Confidentiality

of

DSS

Records

Monroe County Law Department:
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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 and regulations yourself.
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CONFIDENTIALITY OF DSS RECORDS

All records generated by a local social services district are confidential to some extent. Section 136 of the Social Services Law (SSL) contains the basic confidentiality guidelines for DSS records and 18 NYCRR 357 the basic regulations. Unfortunately, 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. The enactment of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) has added a new wrinkle to the area of confidentiality of medical records and Medicaid records. 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. 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.

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. Recently, the Office of Temporary and Disability Assistance issued 10-LCM-17 (11/5/2010), which once again emphasizes the importance of the local districts having a confidentiality policy in place, along with training for the proper use, handling and safeguarding of records. That LCM also provides a list of Federal and State statutes and regulations related to the child support, public assistance and medical assistance functions.

WHAT ARE DSS RECORDS?

We occasionally have attorneys insist that they do not have to comply with confidentiality guidelines because they “…only want the caseworker to testify, not
his/her records.” Sadly for them, for confidentiality purposes, caseworker testimony is considered to be the same as written records. See 18 NYCRR 357.1(a).

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.

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 the Department’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**

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 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.

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.

**THE FREEDOM OF INFORMATION LAW (FOIL)**

The Freedom of Information Law (FOIL) is contained in Article 6 of the Public Officers Law (POL). This law allows an individual to obtain records from
government agencies. However, POL §87(2)(a) states that an agency may deny access to records that are specifically exempted from disclosure by state or federal statute. As practically every DSS record has its own disclosure statute, FOIL should not apply to case records. One example of this is found in Matter of Gannett Co., Inc. v. County of Ontario, 173 Misc.2d 304, 661 NYS2d 920, (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 (discussed infra in the CPS record section) 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.

**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.

Applicable Law: SSL §473-e

Applicable Regs: 18 NYCRR 457.16

CHILD PROTECTIVE RECORDS

The specific 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 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. The four most common requests that we see are from (1) persons who are named in the report and their representatives (including their lawyers); (2) courts; (3) probation department; and (4) law enforcement personnel. Here are the rules for these four situations:

Persons who are named in the report or their representatives, including their attorneys. 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. MCDSS has a policy for dealing 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. OCFS takes a more expansive view and does allow attorneys to have access to their client’s records provided that they have a valid authorization from their client. It is our position that a release is not sufficient for a release of records to an attorney 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 our view that if the Legislature had intended to allow attorneys to view CPS records with a release, they would have written it into the statute as they did in the APS statute.

Indeed, there are 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.

The second reason for our 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, we certainly don’t want any of our clients to blaze that trail.

“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.

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” implies that the court must do something more than just issue a subpoena for the records on an ex parte request. One case suggests 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 (New York City Civil Court, 2005). 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.

A probation department conducting an investigation pursuant to article three or seven or section 653 of the Family Court Act may receive CPS information under SSL §422(4)(k) where there is reason to believe that the child or his 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 and that such information is necessary for the making of a determination or recommendation to the court.

Law enforcement officials including district attorneys and police may have access to reports when they state that such reports are necessary to conduct a criminal investigation or 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. See SSL §422(4)(l).

Exceptions w, x, and y provide exceptions for fatality review teams, multidisciplinary investigative teams, the members of which can now freely share information, and citizen review panels. Section z permits disclosure to a legal entity in another state which has the legal authority to license, certify or otherwise approve prospective adoptive and foster parents when disclosure of information regarding these prospective parents and other persons over the age of eighteen who are residing in their homes is required by 42 USC 671(a)(20).

The latest exception, found in §422(4)(A)(aa) permits the disclosure of CPS information to an adult protective worker when the APS worker is investigating the need for services when the worker has reasonable cause to believe that the individual maybe in need of APS services due to the conduct of an individual or individuals who had access to the person when they were a child and that such information is needed to further the APS investigation.

Regardless of the basis for the request, it is best to insist on these requests being made in writing with the appropriate “magic words” included. This provides a record of justification for any disclosures made if anyone ever questions them.

Effective February 12, 1996, SSL §422(5) was amended to provide that all information identifying the subjects of an unfounded report and other persons identified in the report, rather than be expunged as was the case previously, shall be sealed by the central register and the local or state agency that investigated the report. The current version (effective May 1, 2002) provides that 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). We 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, and has not been since this oversight was mentioned in the June, 2003 edition of this handbook.

Legally sealed unfounded reports are required to be expunged ten years after the receipt of the report (subd. (b)) and may, in the discretion of OCFS, be expunged earlier if (1) the source of the report was convicted of falsely reporting an incident regarding the report or (2) the subject of the report presents clear and convincing evidence that affirmatively refutes the allegations contained in the report (subd. (c)).

