

**FEDERAL AND STATE CONFIDENTIALITY STATUTES MOST COMMONLY
APPLICABLE TO RECORDS FOUND IN DHS FILES**

A. Introduction

Each record request must be reviewed to determine the nature of the record requested and the applicable federal and state confidentiality statutes that may apply to the record. This outline reflects the most common confidentiality statutes applicable to the records frequently found in DHS files. Individual files may contain records that are governed by other statutes. Attached is an additional outline on analyzing requests for DHS Child Welfare records.

B. Federal and State Statutes and Rules

1. Child Abuse Reports and Records

a. **Federal Law -- Child Abuse and Neglect Prevention and Treatment Act (CAPTA). 42 USC § 5101 – 5116(i).**

- Requires State to preserve the confidentiality of all records "in order to protect the rights of the child and the child's parents or guardians." 42 USC § 5106a(b)(2)(A)(vii).
- State must ensure that disclosure of information concerning child abuse or neglect of a specific person is made only to persons the State determines has a need to know the information directly related to the purposes of child abuse program. 42 USC § 5106a(b)(2)(A)(vii).
- Allows disclosure to government entity with need to know information to carry out duty to protect children. 42 USC §§ 5106a(b)(2)(A)(vii)(I-VI).
- Authorizes public disclosure of findings or information about a case of child abuse or neglect that resulted in a child fatality or near fatality. 42 USC §§ 5106a(b)(2)(A)(vii) & (x).

b. **Federal Regulations implementing CAPTA. 45 CFR § 1340.14(i).**

- Requires state have "statute that all records concerning reports and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense." 45 CFR § 1340.14(i)(1).
- List of persons or agencies that may be authorized to obtain records under state law. 45 CFR § 1340.14(i)(2)(i-xi).

c. **State Law -- Child Abuse Reporting Statute -- ORS 419B.035.**

- Excludes child abuse reports and records from the application of the Public Records law. ORS 419B.035(1).
- Requires disclosure to certain persons including physicians for the child, law enforcement, attorneys for the child and parent in the juvenile court proceeding, citizen review board, court appointed special advocate, Child Care Division for purpose of certifying, registering or otherwise regulating child care facilities. 419B.035 (1)(a) – (e).
- Permits disclosures based on certain findings including: 1) disclosure is in the best interests of the affected child AND necessary for the department to administer its child welfare service; or 2) disclosure is necessary to investigate, prevent or treat child abuse/neglect or to protect children from child abuse/neglect. ORS 419B.035(2).
- Requires that all records disclosed by DHS must remain confidential in the hands of the recipient subject to criminal penalty for unauthorized redisclosure. ORS 419B.035(6) & (7).

2. DHS Child Welfare Records

a. **State Law -- Confidentiality and disclosure of DHS records -- ORS 409.225.**

- DHS shall not disclose or use contents of any records, files, papers or communications concerning an individual child, family, or other recipient of DHS services for purposes other than those directly connected with the administration of child welfare laws or unless required or authorized by ORS 419A.255 or ORS 419B.035. ORS 409.225(1).
- Unless public records law exemption applies, requires disclosure of certain

records to certain persons in specified circumstances including the juvenile court and parents of children receiving services on a voluntary basis. ORS 409.225(2)(a).

- Unless public records law exemption applies, requires disclosure, if in the best interests of the child, to certain persons in specified circumstances, including other DHS employees, treatment providers, foster or adoptive parents and school officials. ORS 409.225(3)(a) & (b).
- Requires that all records disclosed must be kept confidential by the person to whom the records were disclosed and used only for the purpose for which disclosure was made. ORS 409.225(4)
- Requires DHS disclose information related to its activities & responsibilities in cases where child abuse has resulted in a fatality or near fatality or where an adult has been charged with a crime related to child abuse or neglect. ORS 409.225(6).

3. Juvenile court records

a. Juvenile court legal file -- ORS 419A.255(1).

- Legal file contains summons, petition, motions, other pleadings and other papers filed with the court, excluding reports and other material related to the child's history and prognosis.
- Not available for public inspection.
- Open to inspection by child, parent, guardian, court appointed special advocate, surrogate or intervenor under ORS 109.119(1) and their attorneys.
- Attorneys for listed persons may have copies of the record.

b. Juvenile court social file -- ORS 419A.255(2), (3) & (6).

