian and the Court to come to some sort of agreement on authorization. The authorization does not require the filing of papers or a hearing, only that the court determine that the records be required for a proceeding in the court. Again, you should interpret "records" to include conversations about a youth as well as written records. The authorization could probably made a part of the remand order and might look something like this:

> "ORDERED that the _____ County Probation Department is authorized pursuant to Executive Law §501-c(1)(a)(iii) to obtain information concerning the above named child from the _____ County Children's Center, including mental health information (authorization made pursuant Mental Hygiene Law §33.13[c](1)) and substance abuse information (authorization made pursuant to 42 USC 290dd-2(b)(2)[c])."

Unlike FCA §351.1 (discussed below), EL 501-c(1)(a) does not specifically include psychiatric or psychological information. Under the dictates of the Mental Hygiene Law (MHL), any mental health information that you receive remains confidential and you are obliged to observe the confidentiality law yourself. MHL §33.13(f). A court can authorize the release of mental health information upon a finding that the interests of justice outweigh the need for confidentiality. MHL §33.13[c](1). Another exception is that a treating psychologist or psychiatrist may disclose confidential information to an endangered individual and a law enforcement agency if the patient presents a serious and imminent danger to that individual. This does not mean that the information must be released. MHL sec. §33.13(c)(6).

Substance abuse records are governed by both the MHL and by 42 USC 290dd-2. Like the MHL, 42 USC 290dd-2 makes the records confidential, but they may be released upon application to a court that shows "good cause" for the release of the records. 42 USC 290dd-2(b)(2)[C]. In assessing "good cause," the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-client relationship, and to the treatment services. When the court grants the order it shall also impose appropriate safeguards against unauthorized disclosure, which really means re-disclosure by your agency. We have found that the substance abuse treatment provider will attach a form that contains language that warns against improper re-disclosure to the records that it provides.

Absent any of the exceptions noted above, court authorization should be obtained before detention records are released. If the judge assigned to the particular case were to authorize release of any of this information before fact-finding, you would be safe. This would apply to releasing the information to law guardians, juvenile prosecutors, DSS, or potential treatment or placement agency, as well as probation. Without this court authorization, and absent any of the other exceptions noted above, you should probably not be sharing this information.

Once a delinquency case reaches the dispositional phase, the confidentiality rules change. EL §501-c mandates that DFY records are confidential. FCA §351.1(1) and §351.1(2) mandate that a probation investigation be completed after a determination that a respondent has committed a crime. EL §501-c(2) authorizes the probation department, upon written request, accompanied by a copy of the court order to have access to DFY records for the purposes of the probation investigation. Thus, a children's detention center can release information to the Probation Department for the purposes of the probation report. As FCA §351.1 directs that the probation report shall include any previous psychological and psychiatric information, those types of information may be released. The limitations on information are that the records must be less than three years old and relate to a youth less than 21 years old at the time of the request. Although the statute also says that probation is only entitled to a copy of the youth's official record, I think that the detention center could discuss the youth with probation, provided that everything that is discussed is contained in the youth's case record.

To comply with EL §501-c(2), it might be appropriate to develop a form that the Probation Departrment can use to make records requests, similar to the one that is attached at the end of this section.

As discussed above OCFS disagrees with our view on this subject, and you may wish to contact them for their opinion.

As an OCFS licensed/certified facility, a detention facility would be subject to the dictates of the Justice Center statutes as well.

Applicable law: Executive Law §501-c
SSL §372

Applicable regs.: 9 NYCRR 168.7

To: _____ County Children's Center

From: _____, _____ County Probation Department

Date:

Re:

Pursuant to Family Court Act §351.1 and Executive Law §501-c(2), I hereby request access to your agency file, including any psychological and psychiatric records, concerning _____.

I understand that pursuant to Executive Law §501-c(2), I may only receive records that are less than three years old at the time of this request. The above named youth is less than 21 years old as of the date of this request.

I am attaching a copy of the order of investigation made by the Court.

Dated: _____ _____
[Name]
_____ County Probation Department

SPECIALIZED SECURE DETENTION FACILITY

Beginning in October 2018, the "Raise the Age" legislation went into effect, which among other things, created a new form of youth detention called "specialized secure detention." Specialized secure detention facilities are administered jointly by the county agency responsible for youth detention and the Sheriff of the county in which the facility is located. Unlike secure and non-secure detention, specialized secure detention facilities are defined as "local correctional facilities." These facilities are jointly regulated by the Office of Children and Family Services and the State Commission of Corrections. Another difference between specialized secure and secure/non-secure detention is that a sentenced youth who is an adolescent offender may be placed in a specialized secure facility- that is not an option for a juvenile delinquent, juvenile offender, or PINS youth.

It had been my hope that the OCFS regulation concerning the records of youths in specialized secure detention facilities would have been similar to that for OCFS youth, however they did choose to go with a reference to Social Services Law §372 as the statute for their content and confidentiality. 9 NYCRR 180-3.7 requires that all specialized secure detention youth records, including the case record and any medical, mental health, substance abuse or educational records, are confidential pursuant to New York Social Services Law §372(4), which states:

> 4. (a) All such records relating to such children shall be open to the inspection of the board and the department at any reasonable time, and the information called for under this section and such other data as may be required by the department shall be reported to the department, in accordance with the regulations of the department. Such records kept by the department shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection

> or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice.

In the statute, "department" should be read as "Office of Children and Family Services," so the law requires the Facility to provide access to Youth files to OCFS.

Additionally, Social Services Law §491(1)(c) requires the Facility to provide the Justice Center with any requested records, if the detention center has made a report to the Justice Center as a mandated reporter.

The New York State Commission of Correction, pursuant to Correction Law §46 has the authority to obtain any and all Youth records, including medical records from the Facility.

Also, records such as medical, mental health, substance abuse treatment, and educational records, which have additional confidentiality requirements pursuant to State and/or Federal law or regulation, are also be subject to those laws or regulations with regard to the confidentiality of such records.

DISCLOSURE OF DSS RECORDS

SUBPOENA REQUIREMENTS FOR DSS RECORDS

General:

A social services district qualifies as a municipal corporation for the purposes of CPLR 2307. CPLR 2307 requires that a subpoena *duces tecum* requesting records of a municipal corporation be issued by a justice of the Supreme Court where the records are located or by the court where the action is triable. In addition, a motion for the subpoena must be made on at least one day's notice to the municipality. This is the most common defect found in subpoenas *duces tecum* for DSS records. Usually, an attorney will issue the subpoena himself or, if he does get a judge's signature, he will do it *ex parte.* This practice creates several problems for a DSS and its attorneys.

First, several types of DSS records (child and adult protective, and foster care), require a court to make specific findings concerning their release, even to a court. Second, since these subpoenas inevitably seem to be served days (if not hours) before they are returnable, DSS personnel have to scramble to try to locate them, which can be difficult if they are off-site or located in a different building. Third, some subpoenas are issued as a fishing expedition to try to find some evidence, not as a means of obtaining legally admissible evidence that the party is already aware of. Sometimes DSS does not have any records to produce. Fourth, every so often, a caseworker will be on vacation when the subpoena is returnable.

Requiring these subpoenas to be issued on notice, and only after any required findings are made, can help avoid all of these problems.

Although the judicial response to complaints about the ex parte subpoena is usually rather lukewarm, the Second Department did make an extreme response in one particular case. In *Matter of LaBella*, 265 AD2d 117, (2nd Dept., 2000) the Court disbarred an attorney, for among other things, causing a subpoena duces tecum for sheriff's department records to be presented without the notice required by CPLR 2307 and Criminal Procedure Law (CPL) 610.20. The attorney also made the subpoena returnable to his office rather than to the court in which the action was to be tried, which the Court held was a violation of CPLR 2306 and CPL 610.25. I am not sure about the reliance upon CPLR 2306, since it applies to medical records, but CPL 610.25 does refer to subpoenaed evidence generally. While we have yet to make any referrals to the Grievance Committee after receiving an ex parte subpoena, I have sometimes mentioned the *LaBella* case to the issuing attorney when we ask then to make a proper application for the subpoena.

Another argument that you might consider raising is one based upon the rationale used by the Court of Appeals in *Matter of Leon RR.,* 48 N.Y.2d 117 (1979). As you may recall, in that case the Court found that it was error to admit the entire DSS case *en masse* without first reviewing to determine if all of its contents satisfied all of the elements required by the hearsay exception for business records found in CPLR §4518. This required a review of whether the entries were made by a DSS employee with a business duty, either at the time of the event or within a reasonable time of the event, or in the case of a third- party providing information to the DSS employee who recorded the information, whether the third party was under any duty to report to the DSS employee. This may be of some use where the attempt to subpoena the DSS case record is also being used to obtain those third- party records.

New York State Criminal Court Subpoenas and Discovery

In 2020 significant amendments to the Criminal Procedure Law were made, which have had impacts on the local districts. It is important to note that the Social Services Law was not amended relative to a lessening of the confidentiality of its records in the context of the criminal law amendments. In a criminal case, DSS records that are material and relevant to a criminal proceeding may be the subject of disclosure to the defense, either by disclosure from the District Attorney or Attorney General, or via subpoena by defense counsel. As a general proposition, relevant DSS records have always been subject to such disclosure (see *People v. James*, 241 AD2d 463 (1997). The recent amendments have both changed the rules for defense counsel's ability to subpoena such records, and required the prosecution to turn over records *in their possession* to the defense much more quickly.

First, there was an amendment to CPL 610.20, which relates to the ability of attorneys in criminal cases to issue a subpoena duces tecum for government agency records. Prior to the amendment, while the DA was permitted the subpoena without bringing a motion under CPLR 2307, defense counsel was required to make that motion. This permitted the local district to appear and oppose the motion or to request limitations on

the scope of the subpoena, if appropriate. The amendment permits defense counsel to now present a proposed subpoena to the court for its "indorsement" and if so indorsed, present that subpoena to the government agency, which is required to comply within three days, unless defense counsel has asked the court to require immediate production.

While I think that this is "fair" in the context that it puts the defense on a more equal footing with the prosecution, it also is going to require the LDSS and its attorneys to be now must react much more quickly in deciding whether a motion to quash the subpoena is going to have to be made, in addition to having to make that motion much more quickly.

Another amendment was the virtual repeal of CPL 240, which are the criminal discovery statutes, and its replacement with CPL 245. This repeal and replacement is a complete sea change from prior criminal discovery practice, with new requirements for a much more speedy and complete disclosure of evidence and potential witnesses by the prosecution to the defense.

Included in this is that the prosecution must provide to the defense:

- transcripts of the testimony of anyone who has testified before the grand jury

- the names and contact information of any person who has any evidence or information relevant to the any offense charged or any potential defense thereto

- the names and work affiliation of any law enforcement personnel that may have any evidence or information relevant to the any offense charged or any potential defense thereto

- all statements, written or recorded or summarized in any writing or recording, made by persons that may have any evidence or information relevant to the any offense charged or any potential defense thereto.

A concern here is that LDSS personnel, children, vulnerable adults, foster parents, and anyone else associated with the types of cases that a local district becomes involved may become even more vulnerable than they are now.

There is also a new section (CPL 245.30(30)) that permits the defense to make a motion for discovery of information held by an individual or agency that may be material to the defense. A question is how this may affect child advocacy centers. There have been a number of contested subpoenas over the years for those records, including videos of child interviews. Child Advocacy Centers in New York are not necessarily part of the LDSS, although they may have CPS team attached to it, as well as local law enforcement personnel, including district attorneys.

The above might also be an issue for adult multi-disciplinary and enhance-multi-disciplinary teams, with the added complication for those that they do not have any

specific statutory basis, except for those created pursuant to Elder Law §225, which went into effect in July, 2021.

Criminal Procedure Law §245.20 requires that the prosecution **shall disclose to the defendant, and permit the defendant to discover, inspect, copy, photograph and test, all items and information that relate to the subject matter of the case and <u>are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control</u>.** The section of the statute goes on to list various types of items that are required to be disclosed. However, the key limiting factor here is that this material must be in "**<u>the possession, custody or control of the prosecution or persons under the prosecution's direction or control."</u>** So, the questions for a local social services district is "Are CPS and APS records deemed to be in the possession, custody or control of the prosecution or is CPS/APS under the prosecution's direction or control?"

I think that the answer is no. For one thing, Criminal Procedure Law §245.20(2) says: 2. **Duties of the prosecution. The prosecutor shall make a diligent, good faith effort to ascertain the existence of material or information discoverable under subdivision one of this section and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor's possession, custody or control; provided that the prosecutor shall not be required to obtain by subpoena duces tecum material or information which the defendant may thereby obtain. *For purposes of subdivision one of this section, all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution.***

I think that the italicized portion of the section gives some indication that the Legislature intended to limit the "possession" issue to police agencies. The Legislature could have added APS or CPS to the list if it felt they should be included.

Second, the Legislature did not amend the Social Services Law to make CPS/APS records available to the prosecution or to law enforcement in every circumstance. The situations in which these records may be released by CPS/APS continue to be limited to particular circumstances as set forth in the law.

Because of the limitations placed upon prosecution access to CPS/APS records in the statutes, I do not think that the Criminal Procedure Law amendments now make those records *per se* in "the possession, custody or control of the prosecution or persons under the prosecution's direction or control." However, if CPS/APS records have already been released to the prosecutor or law enforcement under color of the Social Services Law, I think that those records would be subject to the new discovery provisions. Additionally, the new duties of the prosecution to disclose to the defense the existence of information that is not under their control, and the amendment to Criminal Procedure Law §610.20 that eases the ability of the defense to subpoena records would indicate that CPS/APS records are not now subject to *carte blanche* disclosure in a criminal prosecution. Had the Legislature intended to change the

circumstance under which police/prosecutorial agencies obtain or possess CPS/APS records, it would have done so. I am aware of only one reported decision where this issue has discussed by a court in the context of the amendments to the Criminal Procedure Law. In *People v Askin,* 68 Misc3d 372, (County Court, Nassau County, 2020) the court found that the CPS records were not in the custody of or under the control of the prosecutor and that the defense could obtain them via subpoena, with redactions to occur as mandated by the controlling law for the agency. The *Askin* case has been criticized in some subsequent cases, although not in the context of the CPS records issue.

The Second Department has held that indicated reports should not be produced in response to a grand jury subpoena unless there has been a finding that the information therein is necessary for the determination of charges before the grand jury. See *M. of McGuire v DiFiore*, 112 AD3d 630 (2nd Dept., 2013). That requirement is part of the statute.

Federal Court Subpoenas

If maneuvering through the various types of records and their availability through the state court system wasn't tough enough for you, have a go at subpoenas issued through a federal court.

Federal Rule of Civil Procedure 45 is the federal statute concerning subpoenas, and it has some significant differences from the CPLR.

First, the federal subpoenas are not issued on notice to anyone. In fact, under the federal rule, the Court signs the subpoena, but issues it otherwise in blank, to be filled in by the party requesting the subpoena. An attorney is also permitted to sign and issue a federal subpoena in certain circumstances.

Second, Rule 45 permits you to move to quash a subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies…" However, Rule 45 provides an alternative to moving to quash the subpoena. The rule also provides that you may serve written objection to the production of documents on the attorney seeking disclosure, which in turn obliges the party seeking disclosure to make a motion before the court to compel production. This shifts the burden back to the party seeking disclosure to justify the disclosure and show the court why confidentiality should be breached.

Most of the "court ordered" exceptions to confidentiality would apply to a federal subpoena; however foster care records could pose a problem. According to SSL §372(4) the authority to order disclosure of foster care records is limited to a Court of Claims judge, a Family Court judge (for claims or trials in those courts) or a justice of the Supreme Court. We do not look forward to telling a federal judge or magistrate that they have less authority than a state Supreme Court justice, let alone a Family Court or Court of Claims judge.

Statute:

Federal Rule of Civil Procedure 45

Fair Hearing Subpoenas

CPS expungement hearings

18 NYCRR 434.6. Hearing officer

(a) The hearing must be conducted by an impartial hearing officer who is employed by the department for that purpose and who has not been involved in any way with the action in question. **The hearing officer has all the powers conferred by law and the regulations of the department to administer oaths, issue subpoenas,** require the attendance of witnesses and the production of books and records, rule upon requests for adjournment, rule upon evidentiary matters and to otherwise regulate the hearing, preserve requirements of due process and effectuate the purpose and provisions of applicable law.

Public Assistance Fair Hearings

18 NYCRR 358-5.6. Hearing officer

(a) The hearing shall be conducted by an impartial hearing officer assigned by OAH to conduct the hearing, who has not been involved in any way with the action in question.

(b) To ensure a complete record at the hearing, the hearing officer must:

(8) at the hearing officer's discretion, where necessary to develop a complete evidentiary record, issue subpoenas, and/or require the attendance of witnesses and the production of books and records;

INTRA- AGENCY DISCLOSURES AND DISCLOSURES TO STATE OR FEDERAL AGENCIES

INTRA- AGENCY DISCLOSURES

Social Services Law §61 provides as follows: “For the purpose of administration of public assistance and care the state shall be divided into county and city social services districts as follows:

1. The city of New York is hereby constituted a city social services district.

2. each of the counties of the state not included in subdivision one of this section is hereby constituted a county social services district.

Social Services Law §64 requires that every social services district shall be organized with a separation of social services from eligibility and assistance payments functions, pursuant to guidelines issued by the state commissioner of social services. The statute also requires that each social services district submit a plan for this separation for approval by the commissioner.

Taken at face value, these statutes, and the confidentiality statutes and regulations themselves would seem to prohibit services and the assistance functions from communicating with each other on client specific issues.

However, 18 NYCRR 300.7 requires that the social services districts must coordinate the skills and experiences of its income maintenance, medical assistance and services divisions, by establishing coordinating procedures from intake to case closing, clearly delineating the responsibilities of each division as they relate to cases of mutual interest. This regulation would seem to permit communication, as long as appropriate procedures are in place.

Additionally, SSL §423(1)(b) requires: “Every local department of social services shall provide to the child protective service information available to the local department which is relevant to the investigation of a report of child abuse or maltreatment or to the provision of protective services, where the confidentiality of such information is not expressly protected by law.”

Release of CPS information to an LDSS welfare fraud investigation unit or law enforcement when there is evidence of welfare fraud

SSL §145 requires that any social services official who becomes aware of welfare fraud is required to report to law enforcement. This statute is also looked at as requiring reporting to a fraud unit. In July, 2023, OCFS counsel opined that CPS can provide CPS information to your fraud unit or law enforcement if it becomes aware of information concerning welfare fraud, even though SSL §422(4)(A) does not contain an exception for that. The advice was that CPS should be disclosing only information that is directly related to the welfare fraud- it is not *carte blanche* to give out any and all CPS information.

Applicable Laws: SSL §61, SSL §64, SSL §145, SSL §423(1)(b

Applicable regs: 18 NYCRR 300.7

DISCLOSURES TO THE NEW YORK STATE WELFARE INSPECTOR GENERAL AND TO FEDERAL AGENCIES THAT INVESTIGATE WELFARE FRAUD

Both the Federal and State governments regulate the social services programs that the local district administer. Included within the regulatory authority is the right to audit and to investigate fraud. The local district may be required to provide records in connections with audits or investigations conducted by these agencies. When you receive a request from one of these agencies, especially when they are requesting records, you will want to be aware of what their authority is to receive those records before you hand them over.

The office of the New York State Welfare Inspector General is created under Executive Law §74. Although the office of welfare inspector general was created in the Department of Law within the office of the Deputy Attorney General for Medicaid fraud control, the welfare inspector general is appointed by the Governor. The Welfare Inspector General conducts investigations of fraud, abuse, or illegal acts perpetrated within the department of social services or the local social services districts, or by contractees (that is the word in the statute, not *contractors*) or recipients of public assistance services as provided by the department of social services.

