Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Social & Health Services Division
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November 5, 2013

Re: Requests for DSHS/CPS Records

Dear Mr. Speikers,

Thank you very much for contacting me regarding the process for obtaining CPS records in a criminal case. I would like to take this opportunity to set out the preferred process for obtaining CPS records for use in a criminal proceeding. We have this process in place with other public defense agencies and our Division chief originally worked this out with the Defender Association in 1987.

Child Protective Services records are not considered health care records so that RCW Chapter 70.02 does not apply. Rather, CPS records are confidential records maintained by a state agency regarding reports of alleged child abuse or neglect. The statutory framework regarding the confidentiality of these records is governed by RCW Chapters 13.50; 26.44 and 74.04. *See* Deer v. DSHS, 122 Wn. App. 84 (2004). In addition, the Department of Social and Health Services is required to keep these records confidential pursuant to federal law, 42 U.S.C. Section 5106a(b) and 45 CFR Section 1340.14(i) (1985). Thus, the Department is prohibited from releasing its records unless the defendant falls within one of the exceptions to non-disclosure.

There are also cases which govern the access to CPS records by criminal defendants. The primary case is a United States Supreme Court case Pennsylvania vs. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Some of the other relevant Supreme Court cases are: United States v. Agurs, 427 U.S. 97 (1975) and Roviaro v. U.S., 353 U.S. 53 (1957). The Washington cases that govern a criminal defendant's access to CPS records are: State v. Kalakosky, 121 Wn.2d 525 (1993); State v. Diemel, 81 Wn.App. 464 (1996). Basically, the criminal defendant must establish that the records are at least material. Further, in order to make an adequate threshold showing to justify an in camera inspection, a defendant must make a particularized factual showing that information useful to the defense is likely to be found in the records.

Based on this case law, we have tried to make the process of obtaining CPS records in a criminal proceeding fair and expeditious. Because a subpoena duces tecum is not sufficient to overcome

the requirement of confidentiality, we typically object to the production of records sought in this manner and request that a court order be obtained. This can cause delays. So, rather than serving the Attorney General's Office and CPS with a subpoena duces tecum, we request that you file a criminal motion requesting access to the CPS records and that you serve our office with notice of your motion. The declaration in support of the motion should state with specificity and particularity the reason(s) for seeking access to these confidential records. In addition to serving the Attorney General's Office, SHS Division, you should also serve CPS with the motion and note for hearing so that they can begin the process of gathering the records. If the declaration sets forth a particularized basis that demonstrates the materiality of the CPS records, we will request that the court conduct an in camera review to determine whether the records or a portion thereof should be provided to the defendant and enter a stipulation to this effect. We will then request entry of an order regarding the disclosure of the records once the court has completed the in camera review.

I trust that this information is helpful to you. Please contact me at 464-7045 if you have any questions. I would appreciate your letting your colleagues know about this process. Thank you.

Sincerely,

Patricia L. Allen
Assistant Attorney General