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Opinion No. 11-21

Confidentiality of Records and Testimony Regarding Child Sexual Abuse Investigations

QUESTION

Are files, interviews, documents, and reports of a Child Advocacy Center that are covered by the confidentiality provisions of Tenn. Code Ann. § 37-1-612 subject to being subpoenaed by anyone not specifically authorized by the statute?

OPINION

No; information covered by the confidentiality provisions of Tenn. Code Ann. § 37-1-612 may only be subpoenaed pursuant to the exceptions contained in Tenn. Code Ann. § 37-1-612 (b), (c), or (h), although a criminal defendant may be entitled to subpoena such records for in camera review for exculpatory evidence.

ANALYSIS

A Child Advocacy Center (CAC) provides a child-focused program in which representatives of many disciplines, including law enforcement, prosecution, child protection, medicine, and mental health, work together to conduct interviews and make team decisions about the investigation, treatment, management, and prosecution of child sexual abuse cases. Tennessee Chapter of Children's Advocacy Centers, http://www.tncac.org/ (last visited February 28, 2011). In order to be eligible to receive state funds, a CAC must, among other things, facilitate the use of a multidisciplinary team to assess victims of child abuse and their families and to determine the need for appropriate services. Tenn. Code Ann. § 9-4-213(a)(4). A CAC must also work with the multidisciplinary team to coordinate efficient and appropriate disposition of child abuse cases through the civil and criminal justice systems and provide needed services or referrals to such services. Tenn. Code Ann. § 9-4-213(a)(5) and (6). In some circumstances, a CAC's designee serves as a statutorily-required member of the child

investigative team. Tenn. Code Ann. § 37-1-607(a)(2). Accordingly, the CAC plays an important role in both the civil and criminal aspects of child abuse cases.[1]

CAC personnel regularly develop records and gain specific knowledge of the abuse suffered by children though interviews and information shared from other agencies. In recognition of the sensitive nature of this information and to protect the rights of child victims and their families, "all records concerning reports of child sexual abuse" and "information . . . directly or indirectly derived from the records" are confidential and may only be disclosed as authorized by statute. Tenn. Code Ann. § 37-1-612(a). Live testimony derived from the records, like the records themselves, may be provided only as authorized by statute.

The release of such confidential records and testimony is necessary in some circumstances. Therefore, access to the records is permitted to a specified list of individuals and entities that the Legislature has determined may have a need for such information. This list includes, but is not limited to, employees of the Department of Children's Services, an attorney or guardian ad litem acting on behalf of the child, law enforcement agencies investigating child sexual abuse, a grand jury, and members and staff of the Tennessee Claims Commission.[2] Tenn. Code Ann. § 37-1-612(b)(1), (2), (c)(1), (3), and (8). If one of the individuals or entities specifically excepted from the confidentiality provisions by Tenn. Code Ann. § 37-1-612 (b) or (c) subpoenas records of a CAC, the records should be produced.

Courts have insisted on strict adherence to the statutory exceptions. In *Canady v. Tolliver*, 1994 WL 312869 (Tenn. Ct. App. July 1, 1994), a minor victim of abuse sought records from the Department of Human Services to use in a civil lawsuit seeking damages for assault and battery and sexual abuse.[3] The Court of Appeals refused to order that the documents be disclosed, finding that the statute was "all-inclusive and the exceptions limited." *Canady*, 1994 WL 312869 at *4. Because a minor plaintiff in a civil lawsuit was not, at the time, among the exceptions, the court found that the records were not subject to disclosure. Since *Canady*, Tenn. Code Ann. § 37-1-612 has been expanded to include new exceptions, one of which would have allowed the child in *Canady* access to the records he requested. Tenn. Code Ann. § 37-1-612(c)(6). However, the rule from *Canady* remains intact – unless the requestor of the records falls into one of the enumerated exceptions, the records remain confidential and cannot be disclosed. Accordingly, if records or testimony are requested of the CAC by an individual or entity that is not an exception to the confidentiality statute, the CAC should resist disclosure of the requested information.

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[1] While your question was submitted on behalf of a specific CAC, the analysis pertains equally to each CAC, as well as other entities that have information regarding investigations of child sexual abuse. Tenn. Code Ann. § 37-1-612(a).

[2] Information identifying a reporter of harm must be redacted from the documents, as that information can only be released as described in Tenn. Code Ann. § 37-1-612(h).

[3] Responsibility for investigating child abuse was transferred to the newly created Department of Children's Services in 1996.