Included in the statute is a section that sets forth the authority of the Welfare Inspector General to obtain records from various sources:

> 4. Cooperation of agency officials and employees.
>
> a. In addition to the authority otherwise provided by this section, the inspector, in carrying out the provisions of this section, is authorized:
>
> (i) to have full and unrestricted access to all records, reports, audits, reviews, documents, papers, recommendations or other material available to the department of social services and local social services districts relating to programs and operations with respect to which the inspector has responsibilities under this section;
>
> (ii) to make such investigations relating to the administration of the programs and operations of the department of social services as are, in the judgment of the inspector, necessary or desirable; and
>
> (iii) to request such information, assistance and cooperation from any federal, state or local governmental department, board, bureau, commission, or other agency or unit thereof as may be necessary for carrying out the duties and responsibilities enjoined upon him by this section. State and local agencies or units thereof are hereby authorized and directed to provide such information, assistance and cooperation.

b. Notwithstanding any other provision of law, rule or regulation to the contrary, no person shall prevent, seek to prevent, interfere with, obstruct or otherwise hinder any investigation being conducted pursuant to this section. Section one hundred thirty-six of the social services law shall in no way be construed to restrict any person or governmental body from cooperating and assisting the inspector or his employees in carrying out their duties under this section. Any violation of this paragraph shall constitute cause for suspension or removal from office or employment.

In addition to the Welfare Inspector General, New York also has an Office of the Medicaid Inspector General (OMIG). OMIG exists under the Public Health Law, and also has statutory authority to obtain records. Public Health Law §33 requires:

1. In addition to the authority otherwise provided by this title, the inspector, in carrying out the provisions of this title, is authorized to request such information, assistance and cooperation from any federal, state or local governmental department, board, bureau, commission, or other agency or unit thereof as may be necessary for carrying out the duties and responsibilities enjoined upon the inspector by this section. State and local agencies or units thereof are hereby authorized and directed to provide to the inspector, or, at the request of the inspector, to state agencies or their contractors, such information, assistance and cooperation. Notwithstanding any other provision of law to the contrary, requests for information, assistance and cooperation may include, but not be limited to, all state and local government birth, death and vital statistics which may be contained in files, databases or registries, and for all information shall, upon request, include, where possible, making electronic copies or record exchanges available. Executive agencies shall coordinate and facilitate the transfer of appropriate functions and positions to the office as necessary and in accordance with applicable law.

The Supplemental Nutritional Assistance Program (SNAP or “Food Stamps”) is regulated by the United States Department of Agriculture. As mentioned in the section of public assistance records, in addition to SNAP records being confidential under SSL §136 and related regulations, they are also confidential pursuant to 7 CFR 272.1. That regulation gives access to those records to a number of program enforcement and administrative personnel as well as to law enforcement:

(c)*Disclosure.*

(1) Use or disclosure of information obtained from SNAP applicant or recipient households shall be restricted to:

(i) Persons directly connected with the administration or enforcement of the provisions of the Food and Nutrition Act of 2008 or regulations, other Federal

assistance programs, federally-assisted State programs providing assistance on a means-tested basis to low income individuals, or general assistance programs which are subject to the joint processing requirements in § 273.2(j)(2).

(ii) Persons directly connected with the administration or enforcement of the programs which are required to participate in the State income and eligibility verification system (IEVS) as specified in § 272.8(a)(2), to the extent the SNAP information is useful in establishing or verifying eligibility or benefit amounts under those programs;

(iii) Persons directly connected with the verification of immigration status of aliens applying for SNAP benefits, through the Systematic Alien Verification for Entitlements (SAVE) Program, to the extent the information is necessary to identify the individual for verification purposes.

(iv) Persons directly connected with the administration of the Child Support Program under part D, title IV of the Social Security Act in order to assist in the administration of that program, and employees of the Secretary of Health and Human Services as necessary to assist in establishing or verifying eligibility or benefits under titles II and XVI of the Social Security Act;

(v) Employees of the Comptroller General's Office of the United States for audit examination authorized by any other provision of law; and

(vi) Local, State, or Federal law enforcement officials, upon their written request, for the purpose of investigating an alleged violation of the Food and Nutrition Act of 2008 or regulation. The written request shall include the identity of the individual requesting the information and his authority to do so, violation being investigated, and the identity of the person on whom the information is requested.

(vii) Local, State, or Federal law enforcement officers acting in their official capacity, upon written request by such law enforcement officers that includes the name of the household member being sought, for the purpose of obtaining the address, social security number, and, if available, photograph of the household member, if the member is fleeing to avoid prosecution or custody for a crime, or an attempt to commit a crime, that would be classified as a felony (or a high misdemeanor in New Jersey), or is violating a condition of probation or parole imposed under a Federal or State law. The State agency shall provide information regarding a household member, upon written request of a law enforcement officer acting in his or her official capacity that includes the name of the person being sought, if the other household member has information necessary for the apprehension or investigation of the other household member who is fleeing to avoid prosecution or custody for a felony, or has violated a condition of probation or parole imposed under Federal or State law. The State agency must accept any document that reasonably establishes the identity of the household member being sought by law enforcement authorities. If a law enforcement officer provides documentation indicating that a household member is fleeing to avoid prosecution or custody for a felony, or has violated a condition of probation or parole, the State agency shall follow the procedures in

§ 273.11(n) to determine whether the member's eligibility in SNAP should be terminated. A determination and request for information that does not comply with the terms and procedures in § 273.11(n) would not be sufficient to terminate the member's participation. The State agency shall disclose only such information as is necessary to comply with a specific written request of a law enforcement agency authorized by this paragraph.

(viii) Local educational agencies administering the National School Lunch Program established under the Richard B. Russell National School Lunch Act or the School Breakfast Program established under the Child Nutrition Act of 1966, for the purpose of directly certifying the eligibility of school-aged children for receipt of free meals under the School Lunch and School Breakfast programs based on their receipt of Supplemental Nutrition Assistance Program benefits.

DISCLOSURES TO OTHER FEDERAL, STATE and LOCAL AGENCIES

General:

A social services district might also receive requests for records from state or federal agencies regarding investigations that do not involve social services matters directly. Some of these agencies have statutory or regulatory authority to issue subpoenas or otherwise obtain records. It is sometimes the case that these agencies don't have the statutory authority that they claim to, so if you receive an agency subpoena or request for records, absent direct authority from the Social Services Law and/or related regulations, you should request their legal authority to obtain records and make sure that they have followed required procedures before releasing DSS records to them. Review the statutes and regulations pertinent to that agency. It is important to determine whether the requesting agency has authority to obtain only certain records, or only records in certain circumstances, or whether their authority is *carte blanche* for any records in any circumstances.

One "exception" to be cautious of in the regulations is the one found in 18 NYCRR 357.3:

> (e) Disclosure to Federal, State or local official.
>
> (1) Information may be disclosed to any properly constituted authority. This includes a legislative body or committee upon proper legislative order, an administrative board charged with investigating or appraising the operation of public welfare, law enforcement officers, grand juries, probation and parole officers, government auditors, and members of public welfare boards, as well as the administrative staff of public welfare agencies.

Although this seems to be a broad exception, it does not apply to criminal investigations that are not welfare fraud related, or that are not covered by the "fleeing felon" exceptions.

Following are some examples.

The New York State Division of Human Rights

The New York State Division of Human Rights is permitted to issue subpoenas on its own and at the request of parties before that agency. That agency's regulations specifically state that a subpoena *duces tecum* issued by the agency does not require the approval of a court. See Executive Law §295 and 9 NYCRR 465.14.

> (a) Who may issue.
> (1) The commissioner, an administrative law judge, the division attorney, or other officer or employee of the division designated for this purpose by the commissioner, may issue subpoenas requiring a witness to appear and give sworn testimony whenever necessary to compel attendance.
> (2) The commissioner, an administrative law judge, the division attorney, the deputy commissioner for regional affairs, regional director, or other officer or employee of the division designated for this purpose by the commissioner, may issue subpoenas *duces tecum* to require the production for examination of any books, payrolls, personnel records, correspondence, documents, papers or any other evidence relating to any matter under investigation or in question before the division.

Note however that there is no "notwithstanding any other law" language, in Executive Law §295:

> 7. To hold hearings, to provide where appropriate for cross interrogatories, subpoena witnesses, impel their attendance, administer oaths, take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the division. The division may make rules as to the issuance of subpoenas which may be issued by the division at any stage of any investigation or proceeding before it. In any such investigation or hearing, the commissioner, or an officer duly designated by the commissioner to conduct such investigation or hearing, may confer immunity in accordance with the provisions of section 50.20 of the criminal procedure law.

The New York State Attorney General

Another example is that of the authority of the New York State Attorney General to request CPS records under the authority of Mental Hygiene Law §10.08(c) for sex offender civil confinement hearings. The statute says:

> Notwithstanding any other provision of law, the commissioner, the case review panel and the attorney general shall be entitled to request from any agency, office, department or other entity of the state, and such entity shall be authorized to provide upon such request, any and all records and reports relating to the respondent's commission or alleged commission of a sex offense, the

> institutional adjustment and any treatment received by such respondent, and any medical, clinical or other information relevant to a determination of whether the respondent is a sex offender requiring civil management. Otherwise confidential materials obtained for purposes of proceedings pursuant to this article shall not be further disseminated or otherwise used except for such purposes. Nothing in this article shall be construed to restrict any right of a respondent to obtain his or her own records pursuant to other provisions of law.

I think that if the Attorney General was making the request in the context of a civil confinement hearing that MHL 10.08(c) talks about, then the local district could provide CPS records, but only to the extent that the CPS records relate "…to the respondent's commission or alleged commission of a sex offense, the institutional adjustment and any treatment received by such respondent, and any medical, clinical or other information relevant to a determination of whether the respondent is a sex offender requiring civil management." I think that due to the local district's function as agent of NYSOCFS for child welfare that the local district would be included as a "state" agency for the purposes of the statute. From what I can see of Art. 10, the legislation was probably more aimed at the sex offender's records from the State corrections system, but 10.08(c) is worded broadly enough to include CPS records that relate to the commission of a sex offense.

The New York State Attorney General (again)

General Business Law §352 permits the Attorney General to investigate securities fraud, and to request information relevant to those investigations. However, that authority does not extend past that type of investigation. What if the Attorney General is investigating a potential criminal matter that does not involve securities fraud? Criminal Procedure Law §1.20(32) includes "attorney general" within the definition of "district attorney," As such, DSS client records may be released to the Attorney General if that office is investigating a criminal matter, and the statute or regulation that pertains to the particular records' confidentiality permits disclosure to a District Attorney. An example of this would be APS records, as Social Services Law §473-e(2)(e) permits the disclosure of APS client records to the district attorney when the information is necessary to conduct a criminal investigation or prosecution that involves or otherwise affects the subject of a report and that it is reasonable to believe that due to the nature of the investigation or prosecution that the records may be related to the investigation or prosecution.

The Department of Homeland Security

The regulations of the Department of Homeland Security (8 CFR 287.4) grant subpoena issuing authority to Immigration and Customs (ICE) to issue subpoenas in criminal or civil investigations. These subpoenas are very similar in form to Federal court subpoenas, and as they are for Federal courts, the State law concept of confidentiality gives way to the Federal concept of privilege.

The State Attorney General also has some overriding authority when conducting an investigation into fraudulent practices involving stocks, bonds and other securities. Per General Business Law §352:

> 5.It shall be the duty of all public officers, their deputies, assistants, subordinates, clerks or employees and all other persons to render and furnish to the attorney-general, his deputy or other designated officer when requested all information and assistance in their possession or within their power. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall disclose to any person other than the attorney-general the name of any witness examined or any other information obtained upon such inquiry except as directed by the attorney-general shall be guilty of a misdemeanor.

Note though that this power is limited to circumstances listed in the statute, it is not a *carte blanche* authority, although the Attorney General does have other authority to obtain social services records, for example the Welfare Inspector General's authority.

State Commission of Corrections

If your district happens to run a specialized secure detention facility, the State Commission of Corrections has authority to obtain records from your facility, pursuant to Corrections Law §46:

> 1. The commission, any member or any employee designated by the commission must be granted access at any and all times to any correctional facility or part thereof and to all books, records, inmate medical records and data pertaining to any correctional facility deemed necessary for carrying out the commission's functions, powers and duties. The commission, any member or any employee designated by the chairman may require from the officers or employees of a correctional facility any information deemed necessary for the purpose of carrying out the commission's functions, powers and duties.

Attorney grievance committee

Attorney grievance committees have authority to investigate complaints, per 22 NYCRR 1240.7, but it does not appear that their authority to obtain records is notwithstanding law to the contrary, at least until they obtain a subpoena:

> (b) Investigation; Disclosure. The Chief Attorney is authorized to:
> (1) interview witnesses and obtain any records and other materials and information necessary to determine the validity of a complaint;
> (2) direct the respondent to provide a written response to the complaint, and to appear and produce records before the Chief Attorney or a staff attorney for a formal interview or examination under oath;

(3) apply to the Clerk of the Court for a subpoena to compel the attendance of a person as a respondent or witness, or the production of relevant books and papers, when it appears that the examination of such person or the production of such books and papers is necessary for a proper determination of the validity of a complaint. Subpoenas shall be issued by the Clerk in the name of the Presiding Justice and may be made returnable at a time and place specified therein.

Federal Trade Commission

The Federal Trade Commission ("FTC") has investigative authority under 15 USC §49

(Documentary evidence; depositions; witnesses), which includes that it:

> shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and *the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation.* Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

SSL §422 does not have an exception for the FTC in particular or federal agencies in general.

Consumer Product Safety Commission

The Consumer Product Safety Commission has subpoena authority pursuant to 15 USC § 2076 (Additional functions of Consumer Product Safety Commission):

> (b) Commission powers; orders
>
> The Commission shall also have the power--
>
> (3) to require by subpena the attendance and testimony of witnesses and the production of all documentary and physical evidence relating to the execution of its duties;
>
> (4) in any proceeding or investigation to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection;

The statute also contains a section that provides immunity from civil liability:

> (d) Disclosure of information

> No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

Note here that the immunity does not extend to criminal liability, so caution should be used if requested to disclose CPS records, or records from electronic databases.

THE FREEDOM OF INFORMATION LAW (FOIL)

The New York State Freedom of Information Law (FOIL) is found in Public Officers Law, Article 6. The law is meant to permit persons to make information requests of New York State and local governments. Some folks get confused and refer to the "Freedom of Information Act" or "FOIA" when they are requesting State or local government information. FOIA is actually the Federal statute and applies only to Federal government records.

To a great extent, the mechanics of the FOIL process are found in NY Public Officers Law §87(1)(b). In that section of the law, you will find such things as:

> The requirement for the agency to have a procedure to allow persons to make a FOIL request;
> The requirement for the agency to have a person to direct the FOIL requests to; and
> The authority to charge for the copying or reproduction of the information that is being released

Interpretation of the FOIL falls under the purview of the New York State Committee on Open Government, which is part of the New York Department of State. The Committee on Open Government does not decide on FOIL requests that are contested, rather, it issues "advisory opinions," which are most often requested by people who have had their FOIL request denied.

Technically, any or all social services records may be subject to a FOIL request. The advisory opinions often contain the following boilerplate language: "…first, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law." Notwithstanding this, I point out again that the advisory opinions of the Committee on Open Government are just that- that agency cannot compel the record holding agency to disclose their records.

Under Public Officers Law §87(2) the most pertinent exceptions, for social services records related purposes, are records that (NOTE- my comments on this statute are in *italics*):

(a) are specifically exempted from disclosure by state or federal statute [*This is probably the most important one, relative to client case records, further discussion this exception is set forth further in this section*];

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article [*This might also be mentioned along with the previous exception, in the context of a request for client records, but the statute-based one is better];*

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations [*this might come into play if you are negotiating vendor contracts];*
(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise [*This would apply if for instance you had a commercial enterprise develop a software program for you. Usually you would advise the private enterprise about the FOIL request and ask them if they have objections the disclosure*];

(e) are compiled for law enforcement purposes and which, if disclosed, would:
i. interfere with law enforcement investigations or judicial proceedings;
ii. deprive a person of a right to a fair trial or impartial adjudication;
iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures [*At first glance, this exception might seem to not be available to a local district. However, there is a case from last October where the Court of Appeals held that the State Department of Education could raise this exemption where a request had been made to disclose audit standards that had been developed to detect fraud in preschool special education programs. The case is called Matter of Madeiros v New York State Educ. Dept., 30 NY3d 67 (2017) This case also a bit of a cautionary tale about liability for attorney's fees, as even though State Ed was able to raise an exemption, they were still compelled to release certain redacted records after they were Article 78'd and the Court of Appeals eventually found that the requestor was a "prevailing party" for the purposes of being awarded attorney's fees];*

(f) if disclosed could endanger the life or safety of any person [*This might come up in the context of a request for client names or addresses, although again the statute-based exception is probably better for that. The more likely scenario is a request for the home addresses, phone numbers, e-mails, etc., of local district employees*];

(g) are inter-agency or intra-agency materials which are not:
i. statistical or factual tabulations or data;
ii. instructions to staff that affect the public;
iii. final agency policy or determinations;
iv. external audits, including but not limited to audits performed by the comptroller and the federal government [*This is an exception that uses exceptions to the exception that describe types of information that you have to disclose. As you can see, final agency policy is subject to disclosure];*

(i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures [*This one might apply to requests that involve technical information or access to local databases, and locally accessed State databases such as WMS, Connections or the Medicaid Data Warehouse or apply to a system that the local district has contracted for];*

As mentioned above, Public Officers Law §67(2)(a) permits the local district to deny access to records that "…are specifically exempted from disclosure by state or federal statute." As seen throughout this Handbook, various confidentiality laws and regulations pertain to all of the various types of client records maintained by the local district. As a general proposition, they prohibit disclosure of client records, except in compliance with the particular statutes and/or regulations that apply to those records.

Contrary to the apparent view of the Committee on Open Government, I am of the view that the social services related laws and regulations provide the exclusive means for the release of social services client records, and that FOIL does not apply to them at all. There is an advisory opinion in 2014 that says that if you redact the names and other identifying information from public assistance records that you are supposed to release them. The advisory opinion, FOIL- AO- 19205, also said that the Committee was aware of only one case that addressed the issue of whether you had to release redacted public assistance records, and that case said that you had to. This was a case from 1975 called *Paine v Chick,* 50 AD2d 686 (3rd Dept., 1975). However, in 1996, a case that says you can't release redacted public assistance records. That case is *Rabinowitz v. Hammons,* 228 AD2d 369 (1st Dept., 1996). The First Department wrote that:

> Social Services Law §136(1) bars disclosure by social service officials of information and communications relating to persons receiving "public assistance or care", except to the Commissioner of Social Services or his authorized representative. In our view, the medical evaluation provided to VPS clients by social service officials is a type of public care within the scope of that statute. Consequently,

> respondents properly declined to disclose these medical records, even in redacted form.

I must point out that there are some other individuals or agencies who you can release certain public assistance records to, and those are found in 18 NYCRR 357.3. In certain circumstances Medicaid client records can be released as well, and those exceptions are in the Social Services Law and in the HIPAA regulations.

And to return to the *Paine v Chick* case, that case itself was not a FOIL case, it was a personal injury case where the defendant wanted to subpoena the plaintiff's public assistance records to defend against the lost wages claim in the lawsuit. And as far as "redaction" of the public assistance records goes, all the Court was saying was that the entire record was not to be produced, but rather only the portion that related to the amount of public assistance that the plaintiff received during the time he was claiming lost wages.