Elisa’s Law also added SSL 422-a, which sets forth the conditions under which a commissioner or director of a local district may release this type of information to the public. This section specifies the considerations that the commissioner must make as well as the type of information that she may release.
SSL §422-a should be carefully read and discussed by a commissioner or director and counsel before information is released. OCFS circulated a “Dear Commissioner” letter dated December 17, 1999 that includes a nine step checklist that breaks SSL §422-a down and is probably the best way to address a request for release of CPS information made by the media. I am told that OCFS intends to reissue the checklist as an LCM, but I have not seen that yet.

SSL 422-a(3) limits the release of information according to the stage of the investigation. Prior to the completion of the investigation, the only information that can be released is a statement that the report is “under investigation.” If the report has been “unfounded,” the only information that may be released is a statement that “the investigation has been completed, and the report has been unfounded.” If the report has been “indicated,” then information may be released pursuant to SSL 422-a(2).

CPS caseworkers are often ordered to conduct “1034” investigations pursuant to FCA §1034 and report to the Court. The above mentioned confidentiality guidelines apply to these types of reports. If there is a referral concurrent with the 1034 investigation, the caseworker and the attorney must be conscious of the sealing provisions of SSL §422(5). If the worker intends to “unfound” the referral, it may be wise to wait until after the 1034 report (including testimony) is made to the Court before “unfounding” the referral. This decision has to be made within the caseworker’s time limits for investigating and making a determination on the case, however.

SSL §422(7) provides that the release of data that would identify the source of a child protective report or a person who cooperated in the subsequent investigation may be prohibited by OCFS (and, presumably, the local district) upon a finding that revealing that information would be detrimental to the safety or interests of such person. However, SSL §422(4)(A) (which, by implication, deals with indicated and pending reports since §422(5) sets forth the rules for unfounded reports), enacted after §422(7), states that nothing in that section shall be deemed to permit the release of source information, with certain exceptions contained therein, without the person’s written consent. SSL §422(5), as interpreted and applied by OCFS, allows the release of source information to a District Attorney or the police when needed to investigate and/or prosecute a person for making a false child protective report. While the statutory scheme is not completely clear on this point, it is the position of OCFS that source information should never be given to the subject of a report, whether pending, indicated or unfounded, without the written consent of the source. As a result, the safety or interest test of §422(7) now applies only to information related to cooperating witnesses.

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).
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, 897 NYS 379 (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 COPS 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.

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*, 909 NYS2d 571 (3rd Dept., 2010).

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.

Section 427-a(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, nonclient 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 and 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.

Applicable Law:  
SSL §372  
SSL §422  
SSL §412  
SSL §422-a  
SSL §427-a

Applicable Regs.: 18 NYCRR 432
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)

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). In Monroe County, the respondents and law guardian are given access to the file at the Law Department to review and copy.

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). If the 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 721, 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. Our office has read CPLR 2307 and SSL §372 together, and have asked that the subpoena be obtained on notice at least to MCDSS, with an opportunity for MCDSS to at least file responding
papers. When a court has ordered production of the record, it is usually provided to the court for an *in camera* inspection.

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).

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).

Applicable Law: SSL §372
Applicable Regs.: 18 NYCRR 441.7
18 NYCRR 357.3

**ADOPTION RECORDS**

It is not completely clear which statute applies to this issue. Two statutes are applicable on adoption issues: SSL Law §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. In Sam v. Sanders, 55 NY2d 1008, 449 NYS2d 474 (1982), the Court found that it would not be proper to permit disclosure to a brother the records of a sibling who had been adopted. See the section on Foster Care Records, supra.

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

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).

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 records are discussed in SSL §§409 and 409-a. SSL §409 defines "preventive services," and SSL §409-a discusses confidentiality of preventive services record in the context of their release to the comptroller’s office of the State or of the City of New York, or of the county officer designated to perform that county’s auditing function.

18 NYCRR 423.7(b) states that preventive services records are confidential, and further states that these records may only be open to the inspection of: (1) New York State DSS (OCFS); (2) the social services district; (3) a preventive service or authorized agency providing service to the child or the family; (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 written consent of the child or the child’s parent executed in accordance with 18 NYCRR 423.7(e). 18 NYCRR 423.7(e) contains the specific requirements of the consent.

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

CHILD SUPPORT ENFORCEMENT*

General Rule:

As a general rule, child support enforcement records are confidential pursuant to SSL §111-v and 42 USCA 654(26). 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 regulation 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. Conforming amendments to the New York
regulations are pending. The current New York regulation related to the confidentiality of child support records is found in 18 NYCRR 347.19. This regulation states that all information obtained by the agency is confidential, whether or not it is contained in the written record or the CSMS/ASSETS record.

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).

**FPLS/SPLS**

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.
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-I; 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 revisions to this section.

