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Disclosure of Child Welfare Records in Cases Where DSS is Not a Party

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Child welfare records maintained by a department of social services (DSS) contain sensitive information that parties in various proceedings are often interested in seeing. A complex web of state and federal law governs the disclosure of these records – more than I can cover here. For purposes of this post, it's sufficient to know that G.S. 108A-80 is a broadly applicable confidentiality statute that applies to DSS and covers client information generally. Absent limited statutory exceptions, G.S. 108A-80(a) prohibits disclosure of information related to individuals who apply for or receive public assistance or social services, including child welfare services.

Child welfare information is also subject to an additional set of confidentiality restrictions under Chapter 7B of the North Carolina General Statutes. For example, G.S. 7B-302 makes information that is obtained by DSS related to a juvenile's alleged abuse, neglect, or dependency (A/N/D) confidential. Similarly, G.S. 7B-2901(b) requires DSS to maintain confidential records of juveniles it has in its custody. Both statutes provide exceptions to the confidentiality requirement.

This post explores how the exceptions in G.S. 7B-302 and 7B-2901(b) apply when a party—either in a North Carolina civil case where DSS is not a party or in a criminal or delinquency matter—wants DSS child welfare records about someone *other* than themselves. Note that in this post I use the term 'DSS records' to refer to child welfare records maintained by DSS, including those from juvenile A/N/D proceedings.

Context matters

Different statutory and regulatory exceptions authorize disclosure of DSS records to certain individuals because they are a DSS client (meaning a recipient of DSS services) or because they are a party in an A/N/D court case. *See, e.g.*, G.S. 7B-302(a1)(2) and 7B-2901(b)(1) (juvenile, former juvenile, and juvenile's guardian ad litem); 7B-700 (discovery and information sharing among A/N/D proceeding parties); 10A N.C.A.C. 69 .0301 (DSS clients; *but see* 10A N.C.A.C. 69 .0303); 10A N.C.A.C. 70A .0113(a)(2) (child or child's attorney). But what happens when a party in a non-A/N/D proceeding does not qualify for access to DSS records under one of these exceptions (e.g., a criminal defendant who wants DSS records about the alleged victim)? The answer depends on what DSS information they are requesting, why they are seeking that information, and the type of court proceeding they are involved in.

Scenario #1: Civil cases where DSS is not a party

A man learns that his children's new stepfather was investigated by DSS for allegedly abusing and neglecting his own biological children. Learning this, the man files a motion in an existing Chapter 50 proceeding to regain custody of his children from his ex-wife. To prepare for court, he wants DSS records related to his children's stepfather and stepsiblings.

The man is not in the limited pool of individuals who have a right to access these records. He is not, for example, the recipient of DSS services or the subject of the records he is seeking. To obtain DSS records on another family, he will need to follow the procedures set out in G.S. 7B-302(a1)(3) and 7B-2901(b)(2), both of which require an order from the court presiding over the civil action (here, the Chapter 50 court). Because a court order is required, issuing a subpoena will be insufficient to allow DSS to disclose confidential child welfare records and will likely result in a motion to quash. Instead, the man will need to file a motion seeking an order for the disclosure of DSS records.

Various requirements and considerations apply before the North Carolina court presiding over the civil action can enter an order requiring DSS to produce or disclose its records.

- *Notice.* DSS must be provided with reasonable notice of the motion and an opportunity to be heard. G.S. 7B-302(a1)(3); 7B-2901(b)(2). Other parties in the matter must be given notice as well, unless an exception exists in the laws that govern the civil matter which allows for ex parte motions of this nature. Because no such exception exists in a Chapter 50 action, the man in our scenario would need to provide his ex-wife notice of his motion to compel

disclosure of DSS records about her new husband. Despite the records being about the children's stepfather and stepsiblings, there is no requirement that they (the subjects of DSS records) be given notice of the motion.

- *In camera review.* Neither governing statute requires a court in a civil matter to conduct an in camera review of DSS records before entering an order to disclose. G.S. 7B-302(a1)(3); 7B-2901(b)(2). DSS or a party in the civil action may request that the court conduct an in camera review; however, whether to conduct that review is in the court's discretion. In considering a request for a discretionary in camera review, the court may instruct the parties and DSS to narrow the scope of the review, tailoring it to the records that are central to the issues.
- *Determinations.* The court presiding over the civil action must find that the DSS information sought is (i) relevant and necessary to the proceeding the request is made in and (ii) unavailable from any other source. G.S. 7B-302(a1)(3); 7B-2901(b)(2). That last requirement is often overlooked in practice. DSS may possess a record (e.g., a bank statement) that parties want but that does not necessarily mean DSS is the appropriate source of that information.
- *Federally protected information.* Applicable federal laws pertaining to the release of certain protected health information (HIPAA), substance use disorder diagnosis or treatment information (42 C.F.R. Part 2), and educational records (FERPA) must be complied with before disclosure of that information can be compelled. (See **Chapter 14** of the A/N/D Manual for more information about those federal laws.) Remember, if DSS obtained the information from another source, those records likely do not fall into the statutory exceptions for disclosure of DSS records discussed in this post, which require that the records be otherwise unavailable from other sources.