Getting back to the redaction issue, I think that this also applies to the other social services related records such as CPS records. There is a trial level case from 1989 that involved a FOIL request from a newspaper reporter who wanted CPS records from New York City Human Resources Administration concerning a particular child. In that case, *New York News, Inc. v Grinker*, 142 Misc. 2d 325 (Supreme Court, New York County, 1989), the Court held that the confidentiality provisions found in Social Services Law §422 prevent the release of CPS records pursuant to a FOIL request. At some point, the newspaper asserted that their writer was entitled to an exemption to the Social Services Law 422 confidentiality under subdivision 422(4)(A)(h) which applies to persons engaged in *bona fide* research projects and, as such, she was entitled to a redacted copy of the CPS records. Although I think the Court could have said that if the newspaper reporter wanted to invoke this exception she should have called the Commissioner of State DSS (this was pre-OCFS) and asked him about that, since that is a pre-requisite under that section of the law, the Judge denied the reporter's request by saying that "It is simply not possible to release the materials sought, and keep the requisite confidentiality. The court has examined them, and even with redaction of names, etc., the persons mentioned in the report will have their identities revealed. In these circumstances, the public's interest in confidentiality, as enunciated in the statute, must prevail." So, I think that redaction is not a proper avenue to use in releasing client related records in response to a FOIL request.

There is another advisory opinion, this one numbered FOIL-AO-16155, from 2006, that says that if the local district receives a decision from a court or has information in a litigation file that is disclosed in open court that it is obliged to produce that information in response to a FOIL request. In support of its opinion, the Committee cited a case for the proposition that court records, assuming that they have not been sealed, that come into the possession of an agency are agency records that fall within the scope of the Freedom of Information Law, and thus, copies of records filed with or maintained by a court that are in possession of the Department of Social

Services constitute agency records that fall within the coverage of the Freedom of Information Law. However, when you read the case, *Newsday v. Empire State Development Corporation*, 98 NY2d 359 (2002), you discover that Empire State Development Corporation did not have separate statutory confidentiality that applied to their records, like a social services district does. There is also an unpublished opinion that explains why the *Newsday* decision doesn't apply to agencies whose records are exempt from FOIL due to separate confidentiality statutes, see *Castillo v Bailey*, 2010 N.Y. Misc. LEXIS 5152 *; 2010 NY Slip Op 32972(U) (Supreme Court, New York County, 2010). In my opinion, the required method for disclosure of social services client records comes from the relevant section of the Social Services Law and/or the related regulations, not from FOIL. I think that there is some case law that supports and illustrates my position. In a case called *Wise v Battistoni*, 208 AD2d 755 (2nd Dept., 1994) the Court was asked to review an appeal of an Article 78 decision which had upheld the denial of a FOIL request made for an adoptive child's records that were in the possession of Dutchess County DSS. The Second Department held that the records were confidential under Social Services Law §372, and, as such, were exempt from FOIL disclosure. The Court also wrote that Social Services Law §372 also requires that the way to obtain those records is via an application to Supreme Court, so not only were the records exempt from FOIL, but also a FOIL request was not the proper means to attempt to obtain the records in the first place. The social services related laws and regulations describe who is entitled to obtain the records that are covered by those laws and regulations, and I think that on the basis of the *Wise* case that you don't have to start redacting and giving out all kinds of other information. The *Grinker* case that I talked about earlier also gives a little insight on this issue. As mentioned previously, the Judge in *Grinker* really focused on SSL 422 and not FOIL in deciding on the release of the CPS records. He did direct the release of a letter sent by the Commissioner of HRA and to the Commissioner of State DSS that involved "agency matters," although he also ordered that any identifying information from that letter be redacted. I don't know what was actually in that letter, but I suspect that it might have been along the lines of the HRA Commissioner telling the State DSS Commissioner about HRA policy, procedure, and the like. I think that this part of the decisions illustrates the difference between client case records, which are not subject to FOIL because of the separate statutes that apply to their confidentiality, and agency policy matters, which are subject to FOIL, although they may require redaction of client identifiable information to ensure that the only disclosure of information under the FOIL request is the types of inter or intra agency material that is required to be released.

A couple of other cases discuss the issue of the disclosure of CPS records in the context of FOIL. *In Matter of Gannett Co., Inc., v. County of Ontario*, 173 Misc.2d 304, (Sup. Ct., Ontario Co., 1997). In that case, the Court ruled in an Article 78 proceeding brought by a newspaper seeking information from Ontario County DSS that FOIL did not apply, since SSL 422-a specifically addresses the request. However, the Court did rule that Ontario County DSS was required to produce the CPS records pursuant to

SSL §422-a(2)(g), a result that was disagreed with and commented upon in a subsequent case. In *Mater of the Application of Children's Rights v. New York State Office of Children & Family Services,* 6 Misc.3d 1026 (Sup. Ct., Rensselaer County, 2005) the Court held that the fact that child protective records are confidential pursuant to the Social Services makes them exempt from FOIL, and that the only way that CPS records can be made available is pursuant to SSL §§422 and 422-a. There is also an unreported Monroe County Supreme Court case that considered FOIL in the context of Adult Protective records. That decision does discuss the individual confidentiality laws as being exceptions to FOIL.

One other consideration when a FOIL request is made is whether the local district is obliged to acknowledge the existence of records, even when it denies the FOIL request. In March of 2018, the Court of Appeals decided a case called *Matter of Abdur-Rashid v. New York City Police Department*, 31 NY3d 217 (2018). Not a social services case, obviously, rather it was one in which the requestor sought records concerning the police investigation and surveillance of two individuals. The police department opposed the FOIL request, asserting the law enforcement and safety exemption to FOIL disclosure. The police department also asserted that it could neither confirm nor deny the existence of the records that had been requested. The Court of Appeals held that it is permissible for an agency to decline to acknowledge possession of responsive records when the fact that responsive records exist would itself reveal identification protected under a FOIL exemption. That might be something for you to consider in situations where you believe that the purpose of the FOIL is not only to obtain the records, but also as a way to smoke out whether you actually have some records. So, you might tailor your response to be something like: "records of the type that you seek are exempt from disclosure pursuant to Public Officers Law §87(2)(a), as such records are confidential pursuant to the Social Services Law. The denial of your FOIL request is neither a confirmation or denial of the existence of such records."

See also, infra, Requests for CPS Fair Hearing Decisions Pursuant to FOIL and for Child Fatality Reviews

The Justice Center

Per Social Services Law §422(4)(A)(j), CPS records may be provided to the Justice Center for the protection of people with special needs or a delegated investigatory entity in connection with an investigation being conducted under article eleven of the Social Services Law.

The statutes that pertain to the Justice Center also provide fairly broad power to the Justice Center to obtain records from mandated reporters. Social Services Law §491 (Duty to Report Incidents) at §1(c):

> The substance or content of any psychological, psychiatric, therapeutic, clinical or medical reports, evaluations or like materials or information

> pertaining to the treatment of a patient or client of a mandatory reporter who reports a reportable incident of such patient or client pursuant to this article, must be provided by such mandatory reporter upon request of the justice center for the protection of people with special needs if such records are essential for a full investigation of such allegation, notwithstanding any applicable privilege which would otherwise bar the disclosure of such materials and records pursuant to article forty-five of the civil practice law and rules or other provision of law except applicable federal law governing the disclosure of patient and related medical records.

From that exception it would also appear that the Justice Center can require the production of many other types of records from a local social services district in addition to CPS records, when the local district is the mandated reporter of a case that the Justice Center is investigating.

Sharing of CPS Information Within Child Abuse/Maltreatment Multi-Disciplinary Teams

Social Services Law §423(6). Permits a social services district to establish a multidisciplinary investigative team or teams which may work as part of a child advocacy center established pursuant Social Services Law §423(6), for the purpose of investigating reports of suspected child abuse or maltreatment.

Members of multidisciplinary teams shall include but not be limited to representatives from the following agencies: child protective services, law enforcement, district attorney's office, physician or medical provider trained in forensic pediatrics, mental health professionals, victim advocacy personnel and, if one exists, a child advocacy center. Members of the multidisciplinary team primarily responsible for the investigation of child abuse reports, including child protective services, law enforcement and district attorney's office, shall participate in joint interviews and conduct investigative functions consistent with the mission of the particular agency member involved. It shall not be required that members of a multidisciplinary team not responsible for the investigation of reports participate in every investigation. Such other members shall provide victim advocacy, emotional support, and access to medical and mental health care, where applicable. All members, consistent with their respective agency missions, shall facilitate efficient delivery of services to victims and appropriate disposition of cases through the criminal justice system and/or the family court system in a collaborative manner, however, non-investigative team members shall note their specific role in the team for reports covered under this title. 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

Social Services Law §422(4)(A)(x) permits the disclosure of CPS information to members of a local or regional multidisciplinary investigative team as established pursuant to Social Services Law §423(6).

So, it would seem that child protective workers may share CPS information with, at least, investigative members of the multi-disciplinary team.

If the multi-disciplinary team is located in a child advocacy center, Social Services Law §423-a(5)(a) provides that the records of the center are confidential. However, disclosure of those records may be made to members of a multidisciplinary investigative team who are engaged in the investigation of a particular case and who need access to the information in order to perform their duties for purposes consistent with this section and to other employees of a child advocacy center who are involved in tracking cases for the child advocacy center. Disclosure shall also be made for the purpose of investigation, prosecution and/or adjudication in any relevant court proceeding or, upon written release by any non-offending parent, for the purpose of counseling for the child victim.

Social Services Law §423-a(5)(b) states that any public or private department, agency or organization may share with a child advocacy center information that is made confidential by law when it is needed to provide or secure services pursuant to this section. Confidential information shared with or provided to a center remains the property of the providing organization. Thus it appears that CPS information could be disclosed for this limited purpose.

Sharing of CPS Information Within Child Fatality ReviewTeams

Social Services Law §422-b (3) permits the establishment at the local or regional level of fatality review teams. For the purposes of this section, a local or regional fatality review team must include, but need not be limited to, representatives from the child protective service, office of children and family services, county department of health, or, should the locality not have a county department of health, the local health commissioner or his or her designee or the local public health director or his or her designee, office of the medical examiner, or, should the locality not have a medical examiner, office of the coroner, office of the district attorney, office of the county attorney, local and state law enforcement, emergency medical services and a pediatrician or comparable medical professional, preferably with expertise in the area of child abuse and maltreatment or forensic pediatrics. A local or regional fatality review team may also include representatives from local departments of social services, mental health agencies, domestic violence agencies, substance abuse programs, hospitals, local schools, and family court.

Social Services Law §422(4)(A)(w) members of a local or regional fatality review team approved by the office of children and family services in accordance with section four hundred twenty-two-b of this title.

So, CPS information may be shared with members of the fatality review team. The caution here would be against permitting access by non-members (interns, students, etc.) to these meetings or to the CPS information disclosed to team members.

OTHER CONFIDENTIALITY STATUTES AND PRIVILEGES

Local district social services staff includes professionals who may also be subject to some form of confidentiality restrictions based upon their professions. There are some variations in the confidentiality rules that pertain to physicians, psychologists, and certified social workers. There are also several sources of confidentiality rules that each profession is obliged to follow. Social workers, physicians and psychologists are subject to the rules of the Board of Regents, specifically part 29, which is found in volume 8 of the New York Code of Rules and Regulations (NYCRR), which pertains to unprofessional conduct. Because of the way in which the psychologist/patient privilege is written, you must also apply the attorney/client privilege to psychologists. Attorneys are subject to the Code of Professional Responsibility, a series of ethical canons and disciplinary rules that are contained in an appendix to the state Judiciary Law. Civil Practice Law and Rules (CPLR) Article 45 (Evidence) contains separate (and different) evidentiary privileges for each profession. In New York, the CPLR privileges apparently extend beyond legal proceedings, despite being contained in an article that is devoted to legal proceedings. Thus, the CPLR privilege must be considered not only in such situations as courtroom testimony, but also in the context of non-legal situations, including disclosure of information of a client intending to commit a crime or harm themselves or another. Because of these variations, each are treated separately.

Certified social workers

There is contained in the CPLR a certified social worker privilege which makes statements made by a client to a certified social worker, or to a person working for the same employer as the certified social worker, or for the certified social worker, confidential (CPLR §4508). However, there are exceptions contained in (CPLR §4508(a)(2)):

1. the such social worker may disclose such information as the client may authorize;

2. the such social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act;

3. where the client is a child under the age of sixteen and the information acquired by such social worker indicates that the client has been the victim or subject of a crime, the social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry;

4. where the client waives the privilege by bringing charges against such social worker and such charges involve confidential communications between the client and the social worker.

You should also bear in mind that the communication must be made directly from the client himself in order for it to be confidential. If a third party reports a statement to the certified social worker that the client made, that statement is not confidential as to the certified social worker. However, if the third party is deemed to be an agent of the certified social worker, the privilege may still attach.

8 NYCRR 29.1(b)(8) states that it is unprofessional conduct to reveal "personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law…" The exception contained in this rule would allow disclosure of the statement based upon the CPLR exception in the preceding paragraph.

Physicians

The physician privilege applies to dentist, podiatrist, chiropractors and nurses as well as physicians. CPLR §4504. This privilege renders confidential any information which the physician acquired from the patient in a professional capacity and was necessary to enable the physician to act in that capacity. Although there are some statutory exceptions to this privilege, none of the exceptions relate to situations where the patient discloses the contemplation of a crime or harmful act. However, there is case law that indicates that there can be an exception if the patient may be a danger to himself or others. The most famous case, and the one which seems to be referred to in every other case of this ilk, is *Tarasoff v. Regents of University of California*, 13 Cal.3d 177, 529 P.2d 529. The basic holding in that case is that although public policy favors the confidentiality of physician/patient communications, there is a countervailing public interest to which it must yield in appropriate circumstances. Thus, where a patient may be a danger to himself or others, a physician is required to disclose to the extent necessary to protect a threatened interest. *Tarasoff* has been cited by the 4th Department, in *dicta*, in at least two cases, *MacDonald v. Clinger,* 84 AD2d 482 (4th Dept., 1982), and *Rea v. Pardo,* 132 Ad2d 442 (4th Dept., 1987). In both of these cases, the information disclosed was not about patients harming themselves or some one else. Interestingly, while *MacDonald* speaks in terms of an obligation to disclose if the patient may be a danger to himself or others, *Rea* says that this duty "might" exist under those circumstances.

Unlike the certified social worker privilege, the above exception to the physician privilege has not addressed the issue of crimes or acts that are not directed toward people. There is a Vermont case, *Peck v. Counseling Service*, 146 Vt. 61, which did find a counseling agency liable for damages sustained when their client burned down his parents' barn. The man had disclosed that he *might* do this, but his counselor thought (wrongly, in hindsight) that she had talked him out of it. She made no disclosure of her client's statements before he burned the barn.

As with certified social workers, 8 NYCRR 29.1(b)(8) states that it is unprofessional conduct for a physician to reveal "personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law." The exception contained in this rule would allow disclosure based upon the exception carved out by the *Tarasoff* case. Although there has not been a definitive New York case on point, the *MacDonald* and *Rea* cases mentioned above do refer to *Tarasoff* and seem to acknowledge a duty to disclose to the extent necessary to protect a threatened interest. See also *People v. Bierenbaum*, 301 AD2d 119 (1st Dept., 2002).

Information that the physician (including a psychiatrist) reports to DSS may also fall under the certified social worker privilege and its exceptions. If disclosures that contemplate a crime or harmful act are made, the physician should be contacted to help assess the seriousness of the threats. The problem in these types of disclosure situations is that *Tarasoff* implies that each disclosure has to be considered on a case-by-case basis.

Psychologists

There is a psychologist privilege contained in CPLR §4507. Unfortunately, this statute creates the privilege by stating that the communications are placed on the same basis as those between an attorney and client. The problem is that the nature of the two relationships are not always identical and the same communication that would be disclosable in an attorney/client relationship may not be disclosable in a psychologist/patient relationship.

There is an attorney/client privilege that is contained in CPLR 4503. This privilege prohibits an attorney from disclosing communications made to him by his client made for the purpose of obtaining legal advice. It has been held that for the communication to be held privileged, it must be for the purpose of legal advice, not for business or personal advice. *Matter of Bekins Record Storage Co., Inc.*, 62 NY2d 324 (1984); *People v. O'Connor*, 85 AD2d 92 (4th Dept., 1982). In the *O'Connor* case, Mr. O'Connor contacted an attorney who had represented him several years before, when the attorney was in private practice. At the time of the call the attorney was an assistant district attorney, a fact which Mr. O'Connor had been aware of for some time. Mr. O'Connor told the attorney that he had shot his girlfriend, and asked about her condition and about surrendering himself. The court found that the communication was not made for the purpose of seeking legal advice and thus not privileged. Likewise, presumably, for a communication with a psychologist to be privileged, it must be for the purpose of obtaining psychological services.

Although neither the statute nor the case law directly address the issue of the lawyer's duty when their client communicates an intention to commit a crime, the Rules of Professional Conduct does. Rule 1.6 permits a lawyer to reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime;
>
> (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
>
> (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
>
> (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
>
> (ii) to establish or collect a fee; or
>
> (6) when permitted or required under these Rules or to comply with other law or court order.

A case that preceded the adoption of the both the Rules and the Code of Professional Responsibility, recognized a similar exception to the confidentiality rule, contained in an American Bar Association canon, where the client announces the intention to commit a crime. *Fontana v. Fontana*, 194 Misc. 1042 (Family Court, Richmond County, 1949).

As with certified social workers and physicians, 8 NYCRR 29.1(b)(8) states that it is unprofessional conduct for a psychologist to reveal "personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law…" Based upon the attorney privilege, at least, a psychologist can probably disclose statements regarding a client's intention to commit a crime.

Applicable law:	CPLR 4503 CPLR 4504 CPLR 4507 CPLR 4508
Applicable regs.	8 NYCRR 29.1 Ethical Canon 4 Disciplinary Rule 4

Other Staff

The various confidentiality statutes and rules discussed above include secretaries, assistants and most other personnel as being subject to the confidentiality guidelines of their employer. Staff would have to be engaged in performing or assisting in the professional service for the privilege to apply. Off-hand, random statements are not privileged, no matter to whom they are made.

OTHER CONFIDENTIAL RECORDS THAT BECOME PART OF A DSS FILE

Because DSS casework often involves contact with medical, mental health, substance abuse and other service providers, it is inevitable that these records find their way into DSS files. These records become part of the DSS file, but also retain their own confidentiality rules.

HIV/AIDS records:

The main statute concerning HIV and AIDS related information is Article 27-F of the Public Health Law (PHL). PHL §2782 obliges DSS to keep HIV/AIDS information that it obtains in the course of providing social services confidential. PHL §2782 provides a list of exceptions to this general rule, and includes persons who have a valid release; authorized agencies in connection with foster care or an adoption; a law guardian appointed under the social services law or family court act, with respect to information concerning the child they are representing; and a person to whom disclosure is ordered by a court of competent jurisdiction pursuant to PHL §2785. There are many other exceptions, so it is worthwhile to keep a copy of this statute handy. The regulation is 10 NYCRR 63.6.

18 NYCRR 357.3(b) describes the disclosure of medical information for foster children, including for confidential HIV-related information. 18 NYCRR 403.9 requires that local district personnel must not reveal confidential HIV-related information except as specified in 18 NYCRR 357.3(b) and Article 27-F of the PHL, upon pain of disciplinary and/or civil penalties or fines.

Medical Records:

The statute concerning access to medical records is found in Public Health Law 18. This statute defines “patient information” as including just about everything concerning an examination or health assessment, except for mental health information (which has its own confidentiality protection); personal notes and observations of a health care practitioner maintained by that practitioner; records from another practitioner; and data disclosed in confidence. PHL §18 (1)(e). PHL §18 (6) obliges third parties to keep medical information that they receive confidential.

The confidentiality provisions of PHL §18 do not restrict or expand disclosure pursuant to the CPLR. PHL §18(10).

The Health Care Portability and Accountability Act of 1996 (HIPAA) is discussed further along in this handbook. To a great extent the Public Health Law has been amended to harmonize with HIPAA.