PUBLIC ASSISTANCE

Social Services Law §136 contains the general provisions related to the confidentiality of public welfare records.

A major portion of this statute (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.” All kidding aside, this probably does include your local newspaper and television stations. 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

SSL §136(5) obliges a social services official to disclose the current address of a recipient to a federal, state or local law enforcement official provided that the official indicates that it is his duty to apprehend the recipient and that the recipient is fleeing to avoid prosecution, custody, or confinement after conviction, for a felony (or high misdemeanor in New Jersey), or is violating a condition of parole or probation or has information necessary for the official to conduct his duties.

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 get the information and the information is related to the service requested. 18 NYCRR 357.3[c](2). 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.

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. However, 18 NYCRR 357.2(a) states that the disclosures may only be made for purposes directly connected to the administration of public assistance.

Medicaid information is also confidential pursuant to SSL §§367-b and 369. SSL §367-b(4) directs you to SSL §136 for the procedure regarding disclosure.
Under these statutes it appears that records could be released under the authority of a valid release executed by the recipient where the disclosure is “necessary for the proper administration of public assistance programs.” SSL §367-b(4). 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. Medicaid records are also subject to HIPAA, and are treated more extensively in the HIPAA discussion, infra.

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-g 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.

18 NYCRR 357.3(f)(1) actually 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.

Applicable Law: SSL §136
SSL § 367-b
SSL § 369
CHILDREN’S DETENTION CENTER

In terms of overly convoluted confidentiality law and regulation, consider yourself lucky if your county does not have a children’s detention center.

County 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), county detention centers are governed by the regulations of the Division For Youth (now, of course, the Office of Children and Family Services). The “DFY” statutes and regulations have not yet been converted to “OCFS” statutes and regulations, so the “DFY” statutes and regulations still apply.

There is some dispute between our office and OCFS counsel about whether the OCFS regulations apply to the records of youth who are detained, but not placed with OCFS. Essentially, OCFS believes that as to non-OCFS placed detainees, that their records should have only the confidentiality protection provided by the type of record that is sought. That is, if medical records or substance abuse records are sought, then the only confidentiality law applied would be that found in the Public Health Law, the Mental Hygiene Law, and/or HIPAA. While we agree that these laws do apply, we also believe that the law and regulation applicable to children under the “jurisdiction” of OCFS should apply as well.

The issue here seems to be “what does the word ‘jurisdiction’ mean in the context of 9 NYCRR 180.12(c)(2)(v)?” OCFS view is that a child is not subject to OCFS “jurisdiction” until he is placed with OCFS. We have some reservation about that opinion. If that is the case, then for the purposes of children in detention, the regulation would only apply during those situations where a child is placed with OCFS. This would be either (a) when a child has just been placed by the Court with OCFS and is awaiting transfer to his OCFS placement or (b) where an OCFS placed child is now returned to detention for some reason (absconding, etc.) Both of these situations would be of very brief duration, and would seem, under OCFS’s reasoning, to require a detention facility to choose between two different sets of confidentiality rules, depending on whether or not the child has been placed with OCFS. Further, it seems to us that a probation department would not have as much use for the records of these children as they would for those who have been detained and are awaiting disposition. It is at that point that a probation department needs detention records in order to make a thorough report to the court. In fact, the
relevant sections of the Family Court Act and Executive Law apply only when the Court has ordered a probation department to prepare a report for disposition. We suggest that a more appropriate definition of OCFS “jurisdiction” would be one that encompasses all children who are in detention. If nothing else, this would provide one set of rules for confidentiality that would apply to all detained children. This interpretation would make Family Court Act §§351.1(1) and 351.1(2) and EL 501-c(2) have some actual meaning. To use the variety of individual confidentiality statutes for each type of record, and to use SSL 372 as the procedural device for a probation department to obtain detention records would be overly burdensome and cumbersome, and would only serve to delay dispositions.

Returning to the definition of “jurisdiction,” there does not seem to be any definition to be found in either the Executive Law or the sections of NYCRR that pertains to detention. However, OCFS detention facilities may only be established, operated and maintained in compliance with the regulations of OCFS (Exec. Law 503(3)). Each detention facility also requires certification from OCFS (Exec. Law 503(5)). These statutes apply to all detained children, whether or not they have been placed with OCFS. 9 NYCRR 180.1, which is the introduction to the detention regulations states that the purpose of the regulations is to provide uniform standards and procedures for operating detention facilities.

We are not comfortable with the OCFS suggestion that SSL 372 be the general governing confidentiality law for detained children. Although 9 NYCRR 180.12(c)(2)(v) does state that SSL 372 is the appropriate confidentiality statute, SSL 372 pertains to foster children. Our 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. Both we and OCFS came to the conclusion that detention is not foster care. We suggest 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.

