

RESPONDING TO SUBPOENA FOR RECORDS

July 25, 2013 Summer Session CLE

Robin K. Martinek, Durham Assistant County Attorney

Outline

- Why are the records confidential
- What confidential records does DSS have
- Why should the records be protected
- What is the appropriate request for records
- What is the appropriate response to maintain protection and confidentiality
- Practice and procedures

What is this presentation not about



- Discovery on current cases shared between parties
- Requests from law enforcement or other departments of social services

Why are records confidential

- Constitutional Basis
- Statutory
- Administrative Rules

Constitutional Basis

- Constitutional Right of Privacy recognized as including an informational right of privacy by *Whalen v. Roe* 429 U.S. 589 (1977)
 - ▣ limits government agencies authority to obtain, use, and disclose personal information about individuals.
 - ▣ Informational privacy was not absolute but balanced against government interest.
- Right of informational privacy found to be in state Constitution by *Treants Enterprises Inc. v. Onslow County*, 83 N.C. App. 345, 350 S.E.2d 365 (1986)
 - ▣ finding that a lack of protections on unwarranted disclosure or limitations on use of records of personal matters would violate the privacy of persons under both federal and state constitutions

Statutory Requirements

- **42 USC § 5106a**, which covers Grants to States for Child Abuse and Neglect Prevention and Treatment Programs, has an eligibility requirement that the State has a state law outlining methods “to preserve the confidentiality of all records in order to protect the rights of the child and the child’s parents or guardians[.]”
- **§ 108A-80. Confidentiality of records.**
 - it shall be unlawful for any person to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of any list of names or other information concerning persons applying for or receiving public assistance or social services that may be directly or indirectly derived from the records, files or communications of the Department or the county boards of social services, or county departments of social services or acquired in the course of performing official duties except for the purposes directly connected with the administration of the programs of public assistance and social services in accordance with federal law, rules and regulations, and the rules of the Social Services Commission or the Department.

Statutory Requirements

- **N.C.G.S. §7B-302 (a1)**
 - All information received by the department of social services, including the identity of the reporter, shall be held in the strictest confidence by the department.
- **N.C.G.S. §7B-2901 (b)** requires Director of DSS to maintain confidentiality of all records related to children under protective custody or under placement by the court.
 - These records can only be examined by the juvenile's guardian ad litem or the juvenile or when a district or superior court civil judge orders the release of the confidential information, after the department has "reasonable notice" and "an opportunity to be heard." Further the court must find that the information is relevant, necessary, and unavailable from any other source.
 - The department may surrender **to the court** as necessary for an in camera review to make the required determinations. Does not affect HIPPA or other federal requirements, including those related to substance abuse treatment records or mental health treatment records.

Administrative Rules

10A NCAC 70A .0113

CONFIDENTIALITY OF COUNTY DSS PROTECTIVE SERVICES RECORDS

(a) The county director shall not allow anyone outside of the county department of social services other than state and federal agency personnel carrying out their lawful responsibilities for program audit and review to examine a protective services case record as described in Rule .0112 of this Subchapter unless:

- (1) the judge orders the county director to allow examination; or
- (2) the child or the child's attorney requests to examine his own record.

(b) The county director in carrying out his duties may share information and a summary of documentation from the case record without a court order with public or private agencies or individuals that are being utilized to provide or facilitate the provision of protective services to a child.

(c) The county director shall allow the District Attorney or his designee access to the case record, including any information or documentation therein, which he needs to carry out his mandated responsibilities that result from a report of confirmed abuse or from the county director's decision not to file a petition.

Administrative Rules

- 10A NCAC 71A .0802
 - ▣ In Adult Protective Service cases, identity of the complainant and collateral contacts shall be kept confidential unless court requires identities revealed
- 10A NCAC 71A .0907
 - ▣ In APS, DSS required to report to complainant result of investigation, but “in order to protect the client’s confidentiality, the notice shall not include specific findings of the evaluation”

What is Confidential

- Social Service Client Records
- Adoption Records
- Adult Protective Services
- Alcohol and Substance Abuse Treatment Records
- Social Security Numbers
- Child Protective Service Records
- Identity of Reporters
- Child Support Enforcement
- Child Welfare Services
- Criminal Record Checks
- Food and Nutrition Services
- Juvenile Proceedings
- Medicaid
- Medical Records and Health Information
- Mental Health Information
- Personnel Records
- Social Security
- Social Services and Public Assistance
- Student Records
- Tax Records
- Temporary Assistance for Needy Families

Why should the records be protected

- Statute requires it
- Liability of the Director for failing to uphold a mandatory duty
- Chilling effect on your client's ability to gather information

What is appropriate request for records

- Subpoena
- Requirements –
 - ▣ from an active or pending case
 - ▣ From Federal court or from In-state action. Subpoenas from another court from outside state are ineffective
 - ▣ Must name and be served on the Director of Department of Social Services. Director is the custodian of records. Service on or naming a social worker is not appropriate.
 - ▣ Must be served pursuant to Rule 45 (see next slide)
 - ▣ Must designate the records requested

Service under Rule 45

- By Sheriff deputy, coroner, or by any person not a party and who is 18 or older to the person subpoenaed
- Registered or certified mail, return receipt requested
- Telephone communication by Sheriff or Sheriff's designee with person subpoenaed (only applies for subpoena for attendance)
- Facsimile is **not** good service
- Service via Federal Express or United Parcel Service is **not** good service
- Dropping it off with the front desk is **not** good service

Appropriate Responses

- Objection to Subpoena (Rule 45(c)(3))
 - Must be served within 10 days after service or before time specified for compliance with written grounds for the objection
 - Grounds
 - Fails to allow reasonable time for compliance
 - Requires Disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection
 - Subjects a person to undue burden or expense
 - Otherwise unreasonable or oppressive
 - Procedurally defective
 - Places the burden on the subpoenaing party to obtain an order from the court after a proper hearing with proper notice to all involved

Appropriate Responses

- Motion to Quash (Rule 45(c)(4))
 - Must be served within 10 days after service or before time specified for compliance
 - Grounds
 - Fails to allow reasonable time for compliance
 - Requires Disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection
 - Subjects a person to undue burden or expense
 - Otherwise unreasonable or oppressive
 - Procedurally defective
 - Some counties require the \$20 filing fee for filing of the motion unless presented in court

Appropriate Responses

- Motion for a Protective Order (Rule 26(c)) – should be combined with the motion to quash
 - ▣ Given the highly confidential nature of the documents and the Director’s duty to maintain the records in the strictest confidence, reasonable to ask the court to limit what records are released and to restrict their dissemination.

- Rule 45 (c)(6) Court may order that the person producing records be reasonably compensated for the cost of producing the records in response to the subpoena.

Practice and Procedures

- Make sure that there are clear internal procedures for
 - ▣ Approved methods for acceptance of service (i.e. mail room can accept certified mail) and subsequent delivery to the Director
 - ▣ Delivery of a copy to legal
 - ▣ To determine when legal is involved and when social worker should have attorney in court

Considerations

How can we balance:

Our need to protect the confidential records held by DSS

vs.

Client's desire to get the Court valuable information regarding a custody case

vs.

The burden placed on DSS by family law attorneys instructing their client's to call in reports to DSS to use DSS as a unpaid investigator to gather potential dirt for a custody case

Acknowledgement

- John Saxon, formerly of the School of Government, for his excellent articles on confidentiality
- John's articles, as well as other resources on confidentiality, can be found at the School of Government website at <http://www.sog.unc.edu/node/508>