Mental Health Records:

Mental Hygiene Law (MHL) §33.13 covers access to clinical records. MHL §33.13[c] states that patient records shall not be released except to certain listed agencies and individuals, or upon a court order made upon a finding that the interests of justice significantly outweigh the need for confidentiality.

Once DSS has obtained mental health records, they must keep them confidential under the same limitations that the mental health provider operates under. MHL §33.13(f). In *M of Richard SS*, the Third Department held that it was error to issue a subpoena for the production of mental health records obtained by child protective without making the finding that the interests of justice significantly outweigh the need for confidentiality. See *M of Richard SS*, 29 AD3d 1118, (3rd Dept., 2006).

The HIPAA regulations also refer to the confidentiality of psychotherapy records. See the HIPAA discussion, infra.

Substance/alcohol abuse records:

Mental Hygiene Law §22.05[b] (effective October 5, 1999) states that all records of identity, diagnosis, prognosis, or treatment of an individual in connection with the person's receipt of chemical dependency services are confidential. The records may only be released under the provisions of the Public Health Law, any other state or federal law or court order. The cross-reference in the PHL is section 18, so you may wish to refer to the discussion above concerning medical records. In 2010 the Fourth Department held that a trial court could not order a plaintiff to execute releases of information to permit a defendant to obtain the plaintiff's alcohol health treatment records without making a finding that the interests of justice significantly outweigh the need for confidentiality. *See LT v. Teva Pharmaceuticals USA, Inc.*, 71 AD3d 1400 (4th Dept., 2010).

42 USCA 290dd-2(b)(2)[c] authorizes a court to order disclosure of substance abuse records upon a finding of good cause. In making this assessment, the court is to weigh the public interest and the need for disclosure against the injury to the patient, the physician-patient relationship and the treatment services.

School Records

See discussion for FERPA, infra.

OTHER STATUTES AND SITUATIONS THAT YOU MAY ENCOUNTER

HIPAA and Preemption of State Law

Confidentiality requirements under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) have been in effect for many years now. Many people of the view that the confidentiality provisions contained in the HIPAA regulations override all State confidentiality statutes and regulations. However, the only social services area that is specifically subject to HIPAA is the Medicaid program. Even with regard to Medicaid records, it is important to consider State statutes and regulations when evaluating a records request.

It is important to remember that New York State already had a very restrictive statutory and regulatory structure with regard to medical records before the HIPAA regulations were promulgated. The following discussion attempts to illustrate HIPAA requirements in comparison to existing confidentiality requirements. For the practitioner, a good rule of thumb for preemption analysis is that when it comes to releasing records to a third party that you should use the confidentiality standard that is the most restrictive, while if it is a Medicaid applicant/recipient who is requesting access to records about their own case, you should use the confidentiality standard that provides the greatest access.

The regulations pertaining to HIPAA preemption of State law are found at 45 CFR 160.201 et seq. The basis of the preemption standard is that if the State law is found to be "contrary" to HIPAA, then it is preempted by HIPAA.

In comparing State law to a HIPAA standard, requirement or implementation specification, there are some important definitions (45 CFR 160.201):

Relates to the privacy of individually identifiable health information
means, with respect to a State law, that the State law has the specific purpose of protecting the privacy of health information or affects the privacy of health information in a direct, clear, and substantial way. This would require an analysis of the Public Health Law and the Mental Hygiene Law. Although the definition does not appear to include State law, such as the general social services confidentiality statute (SSL §136), I have included that statute in this analysis. SSL §136 and other New York State laws address the confidentiality of records that may include medical information. It is my opinion that HIPAA does not abrogate those law and that they must be included in any preemption analysis.

State law means a constitution, statute, regulation, rule, common law, or other State action having the force and effect of law.

Contrary means that either:

(1) a covered entity would find it impossible to comply with both the State and federal requirements; or

(2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L.104-191, as applicable.

More stringent means six different things in the context of HIPAA, depending upon whose rights of access are at issue and other factors:

(1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under this subchapter, except if the disclosure is:

(i) Required by the Secretary in connection with determining whether a covered entity is in compliance with this subchapter; or

(ii) To the individual who is the subject of the individually identifiable health information.

(2) With respect to the rights of an individual who is the subject of the individually identifiable health information of access to or amendment of individually identifiable health information, permits greater rights of access or amendment, as applicable; provided that, nothing in this subchapter may be construed to preempt any State law to the extent that it authorizes or prohibits disclosure of protected health information about a minor to a parent, guardian, or person acting in loco parentis of such minor.

(3) With respect to information to be provided to an individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies, provides the greater amount of information.

(4) With respect to the form or substance of an authorization or consent for use or disclosure of individually identifiable health information, provides requirements that narrow the scope or duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the authorization or consent, as applicable.

(5) With respect to record keeping or requirements relating to accounting of disclosures, provides for the retention or reporting of more detailed information or for a longer duration.

(6) With respect to any other matter, provides greater privacy protection for the individual who is the subject of the individually identifiable health information.

The General Rule and Exceptions for Preemption

The general rule is that any HIPAA standard, etc. that is contrary to State law preempts the State law. There are three automatic exceptions to this rule and one exception that may only be granted by the Secretary of HHS upon a written request made by the Governor of each State or their designee.

The automatic exceptions are:

The provision of State law relates to the privacy of health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.

-or-

The provision of State law, including State procedures established under such law, as applicable, provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.

-or-

The provision of State law requires a health plan to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals.

The Governor of a State may seek an exception on the grounds that the State law:

(1) Is necessary:

(i) To prevent fraud and abuse related to the provision of or payment for health care;

(ii) To ensure appropriate State regulation of insurance and health plans to the extent expressly authorized by statute or regulation;

(iii) For State reporting on health care delivery or costs; or

(iv) For purposes of serving a compelling need related to public health, safety, or welfare, and, if a standard, requirement, or implementation specification under part 164 of this subchapter is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served; or

(2) Has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances (as defined in 21 U.S.C. 802), or that is deemed a controlled substance by State law.

It is my opinion that the Medicaid program, including the application process, is the only Monroe County Division of Social Services program that is subject to HIPAA.

The Medicaid program is deemed to be a "Health Plan" pursuant to 45 CFR 160.103, and thus subject to the confidentiality requirements of HIPAA.

A Court of Appeals case that discusses HIPAA preemption in the context of a Kendra's Law case is *Matter of Miguel M. (Barron)* 17 NY3d 37 (2011). The Court found that an exception to the confidentiality of mental health records found in Mental Hygiene Law §33.13 was preempted by HIPAA, and none of the exceptions found in HIPAA permitted the release of those records under the circumstances under which they were requested.

Current New York State law (Social Services Law [SSL] §§367-b and 369 makes Medicaid information confidential. SSL §367-b directs you to the general Social Services confidentiality statute found at SSL §136. A comparison of the confidentiality requirements of SSL §136, and its related regulations (18 NYCRR 357) and those of HIPAA follows.

Release of Medicaid Information Pursuant to SSL §136 and 18 NYCRR 357- Also Permissible Under HIPAA?

Under present New York law, Medicaid information may only be released where the disclosure is necessary for four activities[11]:

1. establishing eligibility
2. determining the amount of medical assistance
3. providing services for recipients
4. fraud and abuse activities

[11] GIS 00 MA/22

HIV information may only be released pursuant to PHL 2782

The case record is available to the Applicant/Recipient or his representative to review and copy at the agency- Okay under HIPAA.

May release to another person, public official or agency when it may be properly assumed that the client has requested that the inquirer act on his behalf- Would seem to require an authorization under HIPAA.

Judicially issued subpoena- Okay under HIPAA.

May be disclosed to any properly constituted authority with regard to investigation or appraising the operation of public welfare- Okay under HIPAA.

May report to appropriate agency or official known or suspected instances of physical or mental injury, sexual abuse or exploitation or child maltreatment- Okay under HIPAA.

Release of Medical information Under HIPAA

1. To the individual- authorized under current State law

2. For treatment, payment or healthcare operation- authorized under current State law.

3. With Consent or Authorization- only exceptions are within law and regulations

4. Public health authority for disease control- apparently not allowed under Public Health Law §18.

5. To a government agency that is authorized to receive child maltreatment reports- same as State law

6. To a government agency that is authorized to receive reports concerning abuse, neglect or domestic violence- same as State Law (see SSL §§415 & 416)

7. To a health oversight agency- allowable for the investigation of fraud or abuse

8. By court order- same as State law.

9. By grand jury subpoena- same as State law.

10. By administrative request- without subpoena, only to the extent that the agency is related to public welfare purposes

11. By law enforcement request to identify or locate a suspect, fugitive, material witness or missing person, certain limited information- not allowed under State law, except for address for “fleeing felon”

12. To law enforcement, information about a crime victim, an individual who died if the covered entity believes the death may have resulted from criminal conduct or if the covered entity believes that the PHI is evidence of a crime, or if providing emergency medical treatment- Penal Law §265.25 requires a health care provider to report to the police apparent gunshot wounds as well as any stab wounds that are likely to or do result in death.

13. To a coroner or medical examiner- not directly allowed under State law, although a coroner or medical examiner is granted subpoena power pursuant to County Law §674(4). 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, 464 NYS2d 928 (Supreme Court, Niagara County, 1983)

14. To a funeral director- apparently not directly allowed under State law, although Public Health Law §4142 appears to require that a funeral director obtain some medical information in order to prepare death certificates.

15. If it believes that the disclosure is necessary to prevent or lessen a threat of harm to a person or the public- this seems to be allowed under State law under the Tarasoff doctrine described supra.

16. To federal agents for national security reasons or to protect the President- apparently not allowed under State law, although the Tarasoff doctrine would likely apply here as well.

17. To a correctional institution- Correction Law §601(a) requires a health care provider to send a summary of medical and psychiatric records to the medical director of a correctional facility upon request of the facility.

As you can see, many of the HIPAA release provisions are at least similar to those found in current New York State law.

Compliance and enforcement regulations were promulgated at 45 CFR 160.300- 45 CFR 160.552, and are in effect as of March 16, 2006.

45 CFR 164.302- 45 CFR 164.318 add regulations concerning electronic security of the confidential medical information. This includes administrative, physical and technical safeguards that must be complied with.

Unfortunately, the initial experience under HIPAA has been that many “covered entities” have decided that it is safer for them to use HIPAA as a shield and deny access to records rather than look at the exceptions that permit release to child and adult protective services and to the courts. The concern was great enough,

nationwide, that the Director of the federal Office of Civil Rights issued a letter stressing that HIPAA was not meant to restrict access to medical records of child and adult protective records where such access had been previously permitted under state law.

Another recurring area of confusion is in releasing information to a representative of the patient. In *M. of Mougiannis*, 25 AD3d 230 (2nd Dept., 2005) the Court held that a health care agent of a patient is entitled to obtain medical information concerning the patient.

State Technology Law §208

State Technology Law §208 requires that a "state entity" which becomes aware that computerized "private information" has fallen into unauthorized hands must notify the individuals whose information has been released of the security breach. Originally, the Office of Medicaid Management interpreted this law to mean that medical information was included in the definition of "private information." (see GIS 06 MA/002). However, after further review, OMM decided that medical information is not included in the definition, but rather is limited to a personal identifier, such as name or address, and either a social security number, driver's license or non-driver ID number, or an account, credit or debit card number, in combination with any required code or password to enter an individual's financial account. (See GIS 06 MA/014). OMM has determined that this statute applies to a local district, however, the statute is somewhat less than clear on that issue. "State entity" is defined as including any "...other governmental entity performing a governmental or proprietary function for the state of New York, except:... all cities, counties, municipalities, villages, towns, and other local agencies." Apparently, OMM is of the view that for the purposes of this statute that the local district is part of the State. I have some doubt about the purpose of this statute as it relates to the local district, based upon not only the definition of “state entity,” but also based upon the fact that in the context of computerized Medicaid information, the confidentiality of that information is covered by HIPAA, which has its own provisions for security. State Technology Law §208 would seem to be redundant to HIPAA and existing state law. The GIS does require a local district to have written directives to staff about what to do if they discover a security breach and for the local district to have a privacy/security officer.

The Family Educational Rights and Privacy Act (FERPA)

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. §1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."

Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.

Parents or eligible students have the right to request that a school correct records which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record setting forth his or her view about the contested information.

Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):

- School officials with legitimate educational interest;
- Other schools to which a student is transferring;
- Specified officials for audit or evaluation purposes;
- Appropriate parties in connection with financial aid to a student;
- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
- Appropriate officials in cases of health and safety emergencies; and
- State and local authorities, within a juvenile justice system, pursuant to specific State law.

Schools may disclose, without consent, "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them. Schools must notify parents and eligible students annually of their rights under FERPA. The actual means of notification (special letter, inclusion in a PTA bulletin, student handbook, or newspaper article) is left to the discretion of each school.[12]

[12] The above section was copied word for word from the United States Department of Education website.

As you can see, there are no general exceptions for a social services district to receive student information. As such, in situations where you need school information for a matter in litigation you would usually seek a judicially issued subpoena using CPLR 2307. In other situations, such as when you are attempting to verify household composition you may need to obtain the parent or guardian's permission. In Monroe County we have negotiated a Memorandum of Understanding with the Rochester City School District which includes a provision under which the school district honors a release obtained by the social services district as part of the application/re-certification process.

OBTAINING MEDICAL, SUBSTANCE ABUSE AND MENTAL HEALTH TREATMENT RECORDS

Generally:

This section reviews some of the issues that the DSS attorney may encounter when attempting to obtain records for use at a hearing or trial. Actual practice may vary from district to district. A few years back I surveyed attorneys about what their practice is for obtaining records. There was split between those who bring a motion to obtain a subpoena for records such as medical, substance abuse treatment and mental health, and those who rely upon releases (along with issuing a subpoena) to obtain the information. However, the majority brought a motion for judicial subpoenas, even in cases where there was a release or for some even where there was an existing court order that required the release of information as part of a dispositional order. The following material is geared toward what is required when you want to obtain a subpoena for medical, substance abuse and mental (behavioral) health records for a hearing or trial.

Where Should the Records be Sent to and Held?

When a subpoena is judicially issued for records for trial, the subpoena usually requires that the records be delivered to the court. CPLR §2306(b) states that a subpoena for hospital records may be satisfied by delivery of a certified copy of the record to the court records clerk.

When you are requesting a subpoena for records, you usually want to request that the records be certified as business records, especially if you are going to try to enter them into evidence. CPLR §4518 contains the hearsay exception for business records, and provides guidance on the issue of admissibility. This guidance includes reference to both CPLR §2306 and CPLR §2307, which have to do with hospital and government record, and how the subpoena may be satisfied by a certified copy of the records.

Admissibility Issues for Business Records

The admissibility of DSS case files as business records has been the subject of concern for a local district since at least 1979, when the *Leon RR* case was decided. In *Matter of Leon RR*, 48 N.Y.2d 117 (1979), the Court of Appeals held that it was improper, and violative of CPLR §4518, for a court to admit, *en masse*, a DSS case file that contained information from sources that were under no business requirement to report information to DSS:

> To constitute a business record exception to the hearsay rule, the proponent of the record must first demonstrate that it was within the scope of the entrant's business duty to record the act, transaction or occurrence sought to be admitted. But this satisfies only half the test. In addition, each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception *(Johnson v Lutz,* 253 NY 124, 128; *Toll v State of New York,* 32 AD2d 47, 50). Thus, not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant as well (Richardson, ***123*** Evidence [10th ed--Prince], § 299). The reason underlying the business records exception fails and, hence, the statement is inadmissible hearsay if any of the participants in the chain is acting outside the scope of a business duty *(Johnson v Lutz, supra).*
>
> In this case, petitioner was under a statutory duty to maintain a comprehensive case record for Leon containing reports of any transactions or occurrences relevant to his welfare (Social Services Law, § 372; 18 NYCRR 441.7 [a]), thus satisfying this aspect of the business records test (see *Kelly v Wasserman,* 5 NY2d 425, 429). Some of the entries in the case file were based on firsthand observations of Leon's caseworker which were recorded shortly after the occurrences, rendering them admissible. Many of the remaining entries, however, consisted of statements, reports and even rumors made by persons under no business duty to report to petitioner. Especially in the context of this case, it is essential to emphasize that the mere fact that the recording of third-party statements by the caseworker might be routine, imports no guarantee of the truth, or even reliability, of those statements. To construe these statements as admissible simply because the caseworker is under a business duty to record would be to open the floodgates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy --cross-examination and impeachment of the declarant. Unless some other hearsay exception is available *(Toll v State of New York, supra),* admission may only be granted where it is demonstrated that

> the informant has personal knowledge of the act, event or condition and he is under a business duty to report it to the entrant *(Johnson v Lutz, supra;* cf. Model Code of Evidence, rule 514).
>
> *Matter of Leon RR*, 48 N.Y.2d 117, 122-123.

One thing of note here is that the decision did not talk about the CPLR 4518(a) requirement that the entry be made "…at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter," other than noting that the record did have notes of first-hand observations that were recorded shortly after the observations were made. Note also that the statute doesn't use the word "contemporaneous," but it seems that over the years the courts have used "contemporaneous" in two different contexts- one being the time at which the event was recorded, and the second being the duty to report the event to the recording agency- as in a third party telling something to the DSS caseworker, who then records that information in the case file. It appears that the courts continue to use both definitions of the term "contemporaneous" today. See *Matter of Carmela H.,* 185 AD3d 1460 (4th Dept., 2020). The "contemporaneousness" issue might be worth raising when efforts are made to subpoena a DSS case record that contains information obtained from or reported by persons who are under no duty to report to DSS.

Requirements for Obtaining Particular Types of Records for Hearing/trial

Medical records

Statutes/regulations

CPLR 2306- subpoena for medical records-permits a certified copy to be produced instead of the original record

CPLR 2302(b) requires that a subpoena for medical records may only be issued by a court, unless there is a valid authorization from a patient.

The State law specific to medical records is found at Public Health Law §18. This statute was around before HIPAA existed, and after the HIPAA regulations went into effect section 18 was amended to make it similar to HIPAA.

There are a few sub-sections of Public Health Law §18 to keep in mind:

> 3. (i) The release of patient information shall be subject to: (i) article twenty-seven-F of this chapter in the case of confidential HIV-related information; (ii) section seventeen of this article and sections twenty-three hundred one , twenty-three hundred six and twenty-three hundred eight of this chapter in the case of termination of a pregnancy and treatment for a sexually transmitted disease; (iii) article thirty-three

of the mental hygiene law; and (iv) any other provisions of law creating special requirements relating to the release of patient information, including the federal health insurance portability and accountability act of 1996 and its implementing regulations.

6. Disclosure to third persons. Whenever a health care provider, as otherwise authorized by law, discloses patient information to a person or entity other than the subject of such information or to other qualified persons, either a copy of the subject's written authorization shall be added to the patient information or the name and address of such third party and a notation of the purpose for the disclosure shall be indicated in the file or record of such subject's patient information maintained by the provider provided, however, that for disclosures made to government agencies making payments on behalf of patients or to insurance companies licensed pursuant to the insurance law such a notation shall only be entered at the time the disclosure is first made. This subdivision shall not apply to disclosure to practitioners or other personnel employed by or under contract with the facility, or to government agencies for purposes of facility inspections or professional conduct investigations. Any disclosure made pursuant to this section shall be limited to that information necessary in light of the reason for disclosure. Information so disclosed should be kept confidential by the party receiving such information and the limitations on such disclosure in this section shall apply to such party.

7. Applicability of federal law. Whenever federal law or applicable federal regulations affecting the release of patient information are a condition for the receipt of federal aid, and are inconsistent with the provisions of this section, the provisions of federal law or federal regulations shall be controlling.

10. Nothing contained in this section shall restrict, expand or in any way limit the disclosure of any information pursuant to articles twenty-three, thirty-one and forty-five of the civil practice law and rules or section six hundred seventy-seven of the county law .

