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Opinion No. 13-93

Confidentiality of Department of Children's Services Complaints

QUESTIONS

1. Under what circumstances may a parent request and receive a complete copy or a copy of any portion of the files of the Department of Children's Services concerning a confidential complaint of child abuse relating to the parent's child?

2. Under what circumstances may information in the files of the Department of Children's Services be subpoenaed or otherwise subject to discovery in civil court proceedings?

3. Does the response to the previous questions change if the Department of Children's Services determines that the allegations of child abuse are unfounded?

4. Are the answers to the previous questions altered if there is reason to believe that the complaint was either a false report and/or that the individual making the report has a history due to mental illness or otherwise of making false reports of alleged child abuse?

OPINIONS

1. The parent or legal guardian of a child about whom a complaint of child abuse or child sexual abuse has been filed with the Department may, upon written request, obtain a copy of the Department's records concerning that child if the parent or legal guardian is "not the alleged perpetrator of or in any way responsible for the child abuse." Tenn. Code Ann. § 37-5-107(c)(7).

2. Records and information covered by the confidentiality provisions of Tenn. Code Ann. §§ 37-1-409, 37-1-612 and 37-5-107 may only be subpoenaed or otherwise subject to discovery in a state civil court proceeding pursuant to the statutory exceptions contained in Tenn. Code Ann. § 37-1-612. However, these statutory provisions may not necessarily apply in a federal civil rights action in federal court.

3. The statutes making the records of the Department confidential do not provide an exception allowing disclosure where the Department determines that the allegations of child abuse are unfounded. However, a person making a false report of child abuse or child sexual abuse may be subject to criminal prosecution under Tenn. Code Ann. § 37-1-413 for a Class E felony.

4. The statutes making the records of the Department confidential do not provide an exception allowing disclosure if there is reason to believe that the complaint was either a false report and/or that the individual making the report has a history due to mental illness or otherwise of making false reports of alleged child abuse.

ANALYSIS

1. The Tennessee General Assembly has established a comprehensive statutory process providing for the confidentiality of records and information held by the Department of Children's Services ("Department"). The provisions of Tenn. Code Ann. § 37-5-107(a) provide for broad confidentiality of such records and information, stating as follows:

> All applications, certificates, records, reports and all legal documents, petitions and records made or information received pursuant to this title that directly or indirectly identify a child or family receiving services from the department or that identify the person who made a report of harm pursuant to § 37-1-403 or § 37-1-605 shall be kept confidential and shall not be disclosed, except as provided by this section and §§ 37-1-131, 37-1-409, 37-1-612 and 49-6-3051.

Additionally, Tenn. Code Ann. §§ 37-1-409(a) and 37-1-612(a) specifically provide that all reports of alleged child abuse and child sexual abuse, as well as the identity of the reporter, shall remain confidential.[1]

The circumstances whereby the Department, in its discretion, may release the afore-mentioned information are set forth at Tenn. Code Ann. § 37-5-107(b), while subsection (c) sets forth the circumstances when the Department is required to release information. Subsection (c)(7) specifically provides that the Department shall release

> [u]pon written request, records to any person who is the subject of a report made to the department, or to the person's parent or legal guardian if the person is a minor and the parent or legal guardian is not the alleged perpetrator of or in any way responsible for the child abuse, child neglect or child sexual abuse against the child whose records are being requested. A person provided access to the records pursuant to this subdivision (c)(7) shall maintain the confidentiality of the records except to the extent necessary for proper supervision, care or treatment of the subject of the report.

Tenn. Code Ann. § 37-5-107(c)(7).

[1] The provisions of Tenn. Code Ann. §§ 37-1-131 and 49-6-3051, referred to in Tenn. Code Ann. § 37-5-107(a), address confidentiality issues regarding children who have been adjudicated delinquent and are not pertinent to this analysis.

Pursuant to this provision, the parent or legal guardian of the child about whom a complaint of alleged child abuse or alleged child sexual abuse has been filed with the Department may, upon written request, obtain a copy of the Department's records concerning that child, if the parent or legal guardian is "not the alleged perpetrator of or in any way responsible for the child abuse." This provision does not, however, permit the Department to disclose the identity of the person making the report of harm. Tenn. Code Ann. § 37-5-107(i). After receiving such records, the parent or legal guardian is required to keep the records confidential except to provide proper supervision, care, or treatment for the child. Tenn. Code Ann. § 37-5-107(c)(7).

2. As previously stated, the General Assembly has declared that all reports of alleged child abuse and child sexual abuse and the identity of the reporter be kept confidential. Tenn. Code Ann. §§ 37-1-409(a)(1) & 37-1-612(a). Additionally, "all records made or information received pursuant to this title that directly or indirectly identify a child or family receiving services" from the department, Tenn. Code Ann. § 37-5-107(a), as well as "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), (b).

