How to Gain Access to DYFS Records when NOT in a DYFS Case

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Whenever an allegation of child abuse or neglect is made, the Division of Child Protection and Permanency (DCP&P)[2], formerly known as the Division of Youth and Family Services (DYFS), is required to initiate an investigation. N.J.A.C. 10:129-2.1(a). If the evidence gathered during the investigation leads to the conclusion that it is more likely than not that the accused person committed an act of child abuse or neglect, the Division will substantiate the allegation. N.J.A.C. 10:129-7.3(a). Conversely, if it appears from the evidence that it is NOT more likely than not either that (a) the accused person committed the offense, or (b) the offense alleged rises to the level of child abuse or neglect, as defined in N.J.S.A. 9:6-8.21(c), the allegation will be unfounded. Id.

The fact that the Division deems an allegation "unfounded" does not mean that the investigation "exonerated" the accused. The Division collects evidence. Even if the evidence collected is concerning, absent consent of the accused or a court Order, the Division has no authority to compel the accused to take action to remedy the problem. Thus, the Division's involvement in the family may end when an allegation is unfounded.

Similarly, the fact that the Division deems an allegation "substantiated" does not mean that the evidence presents an ***ongoing*** child protection risk. One act of abuse or neglect may be of sufficient concern to warrant the agency substantiating the allegation and listing the parent's name on the Child Abuse Central Registry, notwithstanding the fact that the Division views the incident as an isolated mishap, which is not likely to recur. Thus, the Division may substantiate the allegation and immediately close its case. This is common with lower level offenses, such as leaving a baby in the backseat of car to run into a grocery store, slapping an unruly child and inadvertently leaving a mark, or failing to provide adequate heat to a home though financially able to do so.

For parents addressing issues of custody or parenting time, the information gathered during the course of the agency investigation may prove very useful for a variety of purposes. This is true for both the accused parent and the non-offending parent. Valuable information in the Division's records may include, but not limited to:

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[2] On June 29, 2012, the Governor signed into law A-3101, which reorganizes the Department of Children and Families, which includes the renaming of the Division of Youth and Family Services (DYFS) as the Division of Child Protection and Permanency (DCP&P). L. 2012, c. 16, eff. June 29, 2012.

1. Identification of witnesses with information pertinent to the parents. N.J.A.C. 10:129-3.1(b)(2).

2. Identification of witnesses with information pertinent to the child. N.J.A.C. 10:129-3.1(b)(6).

3. Documentation of the investigator's personal observations of the child at or about the time of the alleged incident. N.J.A.C. 10:129-3.1(a).

4. Documentation of the accused parent's version of events (which may vary in whole or in pertinent part from the statements given in custody litigation). N.J.A.C. 10:129-3.1(b)(7).

5. Children's accounts of events investigated and of the home environment(s) of the parents, respectively. N.J.A.C. 10:129-3.1(a)& (b)(4).

Despite the significant value that this information may have for litigants involved in custody litigation, accessing the information when the Division has not filed a Court action is often quite daunting. The agency records are confidential and are released only pursuant to exceptions to confidentiality statute. Release of records is most easily obtained pursuant to a Court Order, though other statutory exceptions do exist and may be relied upon before an action is filed in Court that implicates the records. However, the Division is most likely to release the records without objection if a Court Order compels the disclosure.

DCP&P Records are Confidential by Statute in *most* – but not ALL – Instances

In general, Superior Court judges are well acquainted with the fact that DCP&P records are confidential per statute. *See,* N.J.S.A. 9:6-8.10a.

Specifically N.J.S.A. 9:6-8.10a ("Confidentiality statute") provides:

> All records of child abuse reports …, all information obtained by the Department of Children and Families in investigating such reports including reports received pursuant to … (C.9:6-8.40), and all reports of findings forwarded to the child abuse registry … **shall be kept confidential** and may be disclosed only under the circumstances expressly authorized under subsections b., c. , d., e., f. and g. herein.

Subsection (b) of the Confidentiality statute provides multiple exceptions to the confidentiality of Department records. The exception upon which a parent may rely in seeking DCP&P records will depend upon the extent of DCP&P's ongoing involvement with the family and whether or not there is ***pending*** litigation involving the child that may implicate the records. However, the first determination to be made is whether or not the records are, in fact, confidential.

When are DCP&P Records Confidential?

The Confidentiality statute applies to three broad categories of documents maintained in the ordinary course of business of the Division. Those categories include:

a. Child Abuse Reports;

b. All reports of Findings forwarded to the Child Abuse Central Registry; and

c. All Information obtained by DCF in investigating such reports.

Child Abuse reports include the information collected at the time someone calls into the agency (e.g., via 1-877-NJ-ABUSE) and makes an allegation of child abuse or neglect. This prong of the statute was designed to ensure that reporters of alleged child abuse are assured anonymity, a policy objective that may not be relevant to your case, depending upon whether or not the Reporter of abuse is the adverse party to custody litigation.