<u>Federal Law/regulation:</u>

HIPAA-

45 CFR 164.512- Uses and disclosures for which an authorization or opportunity to agree or object is not required.

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in

§164.508, or the opportunity for the individual to agree or object as described in §164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

(a)Standard: Uses and disclosures required by law.

(1) A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

(2) A covered entity must meet the requirements described in paragraph (c), (e), or (f) of this section for uses or disclosures required by law.

"Covered Entity"

I have used the term "covered entity" a couple of times already. Just to make sure that we are clear on what that is, it is a term of art created by HIPAA to define who is required to follow the HIPAA regulations.

Under 45 CFR 160.103, a "covered entity" is defined as:

(1) A health plan;

(2) A health care clearinghouse; and

(3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by the HIPAA regulations. An entity could also be determined to be a "hybrid entity," as defined by 45 *CFR* § 164.105, as being a single legal entity that (1) That is a covered entity; (2) Whose business activities include both covered and non-covered functions; and (3) That designates health care components in accordance with paragraph §164.105(a)(2)(iii)(D) as being subject to HIPAA.

The Medicaid program is a "covered entity" under HIPAA, which led some local districts to deem themselves as covered entities while others chose to designate themselves as hybrids, with only their Medicaid program being covered. It is also worth noting that in addition to HIPAA, Medicaid records also remain confidential under the Social Services Law.

The following sections of HIPAA (at 45 CFR 164.512) are the ones that permit the covered entity to comply with Social Services Law §415 and Social Services Law §416:

> (b) (1) Permitted uses and disclosures. A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:
>
> ii. A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect.
>
> (c) Standard: Disclosures about victims of abuse, neglect or domestic violence.
>
> (1) Permitted disclosures. Except for reports of child abuse or neglect permitted by paragraph (b)(1)(ii) of this section, a covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence:
>
> (i) To the extent the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law;
>
> (ii) If the individual agrees to the disclosure; or
>
> (iii) To the extent the disclosure is expressly authorized by statute or regulation and:
>
> (A) The covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or
>
> (B) If the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the protected health information for which disclosure is sought is not intended to be used against the individual and that an immediate enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure. *Remember, under this section it is the child victim's records that you are getting, so the information is not being used against the child.*

This is the section that you would use when you are subpoenaing records for a hearing or trial:

> (e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions

> of this section that otherwise permit or restrict uses or disclosures of protected health information.

Given the requirements above if you don't have a court order, even if you don't have to make a written motion, maybe it would be a best practice to do that, especially if you are also going to be seeking other subpoenas that do require a more rigorous judicial review.

A question here is whether a "so ordered" subpoena that has been signed by a judge counts as the "order" required above? That might also be a matter of local practice- in some courts the judge may want you to bring a written motion for a subpoena, while others might let you make the request orally when you are setting the hearing or trial date. I do note that CPLR §2302(a) requires that a subpoena for clinical records that are maintained under Mental Hygiene Law §33.13 shall be accompanied by a court order.

Preemption

Just to refresh: the basic rules for state law preemption under HIPAA are:

1. To the extent that State law provides greater privacy for health information from a third party, State law prevails, and

2. When State law is more restrictive than HIPAA in providing a person access to his/her health information HIPAA prevails. See 45 CFR 160.202

Will a release work as an alternative to obtaining a subpoena?

A release ("authorization") is specifically part of the HIPAA regulatory scheme and is mentioned in Public Health Law §18. However, releases/authorizations are easily revoked, and in a trial or hearing situation that might happen. There is also the HIPAA requirement involving notice if the subpoena is not issued by a court.

Substance abuse treatment records

Statutes/regulations:

NY Mental Hygiene Law §22.05(b)-

> All records of identity, diagnosis, prognosis, or treatment in connection with a person's receipt of chemical dependence services shall be confidential and shall be released only in accordance with applicable provisions of the public health law, and any other state law, federal law and duly executed court orders.

The State law in this area is sending you back to Public Health Law §18, which, as we have seen already, does not require any special findings to be made by the court to issue a subpoena.

The Federal law related to the confidentiality of substance abuse treatment records is 42 USC 290dd-2:

> (a) Requirement. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).

Note the requirements for the Federal law to apply.

42 USC 290dd-2 goes on to set forth the circumstances under which records may be disclosed, including:

> (b) Permitted disclosure.
> (1) Consent. The content of any record referred to in subsection (a) may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g).
> (2) Method for disclosure. Whether or not the patient, with respect to whom any given record referred to in subsection (a) is maintained, gives written consent, the content of such record may be disclosed as follows:
> (C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause <u>the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.</u> Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

As you can see, the law permits release via authorization as well as by court order. The law sets forth a “good cause” standard for the court to weigh.

42 USC 290dd-2 also permits the promulgation of regulations, including those related to court authorization for the release of records.

(g) Regulations. Except as provided in subsection (h), the Secretary shall prescribe regulations to carry out the purposes of this section. Such regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders under subsection (b)(2)(C), as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

The Federal regulations related to the confidentiality of substance abuse records, which begin at 42 CFR 2.1, were amended in 2017.

42 CFR 2.64 sets forth the “Procedures and criteria for orders authorizing disclosures for noncriminal purposes.”

(a) Application. An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which the applicant asserts that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given written consent (meeting the requirements of the regulations in this part) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(b) Notice. The patient and the person holding the records from whom disclosure is sought must be provided:
(1) Adequate notice in a manner which does not disclose patient identifying information to other persons; and
(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order as described in § 2.64(d).

(c) Review of evidence: Conduct of hearing. Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the

patient requests an open hearing in a manner which meets the written consent requirements of the regulations in this part. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:
(1) Other ways of obtaining the information are not available or would not be effective; and
(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) Content of order. An order authorizing a disclosure must:
(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;
(2) Limit disclosure to those persons whose need for information is the basis for the order; and
(3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

The requirements of this amended regulation are more stringent than under the previous version. The application for the records may be made as part of the pending proceeding, which is what you could do before. However, there is now a requirement to use a fictitious name, and you can't use any other identifying information, in the application, so it would seem that you would have to make the application separate from any other motion for subpoenas for other types of records. There is a notice requirement to both the patient and the record holder. It looks like there is at least the potential for a hearing, which has to be done in chambers unless the patient requests an open hearing. The *proceeding* may include an examination by the judge of the patient records. If the judge is going to permit the release of records she has to make an order finding that other ways of obtaining the records would not be effective, and that the public interest and the need for disclosure outweigh the potential injury to the patient, the physician- patient relationship and the treatment services. The order must limit the disclosure to only those parts of the record that are essential to fulfill the objective of the order and must limit disclosure to those persons whose need for the information is the basis for the order. The order should also include other measures to limit disclosure including perhaps sealing the record of the proceeding for which the records have been ordered.

These procedural requirements are more strict than those for medical or mental health records.

There is a further restriction placed upon communications made by the patient to the program found in 42 CFR 2.63 (“Confidential communications.”). In the context of litigation, the communication may only be disclosed if the patient offers testimony or other evidence that pertains to the content of the confidential communications.

42 CFR 2.61 states that the legal effect of the order is only to authorize the disclosure or use of the patient information, it does not compel its disclosure. The regulation says that a subpoena has to be issued in order to actually compel the disclosure. In practice, you would have to have the Court sign both the order and a subpoena, and you would need to serve both upon the provider.

Preemption

42 CFR 2.20 states the Federal law does not preempt State law as follows: if disclosure is permitted under the Federal law/regulations but is prohibited under State law, the State law prevails. However, no State law may either authorize or compel any disclosure that is prohibited by the Federal regulations.

Will a release work?

Assuming that a Respondent would revoke any previously executed authorization for the release of their substance abuse records, the regulations require a court order, with requisite findings, to authorize the holder of the records to disclose them upon service of a subpoena.

Mental health records

Statutes/regulations:

New York Mental Hygiene Law §33.13 clinical records; confidentiality

Subdivision (c) states that clinical records are not public records and may not be released, except for the 17 exceptions the law lists circumstances under which another person or agency may obtain those records.

One exception is subdivision (c)(1), which requires that any records are not to be released except pursuant to an order of a court of record requiring disclosure upon a finding that the interests of justice significantly outweigh the need for confidentiality.

Another exception is found in subdivision (c)7, which permits the patient to grant consent for the release of their records to a third party. It would seem likely that if a person has given your caseworker a release that they might well revoke it if you are taking further legal action against them.

So, when you want the judge to sign a subpoena to produce records for trial, it looks like you need to bring a motion, since the court is required to make a finding that the interests of justice significantly outweigh the need for confidentiality. In addition to that, CPLR 2302(a) requires that any subpoena for this type of records must be accompanied by a court order.

Federal law/regulation

HIPAA, but under the preemption analysis, the State law is more stringent, as a court is obliged to finding that the interests of justice significantly outweigh the need for confidentiality, while under HIPAA no such finding is required- remember the discussion above about obtaining medical records.

Will a release work?

Yes, for the caseworker to obtain the records to monitor order compliance, but probably not for production to the court for a trial.

Public and Media Access to the Courts and Administrative Hearings

Media Access to the Court Room

The general source for rules about access to the courts by the public and the media is the Court Rules found in various sections of 22 NYCRR. Those generally promote access, however, there are some court or type of case specific statutes that are more restrictive, and there also are some cases that discuss these issues.

The Court Rules include both the Rules of the Chief Judge, and the Rules of the Chief Administrative Judge, and both of those contain rules about media access, including various means of recording.

Rules of the Chief Judge

22 NYCRR Section 29.1(a) forbids the taking of photographs, films or videotapes, or audiotaping, broadcasting or telecasting, in a courthouse including any courtroom, office or hallway thereof, at any time or on any occasion, whether or not the court is in session, unless permission of the Chief Administrator of the Courts or a designee of the Chief Administrator is first obtained, except that the permission of the Chief Judge of the Court of Appeals or the presiding justice of an Appellate Division shall be obtained with respect to the court over which each presides. That section also contains some conditions under which permission may be granted.

Such permission may be granted if:

(1) there will be no detraction from the dignity or decorum of the courtroom or courthouse;

(2) there will be no compromise of the safety of persons having business in the courtroom or courthouse;

(3) there will be no disruption of court activities;

(4) there will be no undue burden upon the resources of the courts; and

(5) granting of permission will be consistent with the constitutional and statutory rights of all affected persons and institutions.

Permission may be conditioned upon compliance with any special requirements that may be necessary to ensure that the above conditions are met.

The regulation also notes that this section does not apply to applications made to the appropriate court for photographing, taping or videotaping by or on behalf of the parties to the litigation and not for public dissemination.

22 NYCRR 29.2 is particular to the appellate courts, and authorizes electronic photographic recording of proceedings in such courts, subject to the approval of the respective appellate court. This regulation also includes three particular directives:

(a) Conferences of counsel. To protect the attorney-client privilege and effective right to counsel, there shall be no audio pickup or audio broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judge held at the bench, without the express consent of all participants in the conference. Nor shall any chambers conference be filmed, recorded or broadcast.

(b) Consent not required. Electronic media or print photography coverage of appellate arguments shall not be limited by the objection of counsel or parties, except for good cause shown.

(c) Appellate review. An order granting or denying the electronic media from access to any proceeding, or affecting other matters arising under these rules and standards, shall not be appealable insofar as it pertains to and arises under these rules and standards except as otherwise provided and authorized by law.

22 NYCRR 29.3 is specific to the trial courts, and simply directs that audio-visual coverage of proceedings in the trial courts shall be permitted only in accordance with the provisions of Part 131 of the Rules of the Chief Administrator.

Rules of the Chief Administrative Judge

22 NYCRR Part 131 sets forth the court rules for audio-visual coverage of judicial proceedings

Section 131.1 Purpose; general provisions.

Although the regulations state that it is the policy of the Unified Court System to facilitate the audio-visual coverage of court proceedings to the fullest extent permitted by the New York Civil Rights Law and other statutes, there are a number of restrictions:

- Audio-visual coverage of proceedings in which the testimony of parties or witnesses by subpoena or other compulsory process is or may be taken is prohibited. (See, Civil Rights Law §52.)

- Audio-visual coverage of party or witness testimony in any court proceeding (other than a plea at an arraignment) is prohibited.

- Nothing in the rules is intended to restrict the power and discretion of the presiding trial judge to control the conduct of their judicial proceedings.

- No judicial proceeding shall be scheduled, delayed, reenacted or continued at the request of, or for the convenience of, the news media.

- All presiding trial judges and all administrative judges shall take whatever steps are necessary to insure that audio-visual coverage is conducted without disruption of court activities, without detracting from or interfering with the dignity or decorum of the court, courtrooms and court facilities, without compromise of the safety of persons having business before the court, and without adversely affecting the administration of justice.

22 NYCRR 131.2 defines "audio-visual coverage" or "coverage" as meaning the electronic broadcasting or other transmission to the public of radio or television signals from the courtroom, or the recording of sound or light in the courtroom for later transmission or reproduction, or the taking of motion pictures in the courtroom by the news media, and to the extent required by law, it shall also mean the taking of still pictures.

"News media" is defined as any news-reporting or news-gathering agency and any employee or agent associated with such agency, including television, radio, radio and television networks, news services, newspapers, magazines, trade papers, in-house publications, professional journals, or any other news- reporting or news-gathering agency, the function of which is to inform the public or some segment thereof.

(f) "Child" shall mean a person who has not attained the age of 16 years.

(g) "Arraignment" shall have the same meaning as such term is defined in subdivision nine of section 1.20 of the Criminal Procedure Law.

22 NYCRR 131.3 requires that coverage of judicial proceedings shall be permitted only upon order of the presiding trial judge approving an oral or written application

made by a representative of the news media for permission to conduct such coverage.

Upon receipt of an application, the presiding trial judge shall conduct such review as may be appropriate, including consultation with:

- the news media applicant

- counsel to all parties to the proceeding of which coverage is sought, who shall be responsible for identifying any concerns or objections of the parties, prospective witnesses, and victims, if any, with respect to the proposed coverage, and advising the court thereof

As well as a review of all statements or affidavits presented to the presiding trial judge concerning the proposed coverage. Where the proceedings of which coverage is sought involve a child (defined for these regulations as a person under 16), a victim, or a party, any of whom object to such coverage, and in any other appropriate instance, the presiding trial judge may hold such conferences and conduct any direct inquiry as may be fitting.

Except as otherwise provided by law or 22 NYCRR 131.7, consent of the parties or other participants in judicial proceedings of which coverage is sought is not required for approval of an application for such coverage.

In determining an application for coverage, the presiding trial judge shall consider all relevant factors, including but not limited to:

(1) the type of case involved;

(2) whether the coverage would cause harm to any participant;

(3) whether the coverage would interfere with the fair administration of justice, the advancement of a fair trial, or the rights of the parties;

(4) whether the coverage would interfere with any law enforcement activity;

(5) whether the proceedings would involve lewd or scandalous matters;

(6) the objections of any of the parties, victims or other participants in the proceeding of which coverage is sought;

(7) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse; and

(8) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought.

The presiding trial judge also shall consider and give great weight to the fact that any party, victim, or other participant in the proceeding is a child.

Following review of an application for coverage of a judicial proceeding, the presiding trial judge, as soon as practicable, shall issue an order, in writing or on the record in open court, approving such application, in whole or in part, or denying it. Such order shall contain any restrictions imposed by the judge on the audio-visual coverage and shall contain a statement advising the parties that any violation of the order is punishable by contempt pursuant to article 19 of the Judiciary Law. Such order shall be included in the record of such proceedings and, unless it wholly approves the application and no party or victim objected to coverage, it shall state the basis for its determination.

(f) Before denying an application for coverage, the presiding trial judge shall consider whether such coverage properly could be approved with the imposition of special limitations, including but not limited to:

(1) delayed broadcast of the proceedings subject to coverage provided, however, where delayed broadcast is directed, it shall be only for the purpose of assisting the news media to comply with the restrictions on coverage provided by law or by the presiding trial judge; or

(2) modification or prohibition of video or audio-visual coverage of portions of the proceedings.

22 NYCRR 131.4 provides that no proceeding shall be delayed or continued to allow for review of an order denying coverage in whole or in part.

22 NYCRR 131.5 requires that if a presiding trial judge has approved, in whole or in part, an application for coverage of any judicial proceeding, the judge, before any such coverage is to begin, shall conduct a pretrial conference for the purpose of reviewing, with counsel to all parties to the proceeding and with representatives of the news media who will provide such coverage, any objections to coverage that have been raised, the scope of coverage to be permitted, the nature and extent of the technical equipment and personnel to be deployed, and the restrictions on coverage to be observed. The court may include in the conference any other person whom it deems appropriate, including prospective witnesses and their representatives.

Where two or more representatives of the news media are parties to an approved application for coverage, no such coverage may begin until all such representatives have agreed upon a pooling arrangement for their respective news media prior to the pretrial conference. Such pooling arrangement shall include the designation of pool operators and replacement pool operators for the electronic and motion picture media and for the still photography media, as appropriate. It also shall include procedures for the cost-sharing and dissemination of audio-visual material and shall make due provision for educational users' needs for full coverage of entire proceedings. The presiding trial judge shall not be called upon to mediate or resolve any dispute as to such arrangement. Nothing herein shall prohibit a person or organization that was not party to an approved application for coverage from making

appropriate arrangements with the pool operator to be given access to the audio-visual material produced by the pool.

22 NYCRR 131.7 places further restrictions on coverage or recording:

(a) No audio pickup or audio broadcast of conferences that occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding trial judge, shall be permitted without the prior express consent of all participants in the conference.

(b) No conference in chambers shall be subject to coverage.

(c) No coverage of the selection of the prospective jury during voir dire shall be permitted.

(d) No coverage of the jury, or of any juror or alternate juror, while in the jury box, in the courtroom, in the jury deliberation room, or during recess, or while going to or from the deliberation room at any time, shall be permitted provided, however, that, upon consent of the foreperson of a jury, the presiding trial judge may, in his or her discretion, permit audio coverage of such foreperson delivering a verdict.

(e) No coverage shall be permitted of the victim in a prosecution for rape, sodomy, sexual abuse, or other sex offense under article 130 or section 255.25 of the Penal Law; notwithstanding the initial approval of a request for audio-visual coverage of such a proceeding, the presiding trial judge shall have discretion throughout the proceeding to limit any coverage that would identify the victim.

(f) No coverage of any participant shall be permitted if the presiding trial judge finds that such coverage is liable to endanger the safety of any person.

(g) No coverage of any judicial proceedings that are by law closed to the public, or that may be closed to the public and that have been closed by the presiding trial judge, shall be permitted.

(h) No coverage of any suppression hearing shall be permitted without the prior consent of all parties to the proceeding.

22 NYCRR 131.8 provides for supervision of audio-visual coverage by the judge

(a) Coverage of judicial proceedings shall be subject to the continuing supervision of the presiding trial judge. No coverage shall take place within the courtroom, whether during recesses or at any other time, when the presiding trial judge is not present and presiding.

(b) Notwithstanding the approval of an application for permission to provide coverage of judicial proceedings, the presiding trial judge shall have discretion throughout such proceedings to revoke such approval or to limit the coverage authorized in any way.