In addition to its enumerated specific exceptions, Tenn. Code Ann. § 37-1-612 allows the Department of Children's Services to disclose "any relevant information" to a court, administrative board, or hearing officer in order to protect children from child abuse or neglect or sexual abuse. Tenn. Code Ann. § 37-1-612(h). The Tennessee Court of Appeals has applied this statute to the Department "and those entities acting at its behest." *See Munke v. Munke*, 882 S.W.2d 803, 806 (Tenn. Ct. App. 1994). Therefore, if records are requested in order to protect a child, and the CAC is investigating in cooperation with the Department, it would be appropriate for the CAC to produce those records. Tenn. Code Ann. § 37-1-612(h); *Munke*, 882 S.W.2d at 806. If there is a disagreement as to what information should be disclosed, the tribunal may enter an order allowing access to any information it finds necessary for the proper disposition of the case. *Id.* In addition, the court, administrative board, or hearing officer may order that any information disclosed in such a proceeding be placed under seal. Tenn. Code Ann. § 37-1-612(h).

Once in the possession of the person or entity who may obtain records of a child sexual abuse investigation, such information remains confidential and should be used only for its specific purpose under the statute, for example, to seek civil damages against a perpetrator of abuse in the case of Tenn. Code Ann. § 37-1-612(c)(6), or for other purposes directly connected with the administration of the child abuse statutes, *i.e.*, protecting children from abuse. Tenn. Code Ann. §§ 37-1-402, 37-1-601. To that end, the information may be used and disclosed by the Department of Children's Services in civil dependency and neglect and termination of parental rights proceedings or by any court, administrative board, or hearing officer in order to protect a child from child abuse, neglect, or sexual abuse. Tenn. Code Ann. § 37-1-612(h).[4]

There are additional considerations when a defendant in a criminal case requests access to records of a child sexual abuse investigation.[5] The United States Supreme Court has held that a criminal defendant is entitled to have child protective services files reviewed by the trial court to determine whether the files contain exculpatory information. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). In *Ritchie*, a criminal defendant sought access to the state's confidential juvenile records relating to alleged abuse he committed against his children. *Ritchie*, 480 U.S. at 43. The Court analyzed the case under the Fourteenth Amendment, holding:

> Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances.

[4] Documents submitted to a juvenile court and live testimony presented in juvenile court proceedings should be adequately protected by existing confidentiality measures. *See* Tenn. R. Juv. P. 27(a)(1) (providing that the court may, in its discretion, exclude the public from any juvenile court proceeding); Tenn. Code Ann. § 37-1-153 (limiting access to juvenile court files to court personnel, the parties and their counsel, and agencies that have custody of a child). In proceedings in circuit or chancery courts, additional measures to protect the confidentiality of sensitive information, such as a protective order, may be necessary.

[5] Since the relevant law enforcement agencies and district attorney general are part of the child protective team, Tenn. Code Ann. § 37-1-607(a)(2), prosecutorial personnel will already have access to necessary information.

* * *

> Ritchie is entitled to have the [child protective services agency's] file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records maintained by [the child protective services agency] contain no such information, or if the nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction.

Ritchie, 480 U.S. at 57-58. The Court went on to explain that the defendant must first establish a basis for his claim that the file contains exculpatory information. *Ritchie*, 480 U.S. at 85, n.15. Thus, when a criminal defendant makes a showing that records of a child sexual abuse investigation contain potentially exculpatory evidence, the court may order the records to be submitted for *in camera* inspection by the judge to determine whether there is, in fact, relevant exculpatory information. *Ritchie*, 480 U.S. at 57-58. If exculpatory information exists in the files, the court may order that the relevant documents be disclosed to the defendant.

A number of Tennessee criminal cases have held that records of child sexual abuse investigations are confidential and, therefore, not discoverable by a defendant in a criminal case. *See, e.g., State v. Gibson*, 973 S.W.2d 231 (Tenn. Ct. App. 1998); *State v. Simpson*, 2007 WL 135609 (Tenn. Crim. App. Jan. 19, 2007); *State v. Hall*, 2007 WL 2917784 (Tenn. Crim. App. Oct. 9, 2007). However, none of these cases analyze the issue of potentially exculpatory evidence in light of *Pennsylvania v. Ritchie*; *Ritchie* supports this general proposition but effectively creates an exception to it. Tennessee cases applying the *Ritchie* decision have, in appropriate circumstances, determined that confidential records should have been reviewed by the trial court *in camera* for exculpatory evidence. *See, e.g., State v. Smith*, 2008 WL 5272480 (Tenn. Crim. App. Dec. 19, 2008). Accordingly, we believe that when a criminal defendant requests that the court review CAC records, and the defendant can make a showing that the records contain potentially exculpatory evidence, the records should be produced for *in camera* inspection.

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