A second category of DCP&P records, the "Findings", are confidential, though these records are easily discoverable without seeking same from the agency. The "Finding" is provided in writing to the accused parent. It will be sent on a form letter that states that on a certain date, the Division received a referral that [name of child] has been the subject of abuse or neglect. The Division has completed its investigation and the allegation is either unfounded or substantiated.

If the determination is "unfounded", the letter will go on to note that child abuse reports are maintained by the agency for a period of three (3) years and then expunged. N.J.S.A. 9:6-8.40a. If the determination is "substantiated", the letter will advise the accused parent of his/her right to appeal and that the person's name has already been listed on the Child Abuse Central Registry maintained in accordance with N.J.S.A. 9:6-8.11. This letter documenting the "finding" provides no additional information, such as the basis for the Division's involvement, the information gleaned from the investigation, etc. It provides little information other than the outcome of the investigation and therefore, is of little value to custody litigation.

The final category of confidential information is the catchall provision – "all information obtained by the Division in investigating" the alleged abuse or neglect. This covers all information told to the Division at the time a call is placed into the central screening hotline, all information gathered by the investigators at the local office once a worker is assigned, any medical or mental health data obtained on forms presented by the Division to the child's providers seeking information about how they are doing, etc.

Interestingly, the statute is specific to information obtained regarding child abuse reports, but covers "all information" obtained in investigation ... This would include information about the parents. So, if the agency requests that a parent participate in some

service in order to address concerns the agency may have *after* it has conducted its investigation, those reports are not shielded with confidentiality. By way of example, if the Division receives a referral that a child was subjected to excessive corporal punishment, the agency investigates and deems that allegation unfounded, but later asks the parent to voluntarily participate in a parenting class to learn alternative forms of discipline, any documentation from the class instructor to the Division is *not* collected as a part of an investigation. Therefore, that information is not confidential.

Once a determination is made as to whether or not the Division records are confidential, the next query is whether or not an exception applies to render the information discoverable pursuant to an exception to the Confidentiality statute.

How to Access to Confidential DCP&P records prior to a Custody Action being filed

The confidentiality statute provides that the Division **shall** release its records upon written request to:

> ***A parent***, resource family parent or legal guardian ***when the information is needed in a department matter in which that parent***, resource family parent or legal guardian ***is directly involved***. The information may be released only to the extent necessary for the requesting parent, resource family parent or legal guardian to discuss services or the basis for the department's involvement or to develop, discuss, or implement a case plan for the child.

N.J.S.A. 9:6-8.10(a)(b)(19).

If the Division investigates and determines that the allegation of abuse or neglect is unfounded, and yet, still decides to open an administrative case and provide services to the family, the records generated from these services should be released to the parent. For instance, if the case plan is "family stabilization" by monitoring and improving a substance abuse problem, the parent arguably requires his or her substance abuse evaluation in order to discuss treatment options, comply with recommended treatment, or perhaps challenge the recommendations made. All of this information is required "to the extent necessary … to discuss services or the basis for the [agency's] involvement". N.J.S.A. 9:6-8.10(a)(b)(19).

There can be little argument that a parent is "directly involved" in a department matter, if the family signs a Safety and Protection Plan with the agency, contractually obligating oneself to comply with Division-recommended services. However, even voluntary compliance with requested services necessitates ongoing Division involvement, cannot be intelligently discussed with a parent if information collected by service providers of the Division is not freely shared with the parent being asked to submit themselves to state action by the Division's interference in family life. This is

particularly so, where the information being addressed in substance abuse or mental health issues.

Unfortunately, the Division often takes the position that it will not release this information, particularly psychological and psychiatric reports conducted on a parent, no matter the clear language in the confidentiality statute mandating its release. A Court Order may be required to obtain the records, which of course requires an action to be pending in Superior Court. Once an action is pending, a person seeking such information has several statutory provisions upon which to rely in support of an application to compel disclosure of the Division's records.

How to Access to Confidential DCP&P records during the pendency of a Custody Action

The confidentiality statute also mandates the Division to release otherwise confidential records to:

> ***A court*** or the Office of Administrative Law, ***upon its finding that access to such records may be necessary*** for determination of an issue before it, and ***such records may be disclosed by the court*** or the Office of Administrative Law ***in whole or in part to*** the law guardian, ***attorney, or other appropriate person*** upon a finding that such further disclosure is necessary for determination of an issue before the court or the Office of Administrative Law.
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> N.J.S.A. 9:6-8.10a(b)(6).

As is clear from the language of the statute, a Court need only find that the record ***may be necessary*** to determine an issue before the Court. Once a Superior Court judge has first reviewed the record and determined that DYFS records bear upon an issue before it can the records be disclosed *to the Court*. *See*, N.J.S.A. 9:6-8.10a(b)(6). However, such further release by the Court to counsel and the parties is permissible but not mandated. In fact, the confidentiality statute mandates that any individual or Court which receives confidential records "***shall keep the records and reports, or parts thereof, confidential and shall not disclose***" them. N.J.S.A. 9:6-8.10a(b)(6). So, unless the Court determines that the records should be disclosed to the parties and counsel, the Court may have the records but may choose not to release them.

