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September 23, 2005

Beth L. Ashcroft, Director
Office of Program Evaluation and Government Accountability
82 State House Station
Augusta, ME 04333-0082

Re: Request for Opinion Regarding Access to Privileged and Confidential DHHS Child Protective Services Files by OPEGA

Dear Ms. Ashcroft:

By letter dated June 15, 2005, you requested an opinion "on whether or not OPEGA is authorized to access privileged and confidential files and records maintained by DHHS related to child protective services." Access to these records is requested by the Office of Program Evaluation and Governmental Accountability ("OPEGA") for purposes of conducting "reviews of activities related to child protective services provided by the State."

Because the response to your question is governed in significant part by the interpretation of federal statutes and regulations concerning confidentiality requirements that states must meet in order to qualify for federal funding of child protection and foster care activities, we forwarded your question to the Administration of Children and Families ("ACF") in the federal Department of Health and Human Services in June. This opinion has been ready to release, but for the response of ACF, for more than two months. The response to regular status inquiries of ACF by our Office has led us to believe that an answer would soon be forthcoming; however, the response to our most recent inquiry was that several more weeks would be required. In light of the fact that you are at a point in your review where access to documents held by Maine's Department of Health and Human Services ("DHHS") is needed, I have decided to issue this opinion without the input of ACF. To the extent that the ACF response supplements or conflicts in any way with this opinion, those issues can be addressed once that response is received.

For the reasons discussed in detail below, we believe that federal and state law confidentiality requirements specific to child protection records contain an exception that permits the Director and staff of OPEGA to access these records provided that they are maintained in confidence in a manner consistent with the OPEGA statute. To the extent that there are records

in the particular files that you ultimately select for review that are subject to other federal law confidentiality requirements, additional federal laws may need to be reviewed to determine whether they contain a comparable exception.[1]

The OPEGA Statute

OPEGA is established and governed by Title 3, M.R.S.A., §§ 991-997 (Supp. 2004) ("the OPEGA statute"). OPEGA operates under the oversight of the Governmental Oversight Committee ("the Committee"), a joint legislative committee established by Joint Rule 371 of the Maine Legislature. Under § 991, OPEGA is authorized to conduct program evaluations of agencies and programs of state government, and, when directed by the Committee, to evaluate various local governmental units.[2] OPEGA is also charged with ensuring that public funds provided to local governmental units are expended in accordance with the purposes for which they were appropriated, allocated, or contracted, and, when authorized by the Committee, to examine any state contractor financed in whole or in part by public funds as well as any expenditure of public funds by any public official or employee.

The OPEGA statute contains a number of provisions that address access to records, with different standards applicable to the Committee, as distinguished from those applicable to the OPEGA staff. Title 3, M.R.S.A., § 994(11) provides that information available to the Committee is governed by Title 3, M.R.S.A., Chapter 21, which addresses legislative investigative committees, and by the Freedom of Access Law ("FOAL"), Title 1, M.R.S.A., Chapter 13 (1989 & Supp. 2004). As a result, records that are confidential under the FOAL are not available to the Committee.

In contrast, state agencies and other entities subject to program evaluation are required to give the OPEGA staff access to information that is privileged or confidential as defined by the FOAL, pursuant to 3 M.R.S.A. § 997(4). Privileged or confidential information obtained by the staff "is privileged or confidential to the same extent under law that that information would be privileged or confidential in the possession of the state agency or other entity providing the information." Further, "Privileged or confidential information obtained by the office during the course of a program evaluation may be disclosed only as provided by law and with the agreement of the state agency or other entity subject to the program evaluation that provided the information." § 997(4)(B).

The OPEGA statute also establishes procedures for obtaining and handling records that are designed to protect their confidential status. Before an evaluation begins, the staff is to

[1] The applicability of other federal confidentiality statutes will depend on the exact nature of the records you seek to review in your evaluation as well as the terms of the statute at issue. It will also depend to a material degree on the precise nature of the information requested. For example, in the area of medical services provided by the State through its various programs, individually identified information is subject to far greater confidentiality requirements than is information that does not contain patient or client names. Since the nature of the documents you seek is identified in your letter simply as the general category of child protection records held by DHHS, we will address the specific confidentiality requirements applicable to those records.

[2] This includes "local and county governments, quasi-municipal governments, special districts, utility districts, regional development agencies or any municipal or nonprofit corporation." § 991.

"furnish a written statement of its determination that it is necessary for the office[3] to access such records and consult with representatives of the state agency or other entity to discuss methods of identifying and protecting privileged or confidential information in those records." § 997(4)(A). If the staff access privileged or confidential information, they are required to comply with the standards or procedures for handling that information that have been established by the agency or entity holding the records, and must comply with those procedures if they incorporate excerpts from the information in their working papers. § 997(4)(C). Working papers, defined broadly by § 992(7) to include everything that is received by OPEGA, are themselves made confidential and may not be disclosed to any person other than the agency that supplied them. § 997(5).

In effect, the OPEGA statute creates an exception to state law confidentiality and privilege requirements by giving the staff the authority to review confidential or privileged information that is held by an agency or entity to the extent necessary to conduct a program evaluation. However, since state statutes cannot amend federal laws, the determination of whether a federal confidentiality statute might preclude access by OPEGA requires a review of its terms. In the case of child protection services provided by the State, two separate federal statutes are relevant. A review of the pertinent provisions of those statutes is helpful to our analysis.