Furthermore, when viewed in a historical context, SSL 372 should also not apply. 9 NYCRR 180.12(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. We suggest that 9 NYCRR 180.12(c)(2)(v) should have been amended to refer to Exec. Law 501-c.

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 civil practice law and rules. 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 children’s detention center 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. 9 NYCRR 180.12(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
One of the agencies that most frequently seek information from a children’s detention center 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 Department 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.

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

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, our local district has received requests from both other county agencies and private agencies to be allowed access to WMS terminals. We have denied these requests due to the broad scope of information contained in WMS, as well as the difficulty in limiting access to only the information that is actually needed by the outside agency. With the enactment of HIPAA, this limitation of access becomes even more important.

Applicable law: SSL §21
Applicable regs.: 18 NYCRR §655.1

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 permit communication, as long as appropriate procedures are in place.

Applicable Laws: SSL §61, SSL §64
Applicable regs: 18 NYCRR 300.7

**DISCLOSURES TO FEDERAL AND STATE AGENCIES**

A social services district might also receive requests for records from state or federal agencies. Some of these agencies have statutory or regulatory authority to issue subpoenas or otherwise obtain records. If you receive an agency subpoena or request for records, review the statutes and regulations pertinent to that agency.

For example, 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 subpoenae duces tecum issued by the agency do not require the approval of a court. See Executive Law §295 and 9 NYCRR 465.14.

**OTHER CONFIDENTIALITY STATUTES AND PRIVILEGES**

A department of social services staff is made up of professionals who are all subject to some form of confidentiality restrictions. There are some variations in the confidentiality rules that pertain to physicians, psychologists or 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, if the client reveals the contemplation of a crime or harmful act, the certified social worker is not required to treat the communication as confidential (CPLR 4508(a)(2)). 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, 446 NYS2d 801 (4th Dept., 1982), and *Rea v. Pardo*, 132 Ad2d 442, 522 NYS2d 393 (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, 476 NYS2d 806 (1984); People v. O’Connor, 85 AD2d 92, 447 NYS2d 553 (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, 87 NYS2d 903 (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.
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 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. Relevant rules and regulations are found in 10 NYCRR 63.

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 the federal government's latest foray into the area of confidentiality. A discussion of HIPAA is included further along in this handbook.

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, 815 NYS2d 282 (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 AD2d 1400, 898 NYS2d 742 (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.

**SUBPOENA REQUIREMENTS FOR DSS RECORDS**

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, 707 NYS2d 120 (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. We are 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, we do sometimes mention the LaBella case to the issuing attorney when we ask then to make a proper application for the subpoena.
STATE CRIMINAL COURT SUBPOENAS

Criminal Procedure Law 610.20(2) provides that a district attorney may issue a subpoena (which includes a subpoena duces tecum, per CPL 610.10[3]) subscribed by herself for a court or grand jury proceeding. On the other hand, Criminal Procedure Law 610.20(3) requires that an attorney for a defendant must comply with CPLR 2307 to have a subpoena duces tecum issued by a court for records of a department, bureau, or agency of the state or of a political subdivision thereof.

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
Confidentiality requirements under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) are now in effect. In Monroe County, we have determined that the HIPAA confidentiality requirements apply only to our Medicaid related social services programs. All of the Medicaid programs are subject to HIPAA, by regulation, including the application process. This includes applications for Medicaid which result in a denial, as well as those applications for multiple benefits, such as Medicaid, cash assistance or food stamps. As long as the application requests Medicaid benefits, it is HIPAA covered. Non-Medicaid programs may be touched by HIPAA, to the extent that they involve the acquisition of health information from sources (such as a hospital) that are themselves subject to HIPAA.

It is important to remember that New York State already has a very restrictive statutory and regulatory structure with regard to medical records. The following discussion attempts to illustrate HIPAA requirements in comparison to existing confidentiality requirements. For the practitioner, the process of preemption analysis promises much shedding of blood, sweat and tears. HIPAA will affect not only the release of records maintained by your client, but will also affect your efforts to obtain health care records.

**HIPAA and Preemption of State Law**

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 our 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.

Current New York State law (Social Services Law §§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 information pursuant to SSL §136 and 18 NYCRR 357.**

Under present New York law, Medicaid information may only be released where the disclosure is necessary for four activities:

1. establishing eligibility
2. determining the amount of medical assistance
3. providing services for recipients
4. fraud and abuse activities

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 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
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 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;
  - Accreditting 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.\(^1\)

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.

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**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.

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

\(^1\) The above section was copied word for word from the United States Department of Education website.
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).
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 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.

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.
Senior Deputy County Attorney
39 West Main Street, Room 307
Rochester, NY 14614
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

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.
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 abuse 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.


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)(5) to decline such a request.


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.

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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