- Reports and other materials related to the child's history or prognosis are privileged and, except at the request of the child or youth, may not be disclosed to anyone except the judge of the juvenile court, those acting under the judge's direction and to attorneys of record for the child or the child's parent or guardian, CASA, surrogate or intervenor under ORS 109.119(1). ORS 419A.255(2).
 - May disclose history and prognosis information to evaluate eligibility for special education, for presentence reports and in other juvenile court proceedings and appeals regarding the child. ORS 419A.255(3).
 - May disclose history and prognosis information if clear and present danger to another person or to society. ORS 419A.255 (6).
- c. Juvenile court status -- ORS 419A.255(5).
- May disclose the name of the youth, youth's date of birth, basis of juvenile court jurisdiction over youth and time and place of juvenile proceedings in delinquency action. May also disclose the delinquent act alleged in the petition, that portion of court order providing for legal disposition where jurisdiction is based on delinquency and the name and address of the youth's parents.
- d. Juvenile court record expunction -- ORS 419A.262(19), (23),(24), and (25).
- Upon entry of an expunction order, the contact that is the subject of the expunged order shall not be disclosed. DHS must respond that no record or reference to the contact exists. ORS 419A.262 (19).
 - Intentional violation of the confidentiality provisions of expunction statute is cause for dismissal for cause of a public employee and may result in criminal penalties. ORS 419A.262 (24) & (25).

4. Public Assistance – Related Records

- a. **Federal Law** -- Aid to Families with Dependent Children -- Foster Care Payments (Title IV-E of the Social Security Act). 42 USC § 671.
- State must provide safeguards that restrict the use or disclosure of information

concerning applicants or recipients to purposes directly connected with the administration of the program. 42 USC § 671(a)(8).

- May disclose information about known or suspected child abuse or neglect to appropriate authorities. 42 USC §§ 671(a)(9)(A) & (B).

b. **Federal Regulations** -- 45 CFR § 1355.21(a) and 1355.30 incorporating by references 45 CFR § 205.50.

- Requires the State to have a statute that imposes legal sanctions on the use or disclosure of information concerning applicants or recipients except for enumerated purposes directly connected with the administration of the program.
- Safeguards information such as names, addresses, social and economic conditions and medical information.

c. **State Law** -- ORS 418.130 & 418.990(1).

- No person shall, except for purposes directly connected with the administration of ADC, disclose or receive any information concerning persons applying for or receiving such aid. ORS 418.130(1).
- Subject to criminal penalties. ORS 418.990(1).

d. **State Law** -- ORS 411.320 & 411.990(1).

- For protection of applicant and recipients of public assistance, cannot disclose or use records for purposes other than the administration of public assistance laws. ORS 411.320.
- Subject to criminal penalties for violation. ORS 411.990(1)

5. Medical information

a. **Federal Law** -- Medicaid (Title XIX of the Social Security Act). 42 USC § 1396a(7).

- State must provide safeguards that restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the program.

- b. Federal Regulations implementing Medicaid. 42 CFR 431.301- 431.307.
 - State must have a statute that imposes legal sanctions and safeguards that restrict the use and disclosure of information. – 42 CFR 431.300.
 - Rules specify what constitutes purposes directly connected with the administration of the program. 42 CFR 431.301- 431.307.
- c. **Federal Law** -- Health Insurance Portability and Accountability Act (HIPAA). 42 USC §§ 1302 and 1320d.
 - Prohibits use or disclosure of protected health information (PHI), which includes information related to the past, present or future physical or mental condition of an individual that identifies the individual directly or indirectly, except in compliance with HIPAA or state law.
 - Preempts state law to the extent HIPAA is more protective than state law.
 - Permits use or disclosure of PHI with proper authorization, if required by law, pursuant to court order in response to proper subpoena.
- d. Federal Regulations implementing HIPAA -- 45 CFR Parts 160 & 164.
 - Extensive federal regulations describe requirements for authorization and subpoenas and other exceptions to restricted use and disclosure of PHI.
- e. **State Law** -- Physician-patient privilege. ORS 40.235.
- f. **State Law** -- Health care provider's authority to disclose information during child abuse investigation. ORS 419B.050.
 - With notice from either a law enforcement agency or DHS, a health care provider will not be civilly or criminally liable for disclosure of a child's medical records even without consent of the child or guardian. 419B.050(1).
 - Statute contains a list of persons and agencies qualifying as "health care providers" that would be authorized to permit DHS or law enforcement agency to inspect and copy medical records. 419B.050(2).

6. Substance abuse treatment records

a. **Federal Law** -- 42 USC § 290dd-2 (substance abuse education, prevention, treatment, rehabilitation or research records).

- Makes confidential records regarding identity, diagnosis, prognosis or treatment of patient except in enumerated circumstances.

b. **Federal Regulations** -- 42 CFR Part 2.

- Minor patient acting alone has legal capacity under applicable state law to apply and obtain alcohol or drug abuse treatment and any written consent for disclosure may be given only by the minor patient
- Minor patient where a state requires consent of a parent, guardian or other person for a minor to obtain alcohol or drug abuse treatment, any written consent for disclosure must be given by both the minor and his/her parent, guardian, or other person authorized to act on minor's behalf
- Fact relevant to reducing threat to life or physical well being of individual may be disclosed to parent, guardian or other person authorized to act on minor's behalf if the minor applicant lacks capacity due to extreme youth or mental or physical condition, or if situation poses threat which may be reduced by communicating facts to person of authority.

c. **State Law** -- ORS 430.399(5).