Scenario #2: Criminal cases

A criminal defendant is accused of harming her infant. The defendant learns that the infant's babysitter was previously investigated by DSS for harming her own child in a similar way. Believing the babysitter may have harmed the defendant's infant, the defendant wants access to DSS records about the babysitter and the babysitter's child.

The defendant is not in the limited pool of individuals who have a right to access these records. She is not, for example, the recipient of DSS services or the subject of the records she is seeking. Thus, she will need to follow the procedures set out in G.S. 7B-302(a1)(4) and 7B-2901(b)(3), both of which require an order from the court presiding over the matter. Because a court order is required, issuing a subpoena will be insufficient to allow DSS to disclose confidential child welfare records and will likely result in a motion to quash. Instead, the defendant will need to file a motion to obtain an order for the disclosure of DSS records.

Certain requirements and considerations apply before a North Carolina court presiding over a criminal matter may order DSS to disclose its records. There are some similarities with those identified in the civil example in Scenario #1, but there are also important differences.

- *Notice.* The governing statutes do not require that DSS be given notice or an opportunity to be heard before a court in a criminal matter enters an order requiring disclosure of DSS records. G.S. 7B-302(a1)(4); 7B-2901(b)(3). There is no requirement that the subjects of DSS records—here, the babysitter and her children—be given notice of the motion simply because the records are about them. For a discussion of whether (i) a defendant may apply ex parte for an order compelling production of third-party records, and (ii) the prosecution has standing to object to such a motion, see the School of Government's NC Defender Manual, Vol. 1 (Pretrial), on **page 4-56**; see also C. Prosecutors' Resource Online at section **210.3.D.**
- *In camera review.* The court presiding over the criminal matter must conduct an in camera review of DSS records before ordering disclosure to a defendant who does not otherwise have a statutory right of access to those records. G.S. 7B-302(a1)(4); G.S. 7B-2901(b)(3). The statute makes no exception to this requirement, nor does it allow a court to deputize an attorney to conduct the review on the court's behalf.
- *Determinations.* A criminal defendant has due process rights, Sixth Amendment compulsory process rights, and the right to access exculpatory third-party records that are otherwise confidential – rights which have been recognized by the U.S. Supreme Court and North Carolina's appellate courts and apply to DSS records. See *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (holding that conducting an in camera review before releasing confidential records that are favorable and material protects a defendant's due process rights without impairing the state's interest in protecting child abuse information); see also, e.g., *State v. Martinez*, 212 N.C. App. 661 (2011). Thus,

before ordering disclosure, the court must first determine that the DSS records may contain evidence that is both favorable and material in the case against the defendant. If the court declines to either order DSS to produce the records for an in camera review or to disclose the records to the defendant, the defendant may move to have the records sealed and included in the court record to preserve the issue for a potential appeal. *State v. McGill*, 141 N.C. App. 98 (2000); *see also State v. Burr*, 341 N.C. 263 (1995) (appellate court was unable to review lower court's denial of motion to require production of third-party records where defendant failed to include documents in record on appeal). If the court further declines to order production of the files to make them part of the record on appeal, the defense may make an offer of proof as to their content.

- *Federally protected information.* Applicable federal laws pertaining to the release of certain protected health information (HIPAA), substance use disorder diagnosis or treatment information (42 C.F.R. Part 2), and educational records (FERPA) must be complied with before disclosure of that information can be compelled. (See **Chapter 14** of the A/N/D Manual for more information about those federal laws.)

Scenario #3: Delinquency proceedings

All juveniles, including a juvenile respondent, have a right to access DSS records when they are the subject of those records, unless disclosure of information in those records is prohibited by federal law. G.S. 7B-302(a1)(2); 7B-2901(b)(1). North Carolina appellate courts have not directly addressed the issue of a juvenile respondent's right to access confidential third-party records (including DSS records) that are about someone *other* than the juvenile. The governing statutes, however, expressly state that the same procedures detailed in Scenario #2 above regarding disclosure in a criminal matter apply in delinquency matters. G.S. 7B-302(a1)(4); 7B-2901(b)(3). Further, juveniles in these proceedings are afforded the same rights as adult offenders, except those excluded by statute (access to records not being one of the named exceptions). G.S. 7B-2405. Thus, a juvenile respondent would be entitled to DSS records following a court's in camera review and determination that the records may contain favorable and material evidence in the case involving the juvenile. Other considerations (e.g., notice) would be the same for a juvenile respondent as they are for a criminal defendant detailed in Scenario #2, above.

Closing thoughts

When it comes to disclosure of DSS records, the details matter, including who wants them and for what purpose. I previously published a bulletin on access to DSS and A/N/D court records by criminal defense attorneys whose clients are a party to an A/N/D matter, which you can find [here](#). Reach out to me any time at [**Heinle@sog.unc.edu**](mailto:Heinle@sog.unc.edu) to discuss the issues raised in this post or that bulletin.