Confidentiality and Its Exceptions

A Review of 41-3-205, MCA

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Introduction

At its May 2012 meeting, the Children, Families, Health, and Human Services Interim Committee directed staff to contact the Department of Public Health and Human Services, Child and Family Services Division (Department), regarding 41-3-205, MCA, which governs the disclosure of confidential information in child abuse and neglect cases, asking the Department to identify perceived constraints in the sharing of information and/or potential amendments to ease information sharing. The Department declined to identify constraints or make recommendations, citing the confidentiality/disclosure issue as a public policy determination that is better suited for the legislative process. To assist in the Committee's consideration of 41-3-205, this briefing paper provides an overview of the statute, including the disclosure process, constitutional considerations, and current proposed amendments.

Overview

Case records[1] of the Department, county attorney, and courts involving child abuse and neglect proceedings and all records concerning reports of child abuse and neglect must be kept confidential, except as specifically authorized by 41-3-205.

Disclosure Exceptions -- Process

The procedure governing the Department's response to requests for disclosure is set forth in administrative rule.[2] Requests for disclosure must be in writing. Upon receipt of a written request, the Department must respond to the request within 30 calendar days. If the Department is unable to respond within this timeframe, it must notify the requestor of the reason for the delay.

In responding to a request for information, the Department must determine if the requestor is one of the following entities authorized to receive information under 41-3-205(3):

- Local, state, federal, or tribal agencies, if authorized to investigate reports of child abuse and neglect;
- **Substitute care providers**, including licensed youth care facilities and child-placing agencies;
- **Health care providers** who are treating the family or child who is the subject of the report;

[1] Case records include case notes, correspondence, evaluations, videotapes, and interviews. (41-3-205, MCA) The availability of case records may also be affected by storage timeframes. Records for unfounded reports must be destroyed within 30 days of the determination that the report was unfounded. If a report is categorized as unsubstantiated, all records, except for medical records, must be destroyed within 30 days after the end of the 3-year period starting from the date the report was determined to be unsubstantiated unless there had been a previous or there is a subsequent substantiated report concerning the same person or an order has been issued under Title 41, chapter 3, based on the circumstances surrounding the initial allegations. (41-3-202, MCA)

[2] Title 37, chapter 47, subchapter 6, ARM.

- **Parent or guardian of a child** who is the subject of a report, *without disclosing the reporter's identity*;
- **Child** who is named in the records and allegedly abused or neglected (or child's guardian, CASA, guardian ad litem, or attorney);
- **State protection and advocacy program** (i.e., Disability Rights Montana);
- **Prospective foster or adoptive parents**;
- **Person who is the subject of a report** and his or her attorney, *without disclosing the reporter's identity*;
- **Probation or parole agency** that is responsible for the supervision of an alleged perpetrator of child abuse or neglect;
- **Research or evaluation project** engaged in bona fide research and authorized by the Department to conduct the research;
- Members of an **interdisciplinary child protective team** (41-3-108) or family group decisionmaking meeting;
- **Coroner/medical examiner** if determining the cause of death of a child;
- **Child fatality review team**;
- **Department or agency investigating an applicant** for a day care, child-placing agency, or youth care facility;
- **Background checks** on an employee or volunteer who may have unsupervised contact with children;
- **Media, member of Congress, or a state legislator** *if the disclosure is limited to confirmation of factual information regarding how the case was handled and if disclosure does not violate the privacy rights of the child or child's parents (determined by Department)*;
- **Department employee or other agency employee** for the administration of programs (i.e., SNAP, Medicaid) that will benefit the child;
- **Indian tribes and relatives** if required under the federal Indian Child Welfare Act;
- **Youth probation officer** who is working with the child;
- **County attorney, law enforcement, or Department attorney** if necessary for the investigation, defense, or prosecution of a child abuse and neglect case[3];
- **Foster care review committee** (41-3-115);
- **School employee** participating in an interview of a child;
- Member of a **county interdisciplinary child information team** (52-2-211);
- Member of a **local interagency staffing group** (52-2-203);
- Member of a **youth placement committee** (41-5-121); or
- **Principal of a school or other employee** of a school district authorized by the school district trustees to receive information.