- Requires client consent for the release of treatment records.

7. Mental Health Treatment Records

a. **State Law** -- ORS 179.505

- Broad definition of "provider" and protected records. ORS 179.505(1)(b) & (c).
- Restricts disclosure of patient records without consent. ORS 179.505(2-17).

b. **Psychotherapist-patient privilege** ORS 40.230; **social worker privilege** ORS 40.250; **licensed marriage and family therapists privilege** ORS 40.262.

8. HIV Information
 - a. **State Law** -- ORS 433.045(3)
 - May not be disclosed without consent, regardless of how the information is obtained, even if it is received directly from the tested individual.

9. Education records
 - a. **Federal Law** -- Family Educational and Privacy Rights Act. 20 USC § 1232g.
 - Requires consent of parent, student or educational surrogate to permit the release of records except in enumerated circumstances.
 - b. Federal Regulations implementing FEPR. 34 CFR Part 99.
 - Describes circumstances where release of information is authorized and limits on redisclosure of information.
 - c. Individuals with Disabilities Education Act. 20 USC § 1417(c).
 - d. Federal Regulations implementing IDEA. 34 CFR § 300.500 et seq.
 - Confidentiality requirements generally.
 - e. **State Law** -- ORS 326.565, 326.575, 336.187.
 - Student records shall be confidential.

10. Criminal history
 - a. Federal Regulations implementing a Federal Law -- 28 CFR Part 20.
 - Restrictions on disclosure of federal and state criminal offender information records.
 - b. **State Law** -- ORS 181.548.
 - Confidentiality of state criminal record information. Any state rules-see OSP rules.

11. Social Security number -- Section 7 of the Privacy Act of 1974, 5 USC § 552a note 36.

12. Adoption records -- ORS 7.211, ORS 109.440.

13. Public records law -- ORS 192.410 to 192.505

a. Criminal Investigatory Material -- 192.501(3).

- This section of the statute conditionally exempts: "Investigatory information compiled for criminal law purposes. The record of an arrest or the report of a crime shall be disclosed unless and only for so long as there is a clear need to delay disclosure in the course of a specific investigation, including the need to protect the complaining party or the victim. Nothing in this subsection shall limit any right constitutionally guaranteed, or granted by statute, to disclosure or discovery in criminal cases. For purposes of this subsection, the record of an arrest or the report of a crime includes, but is not limited to:

(a) The arrested person's name, age, residence, employment, marital status and similar biographical information;

(b) The offense for which the arrested person is charged;

(c) The conditions of release pursuant to ORS 135.230 to 135.290;

(d) The identity of and biographical information concerning both complaining party and victim;

(e) The identity of the investigating and arresting agency and the length of the investigation;

(f) The circumstances of the arrest, including time, place, resistance, pursuit and weapons used; and

(g) Such information as may be necessary to enlist public assistance in apprehending fugitives from justice

b. Personnel Discipline Actions --192.501(12).

- This section of the statute conditionally exempts: "A personnel discipline action, or materials or documents supporting that action."

c. Internal Advisory Communications -- 192.502(1).

- This section of the statute exempts: "Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination

of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.”

d. Personal Privacy Exemption -- 192.502(2).

- This section of the statute exempts: “Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

e. Confidential Submissions -- 192.502(4).

- This section of the statute exempts: “Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.”

f. Federal Law Exemption -- 192.502(8).

- This section of the statute exempts: “Any public records or information the disclosure of which is prohibited by federal law or regulations.”

g. Other Oregon Statutes Establishing Specific Exemptions -- 192.502(9).

- This section of the statute exempts: “Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential or privileged under Oregon law.

h. Transferred Records -- 192.502(10).

- This section of the statute exempts: “Public records or information described in this section, furnished by the public body originally compiling, preparing or receiving them to any other public officer or public body in connection with performance of the duties of the recipient, if the considerations originally giving rise to the confidential or exempt nature of the public records or information remain applicable.”

C. Significant Caselaw

State v. Graville, 304 Or. 428, 746 P.2d 715 (1987) (Holding that the notes of the caseworker's conversations with the victim regarding the events to which they testified were subject to discovery in criminal proceeding. Also, *in camera* review by the trial judge of Children's Services Division files was required.)

State v. Warren, 304 Or. 424, 746 P.2d 711 (1988) (Holding that Children Services Division files were subject to discovery in criminal proceeding, with limitations, and the trial court should have conducted an *in camera* inspection of the files to determine whether any exculpatory evidence was contained therein.)