Although it would seem like the court rules would be fairly liberal in permitting media coverage of trials, Civil Rights Law §52, particularly as interpreted by a court case, has restricted such coverage to a great extent. The statute prohibits the televising or taking of motion pictures in any New York State court room, in which "…the testimony of witnesses by subpoena or other compulsory process is or may be taken…"

Civil Rights Law §52 Televising, broadcasting or taking motion pictures of certain proceedings prohibited

No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state; except that the prohibition contained in this section shall not apply to public hearings conducted by the public service commission with regard to rates charged by utilities, or to proceedings by either house of the state legislature or committee or joint committee of the legislature or by a temporary state commission which includes members of the legislature, so long as any testimony of witnesses which is taken is taken without resort to subpoena or other compulsory process, if (1) the consent of the temporary president of the senate or the speaker of the assembly, in the case of the respective houses of the state legislature, or the chairman, in the case of such a committee or commission, and a majority of the members thereof present at such proceedings, shall have been first obtained, provided, however, that in the case of the public rate hearings of the public service commission, it shall be sufficient to obtain the consent of the presiding officer, (2) the written consent of the witness testifying at the time shall have been obtained, prior to the time of his testifying, and (3) it has been determined by such presiding officer or chairman and such majority of the members that it is in the public interest to permit the televising, broadcasting or taking of motion pictures.

Any violation of this section shall be a misdemeanor.

This prohibition was challenged in 2005 in a case entitled *Courtroom Tel. Network LLC v State of New York*, 5 NY3d 222 (2005). In that case the Court of Appeals held that is no First Amendment or New York Constitution, article I, § 8 right to televise a trial. In that case, the Court of Appeals upheld the decisions of Supreme Court and the Appellate Division, and effectively bar the televising of any portions of trials or hearings. The Court of Appeals did note that that the televising of trials or hearings is different from the reporting of criminal cases by reporters sitting in the courtroom, listening to the testimony and then reporting on that. The Court also noted that the issue of cameras in the courtroom is a legislative matter and that it would not disturb the Legislature's decision on the issue.

The Court of Appeals also noted that:

> New York State had, from 1987 until 1997, an "experimental program in which presiding trial judges, in their discretion, [were allowed to] permit audio-visual coverage of civil and criminal court proceedings, including trials subject to certain conditions and restrictions." *Courtroom Television*, 5 NY3d at 233—34, *discussing* Judiciary Law § 218. "On June 30, 1997, the Legislature and Governor allowed Judiciary Law § 218 to sunset. Thus, the ban on televised trials contained in Civil Rights Law § 52 resumed as of July 1, 1997, a ban which continues to the present.

A few months before the *Courtroom TV* case the case of *Matter of Heckstall v McGrath*, 15 AD3d 824 (3rd Dept., 2005) was decided. In that case, the Third Department reversed the trial court's decision to permit cameras in the court room during a murder case. The Third Department noted that the trial court had too narrowly interpreted the Civil Rights Law as only prohibiting camera during subpoenaed testimony, and that the section of the law that states that there shall be no cameras at court proceedings where testimony "…may be taken…" is a much broader bar on access.

There are also Court Rules of both the Chief Judge and the Chief Administrative Judge that require anyone who wishes to conduct any audio-visual recording or broadcast of court proceedings to make application to the presiding trial court judge before any recording or broadcast.

Most recent case *C.C. v D.D.*, 64 Misc.3d 828 (Supreme Court, New York County, June 27, 2019). In a matrimonial action, the defendant father (an attorney who had let his NY admission lapse, and who was now representing himself *pro se)* had met with a person who wanted to videotape the matrimonial proceeding. That person then applied to the court for permission to do that, claiming that he was producing a documentary about how attorneys charged too much and ran up their bills. Defendant father supported the application, while the plaintiff mother and the attorney for the children opposed.

The Court cited both the *Courtroom TV* case and *Matter of Heckstall v McGrath* in denying the application and noted:

> Neither Mr. Sebastian D. nor Defendant, who are both writing in support of videotaping in this case, presented the court with information about any matrimonial cases where videotaping was allowed after the 1997 sunset of Judiciary Law §218. Nor is the court aware of any such cases.

Citing the Court Rules, the Judge in this case also granted a protective order prohibiting the applicant from videotaping any on the court proceeding in the case.

<u>Public Access to Court Hearings</u>

Although the rules of the Chief Administrative Judge start off by mentioning the importance of "public access to the courts" the rest of the regulations are all about media access to the court. The rest of the court rules that pertain generally to trial

courts don't say anything about public access. However, there is some guidance in some of the specific statutes and court rules.

Family Court

FCA §1043 Hearings Not Open to the Public

The general public may be excluded from any hearing under this article and only such persons and the representatives of authorized agencies admitted thereto as have an interest in the case.

Note here that this statute would be applied specifically to an article 10 abuse or neglect case. There is a court rule that is more permissive than the statute and which would likely apply to non-Article 10 cases:

22 NYCRR 205.4 Access to Family Court proceedings.

(a) The Family Court is open to the public. Members of the public, including the news media, shall have access to all courtrooms, lobbies, public waiting areas and other common areas of Family Court otherwise open to individuals having business before the court.

(b) The general public or any person may be excluded from a courtroom only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that such exclusion is warranted in that case. In exercising this inherent and statutory discretion, the judge may consider, among other factors, whether:

(1) the person is causing or is likely to cause a disruption in the proceedings;

(2) the presence of the person is objected to by one of the parties, including the attorney for the child, for a compelling reason;

(3) the orderly and sound administration of justice, including the nature of the proceeding, the privacy interests of individuals before the court, and the need for protection of the litigants, in particular, children, from harm, requires that some or all observers be excluded from the courtroom;

(4) less restrictive alternatives to exclusion are unavailable or inappropriate to the circumstances of the particular case.

Whenever the judge exercises discretion to exclude any person or the general public from a proceeding or part of a proceeding in Family Court, the judge shall make findings prior to ordering exclusion.

There are some cases that have reviewed applications for the closure or access to Family Court, but they primarily apply to media access.

In re Katherine B, 189 AD2d 443 (2nd Dept., 1993)- 2nd Dept. reversed a decision of Family Court and said that under the facts that the courtroom should be closed.

Although the regulation on access was amended in the years after this case, the first three factors that the judge was to consider were part of the regulation that the decision was made under. The child in this case vehemently opposed the presence of the media in the courtroom.

In re Ulster County Dep't of Social Servs. Ex rel. Jane, 163 Misc.2d 373 (Family Court, Ulster County, 1993)- Court permitted newspaper reporter access, as well as providing transcript of hearing, after respondent mother had obtained a copy of the transcript after each day's hearing, provided it to the reporter and asked him to attend court and write story. Part of the judge's reasoning in this case was that the reporter was going to write his story anyway, so why not let him see everything,

In re Ruben B., 219 AD2d 117 (1st Dept., 1996)- this was one of the decisions from the Elisa Izquierdo case. In this case, the Commissioner, the law guardian, and the respondents objected to the presence of the press, but the Family Court judge denied those objections. The First Dept. reversed, citing to the potential harm to the remaining children by the press coverage, that all four parties objected to the press presence, and the invasion of the privacy of the remaining children, notwithstanding that the full names and ages of all five children and photographs of three of them had been disseminated by the media.

Matter of S./B./B./R. Children, 12 Misc3d 1172(A) (Family Court, Kings County, 2006) This was a decision from the *Nixmary B* case, and is similar to the *Ruben B.* case in that it involved the Article 10 case of surviving siblings. To a great extent the court's analysis and decision were shaped by the *Ruben B.* decision. The Court also found that the fact that the regulation had been amended between the cases to add language that stated explicitly that Family Court is open to the public including members of the news media, did not change the factors that a court was to analyze when making these decisions. In the last paragraph of its decision the court invited the media, if it was truly interested in helping the public understand family court, to make a commitment to cover the hundreds of "anonymous" CPS cases filed each year.

Matter of A.H., 16 Misc3d 1124(A) (Family Court, Richmond County, 2007) The Court found that the based upon the information concerning the potential impacts to the four and six year old children that closure of the court for the Art. 10 dispositional hearing was warranted. In this case, the respondent father and the AFC objected to the press, ACS took no position.

<u>Article 81 guardianship hearings</u>

A Mental Hygiene Law Article 81 guardianship petition may be filed and heard in Supreme Court, or, under certain circumstances, Surrogate's Court, or in County Courts outside the City of New York.

Mental Hygiene Law §81.14

(c) The court shall not exclude a person or persons or the general public from a proceeding under this article except upon written findings of good cause shown. In determining whether good cause has been shown, the court shall consider the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy of the person alleged to be incapacitated.

(d) At the time of the commencement of the hearing, the court shall inform the allegedly incapacitated person of his or her right to request for good cause that the court records be sealed and that a person, persons, or the general public be excluded from the hearing.

The Court held in *In Re Linda B*, 55 Misc.3d 700 (Supreme Court, Tompkins County, 2017) that it would seal the record and close the courtroom to the public where the alleged incapacitated person was facing a criminal charge (murder) and the District Attorney and his staff who intended to attend guardianship hearing.

Public Assistance and SCR Fair Hearings

The regulations pertaining to fair hearings include sections that specifically address who may be present at a fair hearing.

Public Assistance Fair Hearings:

18 NYCRRR Part 358. Fair Hearings: Family Assistance, Safety Net Assistance, Medical Assistance, Emergency Assistance to Aged, Blind or Disabled Persons, Emergency Assistance to Needy Families with Children, Supplemental Nutrition Assistance Program, Home Energy Assistance, and Services Funded Through the Department of Family Assistance

18 NYCRR Section 358-5.7. Who may be present at the fair hearing.

The following persons may be present at a fair hearing:

(a) the appellant who has requested the fair hearing;

(b) the appellant's representative;

(c) counsel or other representatives of the social services agency;

(d) witnesses of either party and any who may be called by the hearing officer;

(e) an interpreter; and

(f) any other person admitted at the hearing officer's discretion, with the consent of the appellant.

SCR Fair Hearings

18 NYCRR Part 434. Child Protective Services Administrative Hearing Procedure

18 NYCRR Section 434.7. Persons who may be present at a hearing; authorization of representative

(a) The parties to a hearing, their attorneys or representatives, their witnesses and any witness called by the hearing officer may be present at the hearing. Other persons may be admitted upon the hearing officer's discretion. Upon the hearing officer's motion, or upon the motion of either party, potential witnesses may be excluded from the hearing during the testimony of other witnesses.

(b) An individual representing the appellant must have a written authorization signed by the appellant if the appellant is not present.

Records Retention

The New York State Board of Regents State Archives section has published a records retention schedule, the LGS-1, which applies to the retention of records maintained by local governmental agencies in New York. Included are sections particular to government attorneys, local social services districts and youth detention facilities. Relevant sections of the LGS-1 are contained in Appendix III of this Handbook. It is important to note that records should be kept for periods beyond those set forth in the schedule of there is litigation.

APPENDIX 1

SAMPLE MOTION PAPERS

Sometimes, a simple phone call to the attorney who is seeking the records will convince him to make a proper application for a subpoena. For those folks, we have attached a responding affirmation for a motion for subpoena. For the recalcitrant and/or repeat offenders, we have an affirmation in support of an Order to Show Cause to quash a subpoena. You can use these with your favorite notice of motion or order to show cause form. These samples are pretty old, so make sure that you take a look at any statutes or regulations that are cited to make sure that they are current.

The sample affirmations combine the sections that are most commonly seen in a subpoena *duces tecum*. You will have to pick and choose between those paragraphs that apply to your subpoena. We have not put in a paragraph for adoption records because they would rarely be a subject for a subpoena, although they are often the subject of a court application. You should base your response upon the appropriate sections of the law that pertain to these records. We have also not put in a paragraph for public assistance records. Although they are often the subject of a subpoena, they do not require a court to make any specific findings before issuing the subpoena. Although the statute requires us to plead confidentiality after the subpoena is issued, once a court has issued the subpoena, there really isn't much to argue about, unless there are no records. If you want to contest the issuance of a subpoena for public assistance records, you will probably be doing so on the CPLR 2307 ground (subpoena must be issued by the court, on notice to DSS).

STATE OF NEW YORK SUPREME COURT
COUNTY OF MONROE

_____

THE PEOPLE OF THE STATE OF NEW YORK

Indict. No.

v.

AFFIRMATION

K. W.,

Defendant.

_____

Mark E. Maves, Esq. affirms the following as true under the penalties of perjury:

1. I am an attorney admitted to the practice of law in the State of New York and employed by the Monroe County Law Department as a Senior Deputy County Attorney assigned to the Social Services Unit, and make this affirmation in response to the application for issuance of a subpoena *duces tecum* in the above-captioned matter.

2. As to any statements made upon information and belief, the source of that information and belief are conversations with S. B., subpoena clerk for the Monroe County Department of Social Services (MCDSS).

3. On or about June 5, 1998 the MCDSS was served with a notice of motion for subpoena, as well as a proposed subpoena *duces tecum* , a copy of which is attached. The subpoena seeks the production of records alleged to be maintained by MCDSS concerning a child protective investigation concerning/ adult protective services provided to/ foster care of/ preventive services provided to a T. A.

4. Upon information and belief, the MCDSS has records pertaining to the individual named in paragraph #3 above.

5. Child protective records are confidential and governed by Social Services Law (SSL) §422. SSL §422(4)(A)(e) provides that such records may be released to a court upon a finding that the information in the record is necessary for the determination of an issue before the court.

6. Upon information and belief, any child protective reports which the Monroe County Department of Social Services may have received regarding any members of this family have been unfounded.

7. An unfounded report is any report which is not supported by some credible evidence. See Social Services Law (SSL) §412(11). *Cf.* SSL §412(12).

8. Pursuant to SSL §422(5) as it existed prior to February 12, 1996, unfounded reports were expunged.

9. Pursuant to the current SSL §422(5), for any unfounded reports made on or after February 12, 1996, all information identifying the subjects of an unfounded report and other persons identified in the report shall be sealed by the central register and the local or state agency that investigated the report. The unfounded reports may only be unsealed and made available to:

    1. OCFS for the purpose of supervising a local district;
    2. OCFS and local or regional fatality team members for the purpose of preparing a fatality report pursuant to SSL §20 or §422-b;
    3. To a local CPS, OCFS, local or regional multidisciplinary investigative team, commission on quality of care for the mentally disabled, or the Department of Mental Hygiene, when investigating 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 the unfounded report;
    4. To the subject of the report;
    5. To a district attorney, ADA, or DA investigator, or officer of the State Police, city, county, town or village police department or of a county sheriff's office when such official verifies that the report is necessary to conduct an active investigation or prosecution of a violation of subdivision three of section 240.55 of the Penal Law (falsely reporting an incident in the second degree).

SSL §422(5) goes on to state that notwithstanding SSL §415, Family Court Act §1046, or any other provision of law, unfounded reports are not admissable in any judicial or administrative proceeding or action, except as follows. An unfounded report may be admitted if the subject of the report is a respondent in a Family Court Article 10 proceeding or a plaintiff or petitioner in a civil action or proceeding alleging the false reporting of child abuse or maltreatment. An unfounded report may also be admitted in criminal court for the purpose of prosecuting a violation of subdivision three of section 240.55 of the Penal Law (PL) (falsely reporting an incident in the second degree). I believe that this is a legislative oversight, because that section of the Penal Law now deals with the false reporting of an occurrence of a fire, explosion, or release of a hazardous substance upon any private premises. Prior to 2001 PL 240.55(3) was the section that dealt with falsely reporting child maltreatment. In 2001, the Penal Law was amended to repeal the older version of PL 240.55(3) and replace it with the current version. The amendment reworded the old section that dealt with false child abuse and maltreatment reports and placed it at PL 240.50(4). The Social Services Law was not amended to reflect the change to the Penal Law.

10. Neither a court nor anyone else involved in this proceeding is included in that list. Nor does the statute include authorization for any court to order unsealing and production of the records. *Cf.*, SSL §422(4)(A)(e) which allows the production of *indicated* child protective reports to a court upon a finding that the information in the record is necessary for the determination of an issue before the court. See also SSL §422(12) which attaches criminal liability to the unauthorized release of child protective records.

11. The contents of unfounded reports cannot be reconstructed through the testimony of the investigating caseworker. *Ann L. v. X. Corp.*, 133 FRD 433 (WDNY 1990) and *K. v. K.*, 126 Misc2d 624 (Sup. Ct., NY County, 1984).

12. Adult protective service records are confidential and governed by Social Services Law (SSL) §473-e. SSL §473-e(2)[c] provides that such records may be released to a court upon a finding that the information is necessary for the use by a party in the action or the determination of an issue before the court.

13. Foster Care records are confidential and governed by Social Services Law (SSL) §372. SSL §372(4)(a) provides that such records may be released by a Justice of the Supreme Court or by a judge of the Court of Claims when such records are required for the trial of a claim or other proceeding in such court, or by a judge of Family Court where such records are required for the trial of a proceeding in such court, after notice to all interested parties and a hearing.

14. Preventive Service records are confidential and governed by Social Services Law (SSL) §409-a and 18 NYCRR 423.7. 18 NYCRR 423.7(b)(4) provides that such records may be made open to the inspection of "any person or entity upon an order of a court of competent jurisdiction…"

15. I take no position as to the Court's granting of the subpoena, however I request that if the Court does issue the subpoena, it do so with the following provisions:

    a. Deny the application for a subpoena for unfounded child protective reports
    b. Direct that a certified copy of the records be delivered to the Court.
    c. Direct that the records be maintained in the Court's chambers or Clerk's Office for *in camera* inspection by the Court and counsel for the parties only.
    d. Direct that the records not be removed from chambers or the Clerk's office, and that they not be photocopied except by the Court for purposes of redaction, if necessary.

Dated: Rochester, N.Y.

_____

Mark E. Maves, Esq.
First Deputy County Attorney
39 West Main Street, Room 307
Rochester, NY 14614
(585) 753-1478

STATE OF NEW YORK SUPREME COURT
COUNTY OF MONROE

_____

THE PEOPLE OF THE STATE OF NEW YORK

Indict. No.

v.

AFFIRMATION

K. W.,

Defendant.

_____

Mark E. Maves, Esq. affirms the following as true under the penalties of perjury:

1. I am an attorney admitted to the practice of law in the State of New York and employed by the Monroe County Law Department as a Deputy County Attorney assigned to the Social Services Unit.

2. I make this affirmation in support of the relief requested in the annexed Order to Show Cause.

3. As to any statements made upon information and belief, the source of that information and belief are conversations with S. B., subpoena clerk for the Monroe County Department of Social Services (MCDSS).

4. Upon information and belief, a certain subpoena *duces tecum* , a copy of which is attached hereto as Exhibit A, was served upon MCDSS. The subpoena seeks the production of records alleged to be maintained by MCDSS concerning a child protective investigation concerning/ adult protective services provided to/ foster care of/ preventive services provided to a T. A., and/or the testimony of _____, a caseworker employed by MCDSS, concerning a child protective investigation concerning/ adult protective services provided to/ foster care of/ preventive services provided to a T. A.

5. The Monroe County Division of Social Services is part of a municipal corporation. Pursuant to CPLR 2307, a subpoena *duces tecum* to be served upon a municipal corporation shall be issued by a justice of the Supreme Court or by a judge of the court in which the action is triable, on motion made on at least one day's notice to the municipality. An examination of the subpoena indicates that it was not so issued.

6. Upon information and belief, the MCDSS has records pertaining to the individual named in paragraph #4 above.

7. Child protective records are confidential and governed by Social Services Law (SSL) §422. SSL §422(4)(A)(e) provides that such records may be released to a court upon a finding that the information in the record is necessary for the determination of an issue before the court.

8. Upon information and belief, no such finding was made as required by SSL §422(4)(A)(e).

9. Upon information and belief, any child protective reports which the Monroe County Department of Social Services may have received regarding any members of this family have been unfounded.

10. An unfounded report is any report which is not supported by some credible evidence. See Social Services Law (SSL) §412(11). *Cf.* SSL §412(12).