The General Assembly has recognized that the release of such confidential records is necessary in some circumstances. Therefore, access to the records is permitted for a specified list of individuals and entities.[2] Specifically, this Office has previously opined that records and information regarding child sexual abuse investigations may be subpoenaed pursuant to the exceptions contained in Tenn. Code Ann. § 37-1-612(b), (c) or (h). *See* Tenn. Att'y Gen. Op. 11-21 (Mar. 11, 2011). Access to such records is also permitted to

> [a]n attorney or next friend who is authorized to act on behalf of the child, who is the subject of the records, for the purpose of recovering damages or other remedies authorized by law in a civil cause of action against the perpetrator or other person or persons who may be responsible for the actions of the perpetrator.

Tenn. Code Ann. § 37-1-612(c)(6).

In addition to these enumerated exceptions, Tenn. Code Ann. § 37-1-612(h) allows the Department 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. 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. *Id*.

Once in the possession of the person or entity authorized by statute to obtain records of a child abuse or child sexual abuse investigation, such records and information remain confidential and may only be used for the specific purposes identified in the statute. *See* Tenn. Code Ann. §§

[2] The Department is authorized by Tenn. Code Ann. §§ 37-1-409(c) and 37-5-107(a) to grant access to information concerning reports of child abuse to those persons specified in Tenn. Code Ann. § 37-1-612.

37-1-612(a) & (b). Information identifying a reporter of harm must be redacted from any records before they are disclosed, because that information can only be released as provided for in Tenn. Code Ann. §§ 37-1-409(a)(2) and 37-1-612(g). Tenn. Code Ann. § 37-1-409(a)(2) specifically provides that the identity of the persons reporting "shall be irrelevant to any civil proceeding and shall, therefore, not be subject to disclosure by order of any court."

These statutes governing the confidentiality of the Department's records may not necessarily apply in a federal civil rights action in federal court. See *Farley v. Farley*, 952 F. Supp. 1232 (M.D. Tenn. 1997). In *Farley*, the plaintiff filed a civil rights action under 42 U.S.C. § 1983 against the State and several individual defendants claiming that her children were removed from her care without a hearing or legal authority in violation of her constitutional rights. As such, Plaintiff sought access to the Department's files, as well as the ability to publish the contents of those files to third parties in furtherance of her fact-witness interviews. *Id*. at 1234. Thus, the issue in that case was to what extent a state law privilege applied in a federal civil rights action in federal court, *i.e.*, application of Fed. R. Evid. 501 to Tennessee's statute mandating the confidentiality of the Department's records. *Id*. at 1235.

The federal district court observed that there was no constitutional inhibition to the abrogation of privileges arising under state law when a matter is heard by a federal tribunal and that, in federal civil rights actions, most courts have concluded that state law must yield to the federal interest in full disclosure of all facts bearing upon the denial of federally guaranteed rights. *Id*. at 1235-36. However, the court noted that state privileges and the policies underlying them may not be ignored in applying Rule 501 to discovery disputes arising in federal question cases. *Id*. at 1236.

The court then found that the statutes mandating the confidentiality of the Department's records to clearly embody a compelling social policy:

> By the enactment of these statutes, the Tennessee General Assembly has asserted in no uncertain terms that the reporting, systematic examination and prevention of child abuse is of fundamental importance. The scope of these provisions is deliberately broad, prohibiting disclosure or use of any information for unauthorized purposes where directly or indirectly derived from DCS sources. Those who breach the confidentiality of abuse records face a criminal penalty.

952 F. Supp. at 1238 (citations omitted).

The federal district court ultimately concluded that these statutes ensuring only limited disclosure of child abuse files must yield to a supervening interest in their production and use in federal civil rights actions. In doing so, however, the court specifically stated that it had "no authority under state law to order production of DCS records and their dissemination in the discovery and trial phases of federal civil rights litigation. Rather, this authority comes from the broad discovery and admissibility mandates of federal law and the prioritization of federal privileges doctrine in federal question matters under Rule 501." *Id*. at 1242.

3 & 4. The statutes making the records of the Department confidential do not provide an exception allowing disclosure if the Department determines that the allegations of abuse are unfounded or if there is reason to believe that the complaint was either a false report and/or that the individual making the report has a history due to mental illness or otherwise making false reports of alleged child abuse. *See* Tenn. Code Ann. §§ 37-1-409(a)(1) and 37-1-612.

This Office has opined that, pursuant to the provisions of Tenn. Code Ann. §§ 37-1-409(a)(2) and 37-1-612(g), the District Attorney General, upon subpoena of the Tennessee Bureau of Investigation, may obtain the name of a person making a report of child abuse. *Id*. This Office also opined that the District Attorney General or the Tennessee Bureau of Investigation may use such information to conduct a criminal investigation to determine whether there has been a violation of Tenn. Code Ann. § 37-1-413 and may also disclose the name of the reporter obtained from the Department to a grand jury for investigation and/or indictment. *Id*. The release of the name of a reporter of child abuse or child sexual abuse as necessary for the investigation and/or prosecution of the false reporting of abuse under Tenn. Code Ann. § 37-1-413 is directly connected with the administration of Title 37, Chapter 1, Part 4, and therefore is permitted pursuant to Tenn. Code Ann. §§ 37-1-409(b) and 37-1-612(b).

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