For this reason, it is important to understand the policy behind confidentiality of the Division's records, so that a compelling argument can be made to allow release of the records where needed to address issues of concern before the Court. *See*, Division of Youth and Family Services v. N.S., 412 N.J.Super. 593 (App.Div.2010). Confidentiality of the Division's records was implemented to foster the "State's goals of maintaining the confidentiality of reporters of abuse and neglect, and of treatment records and reports regarding the victim". Id., citing In re Z.W., 408 N.J.Super. 535, 539 (App.Div.2009).

The primary concern was ***not*** shielding from disclosure to a parent that parent's own mental health records or psychological or substance abuse evaluations. This is significant, as parties often voluntarily submit to evaluation by the Division, but are denied access to their own psychological or substance abuse evaluations and treatment records, unless and until the agency chooses to use those evaluations against the parent when filing litigation. This practice countermands the dictates of the long established principle that civil litigants who submit to Independent Medical Evaluations (IME's) are entitled to their own evaluations *as a matter of course*, whether the evaluation is used in litigation or not. *See*, R. 4:19.

The extent of disclosure required when a professional conducts an independent medical evaluation was first addressed in a Law Division case of 1991. *See*, Koutsouflakis by Koutsouflakis v. Schirmer, 247 N.J.Super. 139, (Law.Div.1991). The Koutsouflakis Court held:

> An expert who conducts an examination pursuant to R. 4:19, but who is not expected to testify is, however, vis-a-vis the party he had examined, is in a special position which distinguishes him from other non-testifying experts. First, the party has been required to submit to the examination under compulsion of the rules. Second, the submission constitutes an invasion of his privacy. And third, he has a legitimate and compelling interest transcending the litigation in knowing what the results of the examination were. These are clearly the considerations resulting in the examined party's right to demand the report of the examination ...
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> Koutsouflakis, 247 N.J.Super. at 143.

This rationale for authorizing an examined party the right to demand the report from an IME has been adopted by the Appellate Division. *See*, Rincon v. Delapaz, 279 N.J.Super. 682 (App.Div.1995). The Rincon Court reiterated the principle that even absent a motion to compel the production of the report, the examined party has an absolute right to his/her medical information – no matter its source. Id. One could argue that this principle is never more resounding than when child protection or a child's best interest are implicated – whether raised by the agency or by a parent in custody litigation.

How to Maintain as Confidential DCP&P Records used in non-DCP&P Litigation

To allay any concerns that disclosure of DCP&P records may serve some injustice, the Court should be asked to enter a Protective Order in accordance with the Court Rules. This request should be made when requesting the agency records to be released **or** when the records are already in the possession of a party who would like the records considered in the course of a pending Custody or Matrimonial case.

When parties are involved in ongoing litigation commenced by the Division, those proceedings and all records generated therein are confidential, pursuant to R. 1:38-3(a) and (d)(12), which provides in pertinent part:

> The following court records are excluded from public access. Records required to be kept confidential by statute, rule or prior case law consistent with this Rule, unless ordered by a Court... Records relating to Division of Youth and Family Services proceedings held pursuant to R. 5:12.

Subsection (a) expressly provides that "(t)hese records remain confidential even when attached to a non-confidential document". Thus, a party may not simply append to a Family Part motion records obtained in a DCP&P proceeding, which are clearly exempted from disclosure pursuant to Court rule.

When seeking access to the DCP&P records for use in custody litigation, counsel should request access to the entire file and not merely the records that are likely to present the most significant information. For instance, if the Division obtained authorizations for information from mental health professionals involved with the family, any information obtained from any such professionals would likely be the subject of testimony – whether from the professional or from the Division employee who testifies to lay the foundation for admissibility of the Division's records at trial. Thus, the parties require full disclosure of information from all such mental health professionals – not for the purpose of having each person testify, but for impeachment purposes pursuant to N.J.R.E. 611(b).

Further, if any of the DCP&P records are offered into evidence, any and all other records may be admissible in accordance with N.J.R.E. 106 (the Completeness doctrine) if, in fairness, the judge should consider one document when hearing testimony or considering evidence with regard to another. A Division employee is not competent to testify as to impressions of mental health providers, as such information would constitute a complex diagnosis (particularly as relates to any causative affect upon the children), and thus, the professional must testify. Nowacki v. Community Medical Center, 279 N.J.Super. 276 (App.Div.1995). The ability to cross-examine such professional is essential and likely would be thwarted by a summary review of mental health information by an investigating worker. This further implicates the need for access to all of the records.

The forgoing information should be taken into consideration when presenting an application to a Superior Court judge for access to DCP&P records. If presently properly, an application seeking access to the DCP&P records should provide more than ample basis in the record to allow access to the DCP&P records for use in custody litigation, while preserving the confidentiality of the information.