11. Pursuant to SSL §422(5) as it existed prior to February 12, 1996, unfounded reports were expunged.

12. Pursuant to the current SSL §422(5), for any unfounded reports made on or after February 12, 1996, all information identifying the subjects of an unfounded report and other persons identified in the report shall be sealed by the central register and the local or state agency that investigated the report. The unfounded reports may only be unsealed and made available to:

    1. OCFS for the purpose of supervising a local district;
    2. OCFS and local or regional fatality team members for the purpose of preparing a fatality report pursuant to SSL §20 or §422-b;
    3. To a local CPS, OCFS, local or regional multidisciplinary investigative team, commission on quality of care for the mentally disabled, or the Department of Mental Hygiene, when investigating 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 the unfounded report;
    4. To the subject of the report;
    5. To a district attorney, ADA, or DA investigator, or officer of the State Police, city, county, town or village police department or of a county sheriff's office when such official verifies that the report is necessary to conduct an active investigation or prosecution of a violation of subdivision three of section 240.55 of the Penal Law (falsely reporting an incident in the second degree).

    SSL §422(5) goes on to state that notwithstanding SSL §415, Family Court Act §1046, or any other provision of law, unfounded reports are not admissible in any judicial or administrative proceeding or action, except as follows. An unfounded report may be admitted If the subject of the report is a respondent in a Family Court Article 10 proceeding or a plaintiff or petitioner in a civil action or proceeding alleging the false reporting of child abuse or maltreatment. An unfounded report may also be admitted in criminal court for the purpose of prosecuting a violation of subdivision three of section 240.55 of the Penal Law (PL) (falsely reporting an incident in the second degree). I believe that this is a legislative oversight, because that section of the Penal Law now deals with the false reporting of an occurrence of a fire, explosion, or release of a hazardous substance upon any private premises. Prior to 2001 PL 240.55(3) was the section

that dealt with falsely reporting child maltreatment. In 2001, the Penal Law was amended to repeal the older version of PL 240.55(3) and replace it with the current version. The amendment reworded the old section that dealt with false child abuse and maltreatment reports and placed it at PL 240.50(4). The Social Services Law was not amended to reflect the change to the Penal Law.

13. Willful release of child protective service information in violation of these rules is a class A misdemeanor. See SSL §422 subd. 12.

14. Adult protective service records are confidential and governed by Social Services Law (SSL) §473-e. SSL §473-e(2)[c] provides that such records may be released to a court upon a finding that the information is necessary for the use by a party in the action or the determination of an issue before the court.

15. Upon information and belief, no such finding was made as required by SSL §473-e.

16. Foster Care records are confidential and governed by Social Services Law (SSL) §372. SSL §372(4)(a) provides that such records may be released by a Justice of the Supreme Court or by a judge of the Court of Claims when such records are required for the trial of a claim or other proceeding in such court, or by a judge of Family Court where such records are required for the trial of a proceeding in such court, after notice to all interested parties and a hearing.

17. Upon information and belief, no such hearing was held as required by SSL §372(4)(a).

18. Preventive Service records are confidential and governed by Social Services Law (SSL) §409-a and 18 NYCRR 423.7. 18 NYCRR 423.7(b)(4) provides that such records may be made open to the inspection of "any person or entity upon an order of a court of competent jurisdiction…"

19. Upon information and belief, no such order was obtained.

20. In addition, all of the records sought are confidential pursuant to CPLR 4508.

WHEREFORE, I respectfully request that this Court grant an Order quashing the aforesaid subpoena *duces tecum* and granting such additional relief to the Monroe County Department of Social Services as this Court deems appropriate.

Dated: Rochester, N.Y.

_____
Mark E. Maves, Esq.

APPENDIX 2

Letter from DHHS on HIPAA Privacy Rule

Transcript of letter date stamped December 23, 2004

Department of Health and Human Services
Office of the Secretary

Director
Office for Civil Rights
Washington, D.C. 20201

Ms. Joyce Young, HIPAA GIVES Coordinator
Department of Human Services, DIRM
695 Palmer Drive
Raleigh, North Carolina 27603

Reference Number: 04-23200

Dear Ms. Young:

Thank you for your letter to Secretary Thompson and me on behalf of HIPAA Government Information Value Exchange for States (GIVES), concerning the health information privacy regulation (Privacy Rule) issued pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The Office for Civil Rights (OCR) is responsible for implementing and enforcing the Privacy Rule, and our office has undertaken a wide range of efforts to assist covered entities in voluntarily complying with their obligations under the Rule. We at the Department also recognize the important and helpful service that HIPAA GIVES performs in promoting effective HIPAA compliance.

Your letter raises a number of concerns about the interaction of the Privacy Rule and Child Protection Services and Adult Protection Services (CPS/APS). In particular, you describe resistance by covered entity medical providers in releasing up-to-date medical information without an authorization or court order; delays that arise because some covered entities have adopted procedures that allow only their privacy officers to disclose this information; that covered entities must account to an individual or an individual's personal representative for disclosures to a CPS/APS agency even when the covered entity has exercised discretion not to inform the

individual or the individual's personal representative of the report; and that covered entities may identify a reporter in an accounting for disclosure, despite state laws that strictly prohibit release of identification of a reporter of suspected abuse or neglect. Your letter also seeks an amendment to the Privacy Rule that would exempt disclosures to CPS/APS from the accounting requirements of the Privacy Rule, and defer to State mandatory reporting, investigation and confidentiality laws pertaining to CPS/APS. As explained below, the Privacy Rule is balanced in a way that generally allows the purposes of both the Privacy Rule and CPS/APS to be effectuated.

With respect to the first of these issues-whether some health care providers resist disclosing protected health information to CPS/APS agencies without an authorization from the individual or a court order -- the Privacy Rule recognizes that protected health information can be essential to agencies charged with protecting individuals against abuse and neglect and domestic violence. To allow covered entities to appropriately share information in this context, and to harmonize the Privacy Rule with existing state and federal laws mandating uses and disclosures of protected health information, 45 CFR § 512(a) permits covered entities to comply with laws requiring the use or disclosure of protected health information, provided the use or disclosure meets and is limited to the relevant requirements of such other laws. Where and to the extent that such disclosures are required by law, no authorization or court order is required for the disclosure. 45 CFR § 512 (a). Further, to the extent that such disclosures are required under State law, as described at 45 CFR § 164.512(a), the minimum necessary standard does not apply: (45 CFR § 164.502(b)(2)(v)). While the Rule itself does not require disclosures in compliance with State laws, neither does it interfere with such State law requirements.

In addition, under the Privacy Rule covered entities may disclose protected health information without the authorization of the individual, or the individual's personal representative, to an appropriate government authority authorized to receive reports of child abuse or neglect (45 CFR § 164.512(b)) or reports of abuse, neglect, or domestic violence (45 CFR § 164.512(c)). In response to your concern that CPS/APS providers often need to seek repeated access to individual medical records during the course of an investigation, we note that pursuant to 45 CFR § 164.512(b) or 164.512(c), a covered entity may, pursuant to the Rule, continue to disclose to such government authorities repeatedly over the duration of an investigation when making disclosures to public officials. Covered entities making

such disclosures must comply with the requirement that the disclosure be limited to the minimum necessary amount for the purpose; but the Privacy Rule also allows a covered entity to reasonably rely on the representations of such officials that the information requested is the minimum necessary for the stated purpose(s) when making disclosures to public officials. (45 CFR § 164.514(d)(3)(iii)(A)).

With respect to your concern that some covered entities delay disclosures because they permit only their designated privacy officials to make them, we note that while 45 CFR § 164.530(a) requires covered entities to designate a privacy official who is responsible for the development and implementation of the policies and procedures of the entity, it does not require or suggest that the designated privacy official is the only person authorized to make discretionary disclosures. The Privacy Rule is designed to be flexible and scalable, and does not dictate who within the covered entity should evaluate requests for disclosures. Rather, a covered entity is free to determine which of its personnel should be authorized to make discretionary disclosures in accordance with the Rule; and in doing so, the covered entity can, of course, take into account factors such as size and complexity of the organization.

Your letter also is concerned that under 45 CFR § 164.512(c)(2), a covered entity has discretion, under certain conditions, to refrain from informing the individual or the individual's personal representative in the cases of a report to a CPS/APS agency, if the notification would either place the individual at risk of serious harm or would not be in the best interests of the individual; but that under 45 CFR § 164.502(g) and 164.528(a) a personal representative has broad rights to demand an accounting of disclosures. In this regard, we note that there are important limitations on the right to receive an accounting of disclosures. For example, the accounting may be suspended for a period of time if the disclosure is to a health oversight agency or a law enforcement official, for the time specified by such agency or official, if the accounting would be reasonably likely to impede the agency's activities. (45 CFR § 164.528(a)(2)). Moreover, if the request is by the individual's personal representative and the covered entity has a reasonable belief that such person is the abuser or that providing the accounting to such person could endanger the individual, the covered entity continues to have the discretion in § 164.502(g)(5) to decline such a request. Given these limitations on the general requirement to treat an individual as the personal representative, the Rule is structured to minimize the conflicts your letter anticipates.

Another issue raised in your letter involves issues of tracking disclosures of protected health information, presumably for the accounting requirement, and the concern that this requirement preempts State confidentiality law which prohibits the release of the identification of a reporter of suspected abused or neglect. The Privacy Rule does not require disclosure in an accounting of the identity of the person who initiated the report of suspected abuse or neglect. To the extent that 45 CFR § 164.528 applies, the only information that needs to be disclosed is the date of the disclosure, the recipient, a brief description of the information disclosed (which does not need to identify the reporter) and the purpose of the disclosure. Therefore, the accounting for disclosure provisions of the Privacy Rule are not contrary to State laws that prohibit release of the identity of reporters of such information and preemption does not apply. See, 45 CFR § 160.203(c).

Turning to various recommendations in your letter for modification to the Privacy Rule, we point out that as the Privacy Rule was being developed, the issues raised by your letter concerning exempting CPS/APS disclosures from the accounting requirements of the Privacy Rule were carefully considered. As stated in sections of the December 28, 2000 and the August 28, 2002 preambles (and restated below), providing such an exemption to the right to accounting for disclosures would also have the effect of cutting off victims of abuse, neglect, or domestic violence from information about the extent of disclosures of their protected health information. Ultimately, the Rule was structured to balance appropriate access to this information by requiring the accounting, while affording appropriate discretion to covered entities to refrain from disclosures that might be harmful in certain circumstances:

Comment: One commenter stated that under Minnesota law, providers who are mandated reporters of abuse are limited as to whom they may reveal the report of abuse (generally law enforcement authorities and other providers only). This is because certain abusers, such as parents, by law may have access to a victim's (child's) records. The commenter requested clarification as to whether these disclosures are exempt from the accounting requirement or whether preemption would apply.

Response: While we do not except mandatory disclosures of abuse from the accounting for disclosure requirement, we believe the commenter's concerns are addressed in several ways. First, nothing in this regulation invalidates or limits the authority or procedures established under state law providing for the reporting of

child abuse. Thus, with respect to child abuse the Minnesota law's procedures are not preempted even though they are less stringent with respect to privacy. Second, with respect to abuse of persons other than children, we allow covered entities to refuse to treat a person as an individual's personal representative if the covered entity believes that the individual has been subjected to domestic violence, abuse, or neglect from the person. Thus, the abuser would not have access to the accounting. We also note that a covered entity must exclude a disclosure, including disclosures to report abuse, from the accounting for specified period of time if the law enforcement official to whom the report is made request such exclusion.

65 Fed. Reg. 82741 (2000)

Comment: One commenter sought an exemption from the accounting requirement for disclosures to adult protective services when referrals are made for abuse, neglect, or domestic violence victims. For the same reasons that the Rule permits waiver of notification to the victim at the time of the referral based on considerations of the victim's safety, the regulation should not make such disclosures known after the fact through the accounting requirement.

Response: The Department appreciates the concerns expressed by the commenter for the safety and welfare of the victims of abuse, neglect, or domestic violence. In recognition of the concerns, the Department does give the covered entity discretion in notifying the victim and/or the individual's personal representative at the time of the disclosure. These concerns become more attenuated in the context of an accounting for disclosures, which must be requested by the individual and for which the covered entity has a longer time frame to respond. Concern for the safety of victims of abuse or domestic violence should not result in stripping these individuals of the rights granted to others. If the individual is requesting the accounting, even after being warned of the potential dangers, the covered entity should honor that request. However, if the request is by the individual's personal representative and the covered entity has a reasonable belief that such person is the abuser or that providing the accounting to such person could endanger the individual, the covered entity continues to have the discretion in § 164.502(g)(50 to decline such a request.

67 Fed. Reg. 53246 (2002)

Again, with regard to your request that the Privacy Rule be amended to defer to state mandatory reporting, investigation and confidentiality laws, we emphasize that

the Privacy Rule does authorize a covered entity to comply with State laws in that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. The specific, additional, requirements for disclosures about an individual whom the covered entity believes to be a victim of abuse, neglect, or domestic violence, found at 45 CFR § 164.512(b) and (c), must be complied with, as applicable. Requirements for disclosures for judicial and administrative proceedings can be found at 45 CFR § 164.512(e); and requirements for disclosures for law enforcement purposes can be found at 45 CFR § 164.512(f). See also the attached FAQ, summarizing the various ways in which disclosures for law enforcement purposes may occur. In general, these various provisions reflect the balance in the Privacy Rule to protect health information, and to afford individuals their rights to access their information and to an accounting for certain disclosures of their information while deferring to State mandatory reporting, investigation and confidentiality laws pertaining to CPS/APS.

***

The Department is continuing its effort to develop and distribute helpful guidance on a wide range of Privacy Rule topics, and your input is helpful to us as we evaluate the effectiveness of the Rule, and focus on efforts to assist covered entities in complying with the Privacy Rule. A significant array of these guidance materials is available at the Office for Civil Rights website, www.hhs.gov/ocr/hipaa/. Among these resources are the full text of the Privacy Rule fact, a HIPAA Privacy Rule Summary, hundreds of answers to frequently asked questions, Privacy Rule fact sheets sample Business Associate contract provisions, extensive guidance on key Privacy Rule topics, a "covered entity decision tool" that helps entities determine whether they are covered by the Privacy Rule, and links to additional Department websites that provide information about other aspects of HIPAA. In addition, the website provides assistance, which can be accessed in both English and Spanish, regarding how to file a Privacy Rule complaint. We are continuing to update and add to these materials to assist covered entities in their efforts to comply with the Privacy Rule.

I trust the information and clarification in this letter are helpful. We very much appreciate the careful thought and important concerns reflected in your letter, and continue to monitor the experience of covered entities and others affected by the

Privacy Rule to ensure that the balance of protecting health information without impeding access to quality care is appropriately struck. Please feel free to contact us as HIPAA GIVES and its members have further experience with these and other provisions of the Rule.

Sincerely,

Richard M. Campanelli, J.D.
Director

APPENDIX III

SELECTED SECTIONS- RETENTION AND DISPOSITION SCHEDULE FOR NEW YORK LOCAL GOVERNMENT RECORDS (LGS-1) 8 NYCRR 185.15, (Appendix L)

Revised version, April, 2022

PURPOSE (p. x)

This Retention and Disposition Schedule for New York Local Government Records indicates the minimum length of time that local government officials must retain their records before they may be disposed of legally. It consolidates and revises Records Retention and Disposition Schedules CO-2, MU-1, MI-1, and ED-1. It has been prepared and issued by the State Archives, State Education Department, pursuant to Section 57.25 of the Arts and Cultural Affairs Law, and Part 185, Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

The purposes of this Schedule are to:

1) ensure that records are retained as long as needed for administrative, legal and fiscal purposes;

2) ensure that state and federal record retention requirements are met;

3) ensure that records with enduring historical and other research value are identified and retained permanently; and

4) encourage and facilitate the systematic disposal of unneeded records.

ADOPTION OF THE SCHEDULE AND REQUESTS FOR ADDITIONAL COPIES (p. xi)

Before any records listed on the Retention and Disposition Schedule for New York Local Government Records may be disposed of and even if the local government previously adopted Schedules CO-2, MU-1, MI-1, and ED-1, the governing body must formally adopt the Schedule by passing a resolution. A model resolution is included at the end of the Introduction to this Schedule. It is not necessary to send a copy of the passed resolution to the State Archives. The Schedule must be adopted no later than January 1, 2021. Upon adoption, this Schedule supersedes Schedules CO2, MU-1, MI-1, and ED-1.

This Schedule may be used by the local government until the governing body rescinds its authorizing resolution, or the Schedule is superseded or replaced by the State Archives.

Additional paper or electronic copies of this Schedule can be obtained by calling the State Archives at (518) 474-6926 or emailing at recmgmt@nysed.gov. The Schedule is also available on the State Archives' website at http://www.archives.nysed.gov.

INTERPRETING SCHEDULE ITEMS (p. xii)

Many of the schedule items are broad and describe the purpose or function of records rather than identifying individual documents and forms. Local officials should match the records in their offices with the generalized descriptions on the Schedule to determine appropriate retention periods. Records whose content and function are substantially the same as an item described in the Schedule should be considered to be covered by that item. Local officials should check with the State Archives when they are uncertain regarding coverage of a function. In situations where local officials have combined related types of records, covered by different items in this Schedule, into a single file series, it may be impractical to separately apply the retention periods of the various applicable Schedule items to the individual records in the file. In such situations, officials may find it more convenient to dispose of the entire set of records by using the applicable retention item with the longest retention period.

Retention periods on this Schedule apply to one "official" copy designated by the local government unless otherwise stated. No matter what the medium, local officials must ensure that the information will be retained for the specified retention period.

The retention periods listed on this Schedule pertain to the information contained in records, regardless of physical form or characteristic (paper, microfilm, computer disk or tape, or other medium). Duplicate copies of records, including copies maintained on different media xiii (paper, electronic, etc.), may be disposed of in accordance with item no. 58 of the General Administration section of this Schedule.

EXCEPTIONS TO APPLYING RETENTION PERIODS INDICATED IN SCHEDULE LEGAL ACTIONS (p. xiii)

Some records may be needed to defend the local government in legal actions. Records that are being used in such actions must be retained for the entire period of the action even if their retention period has passed. **If the retention period has expired by the time the legal action ends, the record must be retained for at least one additional year to resolve any need for the record in an appeal.** If the retention period has not expired, the record must be retained for the remainder of the retention period, but not less than one year after the legal action ends. Prior to disposing of records, local officials may wish to consult with their

county attorney to verify that no legal actions have been initiated which would require longer retention of the records.

AUDITS (p. xiii)

Program and fiscal audits and other needs of state and federal agencies are taken into account when retention periods are established by the State Archives. However, in some instances agencies with audit responsibility and authority may formally request that certain records be kept beyond the retention periods. If such a request is made, these records must be retained beyond the retention periods until the local government receives the audit report or until the need is satisfied.

RECORDS NOT LISTED ON THIS SCHEDULE (p. xiv)

This Schedule covers the vast majority of all records of local governments. For any record not listed, the Records Management Officer, or the custodian of the record, should contact the State Archives to determine if it is indeed covered by this Schedule and if a legal minimum retention period has been established. If not, the State Archives will consult with appropriate state and local officials and users of local government records and advise the local government on the disposition of the records. If the record is not covered by an item on this Schedule, it must be retained until a xv revised edition of or addendum to the Schedule is issued containing an item covering the record in question and providing a minimum legal retention period for it.

Conversely, the State Archives has no legal authority to require local governments to create records where no records exist, even if the records in question are listed on this Schedule. Although there may be laws, regulations or other requirements that certain records must be created, those requirements do not originate from the State Archives. Instead, the purpose of this Schedule is to authorize the disposition of records which local governments maintain. The mere fact that a record is identified on this Schedule should not be interpreted as a requirement that the record must be created.

SUGGESTIONS FOR RECORDS DISPOSITION (p. xx)

Once this Schedule has been formally adopted valueless records may be disposed of continually as they meet their stated minimum retention periods. The advantages of a program for systematic, legal disposal of obsolete records are that it

1) ensures that records are retained as long as they are actually needed for administrative, fiscal, legal, or research purposes;

2) ensures that records are promptly disposed of after they are no longer needed;

3) frees storage space and equipment for important records and for new records as they are created;

4) eliminates time and effort required to service and sort through superfluous records to find needed information;

5) eliminates the potential fire hazard from storage of large quantities of valueless records; and

6) facilitates the identification and preservation of archival records.