State ex rel Dugan v. Tiktin, 313 Or 607, 837 P2d 959 (1992) (Holding that SCF file contains information made confidential by many sources and requiring court to conduct *in camera* review before authorizing the disclosure of confidential records).

State ex rel Carlile v. Lewis, 310 Or 541, 800 P2d 786 (1990) (Holding that trial judge must conduct *in camera* review of SCF file containing confidential information that court cannot delegate review to defense counsel, who requested the file for discovery purposes.)

State v. Weaver, 139 Or App 207, 911 P2d 969 (1996), rev den 323 Or 483 (1996) (Holding that child service records are confidential by statute; therefore, the trial court must undertake *in camera* inspection of such files requested in discovery by criminal defense).

Kahn v. Oregon, 173 Ore. App. 127, 20 P.3d 837 (2001) (Applying ORCP 36 in civil proceeding, court held that SCF records, already in the possession of the plaintiff, were subject to discovery by respondent unless privileged. SCF records protected by ORS § 409.225 are privileged only if they are also records 'relating to a child's history and prognosis' within the meaning of ORS § 419A.255(2)).

State ex rel State Office for Services to Children and Families v. Curtis Williams, Cherise Williams and Dennise Williams, 168 Or. App. 538, 7 P.3d 655 (200) (Holding that to the extent that ORS §§ 419A.255 and 419B.035(1) imposed a duty on DHS to keep adoptive home studies confidential, the prohibition was against public disclosure for purposes other than those directly connected with the administration of child welfare laws, and statutory exceptions consistently allow disclosure to the children's attorney.)

State ex rel State Office for Services to Children and Families v. Mithcell, Mitchell and Boring, 182 Or. App. 402, 49 P.3d 838 (2002) (Holding that a balancing the interest of the CASA to have access to information about prospective adoptive parents against the privacy interests of adoptive families leads to the conclusion that the disclosure to a CASA of home studies that are not submitted to adoption committee is not justified by a CASA's statutory duties or role but that studies submitted to adoption committee may be disclosed to CASA.)

D. Public records orders

Brian Posewitz of Tonkin Torp, as counsel for East Oregonian Publishing Company, requested copy of recording of and/or transcription of three juvenile hearings. Citing ORS 419A.255 the request was denied because the statute makes any record of a proceeding involving a child or youth confidential, including a recording or transcript of the hearing. Also, the request was denied under the Oregon Constitution Article 1, §10. (3.5.03)

Noelle Crombie, of *The Oregonian*, requested “the personnel review report in the matter of Darlene Walsh-Buntrock and Colin Fitzpatrick, in its entirety.” Citing ORS 192.501(3) the request was denied because the material requested was subpoenaed by the District Attorney’s office in a criminal investigation. Under ORS 192.501(3) the reports will “remain confidential because disclosure likely would interfere with law enforcement proceedings.” Also, ORS 419B.035, in part, protects the confidentiality of information identifying child abuse reports, thus serving as a basis to deny the request, as well. (2.11.03)

Noelle Crombie, of *The Oregonian*, requested DHS disclose “the agency’s records concerning its care for and supervision of Miranda Gaddis and Ashley Pond and its records concerning all internal reviews, reports, and investigations which were conducted by or on behalf of the agency concerning the discharge of its responsibilities to Miranda and Ashley and which have not been previously been made public.” Citing ORS 192.501(3) the request was denied because the requested materials met the criminal investigatory exemption. Also, the public interest at the current time did not justify release of the records either. (12.18.02)

Steve Suo, of *The Oregonian*, requested that “selected pieces of information about people treated for drug and alcohol abuse by publicly funded facilities in Oregon” be made available. This request was denied through an application of federal law, 42 USC § 290dd-2 & 42 CFR § 2.4, which restricts DHS’s use and disclosure of patient identifying information. (1.16.03)

Leslie Zaitz, of *Keizertimes*, requested files concerning a child who had died as a result of an overdose. At the time of the child’s death she was a ward of the court and in DHS custody. In requesting these files Zaitz provided an Authorization for Release of Information signed by Green’s father. This request was denied based upon an analysis of ORS 419B.035 (Child Abuse Reports and Investigations), of ORS 419A.255, and 419A.255(1)(2). Also, the request was denied through an application of OAR 413-010-0040(1)(a)-(e) and OAR 413-010-0040(2). (6.28.96). This PRO predates ORS 409.225 and HIPAA.

E. Attorney General Opinion

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First question presented: Is the Governor entitled to inspect confidentiality abuse records maintained by the Children's Services Division pursuant to ORS 418.740? Yes, but only to the extent required for the Governor to determine that laws relating to child abuse are being faithfully executed, and only for that purpose. Second question presented: Is the Attorney General entitled to inspect such child abuse records in conjunction with defense of the Children's Services Division in a suit brought against the division arising out of its handling of a child abuse case? Yes, to the extent required by the legal action

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