If the requestor is not an entity listed in 41-3-205(3), the Department must notify the requestor in writing that the information cannot be disclosed without a court order. If the requestor is an entity authorized by 41-3-205(3) to receive information, the Department may decline to disclose information if disclosure is detrimental to the child or harmful to any person named in the records or if disclosure is prohibited by the federal Health Insurance Portability

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3 The Law and Justice Interim Committee proposes to amend 41-3-205(3)(t) to provide: "an attorney who is hired by or represents the department if disclosure is necessary for the investigation, defense, or prosecution of a case involving child abuse or neglect".

and Accountability Act,[4] Government Health Care Information Act,[5] or the Montana Criminal Justice Information Act.[6] In addition, the federal Child Abuse Prevention and Treatment Act contains an eligibility requirement that states receiving federal grants must preserve the confidentiality of all records, including ensuring that reports are only available to certain entities who are authorized pursuant to a legitimate state purpose.[7] If the Department denies a request, it must provide its reasons in writing. Information that is released to an entity pursuant to 41-3-205(3) must remain confidential -- the requesting entity cannot, without a court order, disseminate the confidential information to the public.

The Balancing Test: Right to Know v. Right to Privacy

Disclosure versus confidentiality under 41-3-205 involves balancing the right to know with the right to privacy guaranteed by the Montana Constitution:

> **Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.[8]
>
> **Right of privacy.** The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.[9]

Case records are exempt from the public's right to know only when the demand of individual privacy clearly exceeds the merits of public disclosure. In enacting 41-3-205, the Legislature "identified the sensitive and private nature of documents relating to child abuse and neglect and classified them as confidential", essentially tipping the balance in privacy's favor.[10]

Litigants have challenged the constitutionality of this balance. Most recently in 2009, Disability Rights Montana (an authorized entity under 41-3-205(3)) challenged the constitutionality of 41-3-205, arguing that it violated the public's right to know by placing an overly broad presumption of confidentiality on case records. Disability Rights Montana argued that the requirement that an entity authorized to receive information under 41-3-205(3) keep the information confidential once the information was in the entity's possession was unconstitutional. The Montana Supreme Court upheld the constitutionality of 41-3-205 in its totality, noting that confidential reports prepared by the Department present unique factual scenarios that require a careful balancing of the right to know and right to privacy and that the statute provides an adequate mechanism for balancing these constitutional rights.

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[4] 42 U.S.C. 1320d, et seq.

[5] Title 50, chapter 16, part 6, MCA.

[6] Title 44, chapter 5, MCA.

[7] 42 U.S.C. 5106a.

[8] Art. II, sec. 9, Mont. Const.

[9] Art. II, sec. 10, Mont. Const.

[10] Disability Rights Mont. v. St., 2009 MT 100, ¶ 10, 350 Mont. 101, 207 P.3d 1092.

Facilitating Disclosure -- Law and Justice Interim Committee (LJIC) Proposed Amendments

The LJIC has approved a bill draft to amend 41-3-205. The amendments seek to do two things:

First, upon written request, the Department is required to disclose -- without considering detriment to the child or harm to another person -- the records described in (3) to the attorney general or county attorney or law enforcement in the county in which the alleged abuse or neglect occurred.

Second, the Department, on its own accord, is required to release the records described in (3) to any of the above, as well as to a county interdisciplinary child information team,[11] upon receipt of a report indicating that any of the following has occurred: (1) death of a child; (2) sexual offense; (3) exposure of the child to an actual violent offense; or (4) exposure of the child to circumstances constituting the criminal manufacture or distribution of dangerous drugs.

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[11] See 52-2-211, MCA.