Suggestions for systematically approaching the disposition process include the following:

(A) Section 57.19 of the Arts and Cultural Affairs Law requires each local government to designate a Records Management Officer to coordinate or directly carry out disposition. The duties of a Records Management Officer are found in Section 185.2 of 8NYCRR. Contact the State Archives for additional information.

(B) Disposition should be carried out regularly, at least once a year. It should not be deferred until records become a pressing storage problem. Duplicate copies of records, including copies maintained on different media (paper, electronic, etc.), may be disposed of in accordance with item no. 58 of the General Administration section of this Schedule.

(C) State law does not prescribe the physical means of destruction of most records. Records may be destroyed in any way the Records Management Officer or other local official chooses. Disposition through consignment to a paper recycling plant is often the best choice as it helps conserve natural resources and may also yield revenue for the local government. For records containing confidential information, disposition should be carried out in a way that ensures that the confidentiality of individuals named in the records is protected.

(D) A record should be kept of the identity, inclusive dates, and approximate quantity of records that are disposed. Sample disposition forms are available from the State Archives.

(E) The Records Management Officer, or other official who carries out disposition, should describe what has been done to dispose of records during the year in an annual report to the governing body.

IMPORTANT REMINDERS (p. xxi)

1. Local governments must adopt this Schedule prior to its use and by January 1, 2021. xxii

2. Records created before 1910 (even those which have been microfilmed) are not eligible for disposition without written permission from the State Archives.

3. No records may be disposed of unless they are listed on this Schedule, or their disposition is covered by other state laws.

4. Records common to most offices are listed under the General Administration section of the Schedule. You should first attempt to locate a specific item under a functional heading. If the record you are locating cannot be found under a functional heading, then proceed to this General Administration section to search for a less specific item covering the record.

5. Records being used in legal actions must be retained for one year after the legal action ends, or until their scheduled retention period has passed, whichever is longer.

6. Any record listed in this Schedule for which a Freedom of Information (FOIL) request has been received should not be destroyed until that request has been answered and until any potential appeal is made and resolved, even if the retention period of the record has passed.

7. Records being kept beyond the established retention periods for audit and other purposes at the request of state or federal agencies must be retained until the local government receives the audit report, or the need is satisfied.

8. Retention periods on this Schedule apply to one "official" copy designated by the local government, unless otherwise stated.

9. The retention periods listed on this Schedule pertain to the information contained in records, regardless of physical form or characteristic (paper, microfilm, computer disk or tape, or other medium).

10. The State Archives has no legal authority to require local governments to create records where no records exist, even if the records in question are listed on this Schedule.

11. The new General Administration section combines the former General and Miscellaneous sections. In addition, it includes items that were duplicated in other sections including, but not limited to, the County Clerk and School District and BOCES sections. The new Executive section combines Supervisor, Mayor, Manager, Administrator, County Executive, and Executive sections, and the school superintendent item into one section. The new School District and BOCES section retains the unique subsections of the Schedule ED-1, including Administration, Food Management and Child Nutrition, Gifted and Talented Programs, Health, Instruction, Magnet Schools, Nursing Education, School Safety, Special Education, Student Records, Supplemental Education Services, Teacher Resource and

Computer Training Center, Transportation: School Bus Routing and Scheduling, and Transportation: Other School Transportation Records.

12. The State Archives cannot identify all record series with historical significance for individual local governments. Local officials will need to appraise records with nonpermanent retention periods for potential research or historical value before destroying them.

13. Certain health-related records may need to be retained for one year longer than this Schedule dictates if those records are subject to the requirements stated in Section 29.2 of 8NYCRR.

14. The Local Government Records Law and this Schedule do not address confidentiality of records. Confidentiality of records is often dependent upon what information they contain. Local officials should address such questions to the Committee on Open Government, their own counsels, or other state or federal agency having oversight of the records in question.

MODEL RESOLUTION (p. xxiii)

RESOLVED, By the _____ [title of governing body] of _____ [local government name] that Retention and Disposition Schedule for New York Local Government Records, issued pursuant to Article 57-A of the Arts and Cultural Affairs Law, and containing legal minimum retention periods for local government records, is hereby adopted for use by all officers in legally disposing of valueless records listed therein. FURTHER RESOLVED, that in accordance with Article 57-A: a) only those records will be disposed of that are described in Retention and Disposition Schedule for New York Local Government Records after they have met the minimum retention periods described therein; xxiv b) only those records will be disposed of that do not have sufficient administrative, fiscal, legal, or historical value to merit retention beyond established legal minimum periods.

ATTORNEY, COUNSEL, OR PUBLIC DEFENDER (p. 22)

95 Legal case file,

documenting litigation and routine matters, including but not limited to court records, investigative materials, memos, correspondence, and decisions and determinations

a For legal case file of attorney or counsel:

RETENTION: 6 years after case closed, or 0 after any minor involved attains age 21, whichever is later

NOTE: Evidence, including video and audio recordings, should be returned to law enforcement or owner as appropriate. Local law enforcement should retain evidence as long as the corresponding case investigative file, item no. 1222.

NOTE: Appraise these records for historical significance prior to disposition. Records with historical value should be retained permanently. Local governments should consider permanent retention of significant cases which have importance or which set major legal precedents. For instance, local governments may wish to permanently retain files for cases concerning major local controversies, issues, individuals and organizations which are likely to be the subject of ongoing research or which result in decisions or rulings of major significance to the local government or community or to the entire state. Contact the State Archives for additional advice in this area. In addition, local governments may wish to retain the complaint and release for routine cases longer for convenience of reference.

96 Legal brief file ("brief bank") containing duplicate copies of legal briefs from case files, retained separately for future reference:

RETENTION: 0 after no longer needed

97 Legal case log giving chronological listing of cases:

RETENTION: 0 after no longer needed

98 Legal case index or summary record, summarizes and/or tracks status of case and may contain listing of cases, dates and summaries of proceedings, conclusions and recommendations, final determinations, notations on activities related to case, and related information:

RETENTION: PERMANENT

99 Evidence logs documenting the receipt, handling, and return of evidence in the course of an investigation:

RETENTION: 1 year after case closed

100 Subpoena, along with documentation of response, issued to local government agency or officer, when not part of legal case file or any other series of records listed on this Schedule:

RETENTION: 6 months after date of response NOTE: Subpoenas relating to legal case files or other series of records listed on this Schedule should be retained as part of or as long as that respective series.

101 Subpoenaed records or exhibits gathered from a government, organization, or individual as part of the discovery process or subpoenaed under civil or criminal procedure law, but not used in a case:

RETENTION: 30 days after final disposition of case, unless return is requested by owner. If requested, return to owner.

102 Subject file assembled and kept for reference purposes:

RETENTION: 0 after no longer needed

JUVENILE DETENTION FACILITY (p. 152)

584 Certification records documenting approval by New York State Office of Children and Family Services for local government to operate juvenile detention facility

a Original application for certification:

RETENTION: PERMANENT

b Renewal application for certification:

RETENTION: 6 years

c Certification:

RETENTION: 6 years after expiration

d Operating certificate revocation or suspension records, including but not limited to hearing proceedings and operating certificate determinations:

RETENTION: 6 years after last entry

585 Facility establishment, major alteration, and change of occupancy records, including but not limited to copies of studies, surveys, plans, specifications and approvals by, and correspondence with, New York State Office of Children and Family Services:

RETENTION: PERMANENT

586 Individual case file for youth held in juvenile detention facility, including but not limited to detention admission and release notice, educational records and medical records:

RETENTION: 0 after individual concerned reaches age 21

587 Master name index of all youths held in juvenile detention facility:

RETENTION: 0 after obsolete

588 Log of daily activity at juvenile detention facility:

RETENTION: 10 years after last entry

589 Log or similar record of visits to youths held at juvenile detention facility: Local Government Schedule (LGS-1) Juvenile Detention Facility Rev. 2022 153

RETENTION: 6 years after last entry

590 Dietary services records for juvenile detention facility

a Dietary services studies, meal counts and related records:

RETENTION: 3 years

b Menus:

RETENTION: 1 year

SOCIAL SERVICES (COUNTY) (p. 304)

1134 County social services case record

a **Where first entry is 1950 or earlier**, including but not limited to application for assistance or services, eligibility forms, case history, authorization of assistance or services, and correspondence:

RETENTION: PERMANENT

b **For adopted child, where first entry is 1951 or later,** including but not limited to pre-adoption history, medical report on natural mother and child, and correspondence, but not covering adoption subsidy:

RETENTION: PERMANENT

c **For cases involving children, where first entry is 1951 or later, and covering one of the following:** abuse or maltreatment; family adopting a child; child health; medical assistance; protective services; or day care child's medical records; except for adopted child sealed case record, which must be retained permanently; including but not limited to application for assistance or services, eligibility forms, authorization of assistance or services, and correspondence:

RETENTION: 0 after youngest child attains age 28

NOTE: Sections 422.5 and 422.6 of the Social Services Law, as amended by Chapter 12 of the Laws of 1996, Chapter 136 of the Laws of 1999, and Chapter 555 of the Laws of 2000, contain legal requirements relating to retention of reports of child abuse and maltreatment held by county social services departments. The current requirements are as follows: 1. Reports, which are unfounded, received by the State Central Register prior to February 12,

1996, must be destroyed or have information expunged from them forthwith. 2. Reports, which are unfounded, received by the State Central Register after February 11, 1996, must be legally sealed forthwith and retained for 10 years after receipt of the report (by the State Central Register), and then must be destroyed or have information expunged from them, except such reports must be destroyed prior to the passage of 10 years upon direction of the NYS Office of Children and Family Services pursuant to provisions of Chapter 555 of the Laws of 2000. 3. All indicated (substantiated) reports must be retained for 10 years after the youngest child mentioned in the report attains age 18, and then must be destroyed or have information expunged from them. For additional information on this subject, contact Counsel's Office, New York State Office of Children and Family Services, 52 Washington Street, North Building, Room 133, Rensselaer, NY 12144-2796; phone, (518) 474-3333.

Although item no. 1134, sections c and e have a less than permanent retention period, the State Archives recommends that county social services agencies consider permanently retaining services case histories (narrative and comment sheets), where they exist. These histories contain information not available elsewhere, and document counties' roles in public assistance programs.

d **For preventive services to children**, where first entry is 1951 or later:

RETENTION: 6 years after 18th birthday of youngest child in the family

e **For foster care cases**, where first entry is 1951 or later:

RETENTION: 30 years after the discharge of the child from foster care

NOTE: Although item no. 1134, sections c and e have a less than permanent retention period, the State Archives recommends that county social services agencies consider permanently retaining services case histories (narrative and comment sheets), where they exist. These histories contain information not available elsewhere, and document counties' roles in in public assistance programs.

f **For child held in detention home, children's shelter or similar facility**, where first entry is 1951 or later, including but not limited to admission and release notice, copy of court order, copy of admission physical examination, psychiatric evaluation, accusation of staff abuse, list of personal property, and clothing inventory: RETENTION: 0 after child attains age 21

NOTE: For child that is a foster care case, follow disposition requirements under part e.

g **Non-services and services case files**, other than those described in other parts of this item, including programs such as Public Assistance and Care, Medical Assistance, Supplemental Nutrition Assistance Program (SNAP), Adult Services, and Aid to Dependent Children, where first entry is 1951 or later, and including but not limited to application for assistance or services, eligibility forms, authorization of assistance or services, and correspondence:

RETENTION: 6 years after case closed

NOTE: The United States Department of Agriculture (USDA), Food and Consumer Services (FCS), requires that certain case files involving Supplemental Nutrition Assistance Program (SNAP) be retained for a longer period of time than stated in part "g". If there has been an intentional program violation (IPV) disqualification, the case record must be retained for the life of the individual involved, or until FCS has notified the State Office of Temporary and Disability Assistance that the case record is no longer needed. For cases involving work requirement violations and permanent disqualifications, the case records must be retained for the life of the individual involved or until that individual attains age 60, whichever is shorter. For additional information, contact the Division of Temporary Assistance, New York State Office of Temporary and Disability Assistance, at (518) 474-9300.

h **Home Energy Assistance Program (HEAP)** case files, including regular benefit, emergency benefit, and clean and tune benefit: Local Government Schedule (LGS-1) Social Services (County) 306

RETENTION: 6 program years, including the current program year

i **Home Energy Assistance Program (HEAP) case files**, including Heating Equipment Repair and Replacement (HERR) and Cooling Assistance Component benefits:

RETENTION: 10 years

j Adoption subsidy case record:

RETENTION: 10 years after child attains age 21

1135 Denied or withdrawn application for assistance or services or to adopt child or to offer foster care, excluding foster homes, including related records:

RETENTION: 6 years after the denial or withdrawal of the application

1136 Register, index or other record showing applications or requests for assistance or services or showing participation in program:

RETENTION: 6 years after last entry

1137 Social services case transaction history or case activity control log listing actions taken on case and dates, including public assistance, adult services, children's services, adoption case, and day care registration:

RETENTION: PERMANENT

1138 Application for foster home, including related records

a Approved application and related records:

RETENTION: 6 years after termination or expiration of foster home certification or license

b Denied, withdrawn, or expired application and related records:

RETENTION: 6 years after the denial, withdrawal or expiration of the application

1139 Foster home case activity control log:

RETENTION: 6 years after termination of foster home certification or license

1140 Record of assistance granted

a When assets have been assigned:

RETENTION: 10 years after case closed

b When there has been no assignment of assets:

RETENTION: 6 years after case closed

1141 Asset assignment record:

RETENTION: 10 years after case closed

1142 Asset register:

RETENTION: 6 years after last case closed

1143 Property records, including deed, mortgage, lien or estate records, and appraisal of fair market value:

RETENTION: 6 years after assets liquidated or recoupment is completed

1144 Utilization review and long-term care placement records, where county social services conducts review and placement functions:

RETENTION: 6 years

1145 Payment roll, schedule or history:

RETENTION: 10 years after case closed

1146 Copies of authorization for payment, retained in accounting office, pursuant to 18NYCRR and Office of Temporary and Disability Assistance (OTDA) policy:

RETENTION: 6 years

1147 Medicare, Medicaid or insurance carrier claim records, including but not limited to schedule of payments, copy of claim, listing of invalid or rejected claims, vendor payment list, list of claims submitted for payment, and list of checks received:

RETENTION: 10 years

1148 Insurance and reimbursement related reports, including Medicare or Medicaid cost report, certified uniform financial or statistical report, and all necessary supporting documentation:

RETENTION: 10 years

1149 Support collection accounting records

a Official record of account:

RETENTION: 6 years after case closed

b Original entry and intermediary records, used in posting information to official account record:

RETENTION: 6 years

c Fiscal and statistical reports relating to support collection:

RETENTION: 6 years

1150 Support collection enforcement case records:

RETENTION: 6 years after youngest child affected by order attains age 21

1151 Master summary record (index or register) of support collection cases:

RETENTION: PERMANENT

1152 Support collection case review and adjustment records:

RETENTION: 6 years after youngest child affected by order attains age 21

1153 Social services case management system reports, produced from manual or automated case management or other systems used to monitor and report on service and non-service cases, other than reports which are specific to individual cases or are covered by other items in this section

a When needed for audit or other fiscal purposes:

RETENTION: 6 years

b When not needed for audit or other fiscal purposes:

RETENTION: 0 after no longer needed

NOTE: Social services case management and related systems generate numerous daily, weekly, monthly, quarterly and other reports. Some of these reports are needed for six years for fiscal audit and related purposes. Other reports can be destroyed after shorter periods of time, such as after they are superseded by subsequent reports, after the preparation of related reports, after passage of specific time periods, or after they are no

longer needed for administrative purposes. For further information on determining appropriate retention periods for specific reports, contact the New York State Office of Temporary and Disability Assistance and the New York State Office of Children and Family Services.

1154 Cemetery records relating to alms house or county home, including but not limited to interment, exhumation or removal records; inscriptions from headstones; burial permits; and maps or surveys of grave locations:

RETENTION: PERMANENT

1155 Register or equivalent summary record listing residents of county poor house or alms house:

RETENTION: PERMANENT

1156 Adult home/adult care/adult shelter/family shelter facility records

a Resident/participant records, including personal, financial and dietary planning records, and related records:

RETENTION: 3 years after death or discharge

b Facility/program records, including records documenting the operation and maintenance of the facility; daily census reports; incident reports; business records; records relating to the application or renewal of the operating certificate; admission and discharge registers; program records including service procedures, activities schedules, agreements with external service providers, disaster and emergency plans, and records of evacuation drills; food service records including menus and food procedure records; records of the maintenance of the physical plant and environmental standards; staff records including personnel procedures, job descriptions, staffing schedules and payment records; certificates or reports issued by local and state jurisdictions related to facility operation; and related records:

RETENTION: 7 years after end of calendar year or 7 years after superseded or obsolete, whichever is longer

1157 Child and adult day care providers review records, including monthly, quarterly, and annual reports:

RETENTION: 6 years

1158 Domestic violence liaison screening and case records

a Screening forms completed by applicants/recipients of public assistance indicating presence of domestic violence and subsequent records assessing credibility of individual's

assertion of domestic violence, records of services referrals, assessments for waivers of public assistance program requirements, and related records:

RETENTION: 6 years after completion of liaison's services to an individual

b Screening forms indicating no presence of domestic violence: RETENTION: 1 year

1159 Domestic violence residential program records, including case records, daily rosters, incident reports, disaster and emergency plans, and related records:

RETENTION: 6 years after termination of operation of the program

1160 Domestic violence safe home network records, including names and addresses of safe homes; lists of family/household members residing in safe homes; records of interviews with members of safe homes; information on orientation and training of safe home providers; description of safe home environments; lists of safe home rules; copies of agreements between safe home providers and the network concerning their respective responsibilities; copies of annual evaluations of safe homes; records of complaints and follow-up; records of fires, accidents and serious incidents in safe homes; and related records:

RETENTION: 6 years after termination of operation of the program

1161 Domestic violence safe dwelling records, including descriptions of physical plant; security plans; diagrams of rooms; locations of smoke detectors, fire extinguishers and telephones; lists of safe dwelling rules; records of fires and accidents; copies of annual reevaluations of safe dwellings; and related records:

RETENTION: 6 years after termination of operation of the program

1162 Domestic violence nonresidential services records

a Case records, including names of persons requesting services, reasons for requests, names of minor children and/or other family/household members receiving services, types of services provided, and related records:

RETENTION: 6 years after case closure

b Daily logs showing number of telephone hotline calls and other telephone calls requesting information and/or referral:

RETENTION: 6 years

1163 Rape crisis intervention records

a Individual client consultation case record of rape crisis intervention program:

RETENTION: 6 years after last entry, or 3 years after any minor involved attains age 18, whichever is later

b Master summary record (log or index) to client consultations or other activities:
RETENTION: PERMANENT

1164 Child fatality investigative reports and records

a Record copy of report concerning the death of a child whose care and custody or guardianship have been transferred to an authorized agency or whose death has been reported to the State Central Register, received from the NYS Office of Children and Family Services or prepared by a local or regional fatality review team pursuant to Sections 20(5) and 422-b, Social Services Law:

RETENTION: PERMANENT

b Non-record copies of child fatality investigative reports, which are provided to the county legislature and county executive:

RETENTION: 0 after no longer needed

c Investigative records, when investigation into child's death is conducted by a local or regional fatality review team:

RETENTION: 10 years after completion of investigation and preparation of final report

1165 Fraud complaint and investigation file

a For fraud case complaint records, when no action is taken:

RETENTION: 6 years after decision not to investigate

b For fraud case complaint or investigation records, when additional action is taken:

RETENTION: 10 years after case closed