Relevant Federal Statutes and Regulations and the Maine Implementing Statute

Maine receives federal grant funding for its child protection programs from two primary sources. First, under Title IV (Parts A-E) of the Social Security Act, 42 U.S.C. §§ 620 *et seq.*, grants are available for child welfare services such as foster care and adoption assistance, as well as family preservation and support services. Second, under Title 42 U.S.C. § 5106a funds are available for services such as intake, assessment, screening, investigations of abuse and neglect reports, case management, training, and technology, among others. To be eligible for these grants, the State must submit a plan that explains how the funds will be used. Each of these statutes contains numerous requirements that participating states must satisfy in order to receive federal funds, and each contains provisions governing confidentiality of records.

The confidentiality provisions of 42 U.S.C. § 671(a)(8) governing the state plan for foster care and adoption assistance require that the plan restrict the disclosure of information to specific identified purposes, as follows:

> a. Requisite features of State plan. In order for a State to be eligible for payments under this part [42 U.S.C. §§ 670 et seq.], it shall have a plan approved by the Secretary which—
>
> ....
>
> (8) **provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with** (A) the administration of the plan of the State approved under this part [42 USCS §§ 670 et seq.], the plan or program of the State under part A,

[3] "Office" is defined under § 992(3) to mean the OPEGA office.

B, or D of this title [42 USCS §§ 601 et seq., 620 et seq., 651 et seq.] or under title I, V, X, XIV, XVI [42 USCS §§ 301 et seq., 701 et seq., 1201 et seq., 1351 et seq., 1381 et seq.] (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX [42 USCS §§ 1396 et seq., 1397 et seq.], or the supplemental security income program established by title XVI [42 USCS §§ 1381 et seq.], (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, **(D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity**, and (E) reporting and providing information pursuant to paragraph (9) to appropriate authorities with respect to known or suspected child abuse or neglect; **and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to any activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient**; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely.

42 U.S.C. § 671(a)(8) (emphasis added).

Additional requirements applicable to the state's plan appear in 42 U.S.C. § 5106a(b)(2)(A)(viii), as follows:

(2) Coordination. A State plan submitted under paragraph (1) shall, to the maximum extent practicable, be coordinated with the State plan under part B of title IV of the Social Security Act [42 USCS §§ 620 et seq.] relating to child welfare services and family preservation and family support services, and shall contain an outline of the activities that the State intends to carry out using amounts received under the grant to achieve the purposes of this title [42 USCS §§ 5101 et seq.], including—

(A) an assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program, relating to child abuse and neglect that includes--

....

(viii) methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians, including requirements ensuring that reports and records made and maintained pursuant to the purposes of this Act [42 USCS §§ 5101 et seq.] shall only be made available to--

(I) individuals who are the subject of the report;

(II) Federal, State, or local government entities, or any agent of such entities, as described in clause (ix);

(III) child abuse citizen review panels;

(IV) child fatality review panels;

(V) a grand jury or court, upon a finding that information in the record is necessary for the determination of an issue before the court or grand jury; and

(VI) other entities or classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate State purpose...

42 U.S.C. § 5106a(b)(2)(A)(viii).

The terms of § 5106a are further detailed by rules found in 42 CFR § 1340.14(i).

(i) Confidentiality.

(1) The State must provide by statute that all records concerning reports and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense.

(2) If a State chooses to, it may authorize by statute disclosure to any or all of the following persons and agencies, under limitations and procedures the State determines:

(i) The agency (agencies) or organizations (including its designated multidisciplinary case consultation team) legally mandated by any Federal or State law to receive and investigate reports of known and suspected child abuse and neglect;

(ii) A court, under terms identified in State statute;

(iii) A grand jury;

(iv) A properly constituted authority (including its designated multidisciplinary case consultation team) investigating a report of known or suspected child abuse or neglect or providing services to a child or family which is the subject of a report;

(v) A physician who has before him or her a child whom the physician reasonably suspects may be abused or neglected;

(vi) A person legally authorized to place a child in protective custody when the person has before him or her a child whom he or she reasonably suspects may be abused or neglected and the person requires the information in the report or record in order to determine whether to place the child in protective custody;

(vii) An agency authorized by a properly constituted authority to diagnose, care for, treat, or supervise a child who is the subject of a report or record of child abuse or neglect;

(viii) A person about whom a report has been made, with protection for the identity of any person reporting known or suspected child abuse or neglect and any other person where the person or agency making the information available finds that disclosure of the information would be likely to endanger the life or safety of such person;

(ix) A child named in the report or record alleged to have been abused or neglected or (as his/her representative) his/her guardian or guardian ad litem;

(x) An appropriate State or local official responsible for administration of the child protective service or for oversight of the enabling or appropriating legislation, carrying out his or her official functions; and

(xi) A person, agency, or organization engaged in a bonafide research or evaluation project, but without information identifying individuals named in a report or record, unless having that information open for review is essential to the research or evaluation, the appropriate State official gives prior written approval, and the child, through his/her representative as cited in paragraph (i) of this section, gives permission to release the information.

42 CFR § 1340.14(i).

In Maine, 22 M.R.S.A. §§ 4007, 4008 and 4008-A (2004 & Supp. 2004) have been enacted in fulfillment of the requirement imposed by 45 CFR § 1340.14(i)(1) that each state must provide by statute that all records concerning child abuse and neglect are confidential, and that their unauthorized disclosure is a criminal offense. (Copies of these statutes are attached.) Consistent with the terms of 42 U.S.C. § 671(a)(8)(D), Maine's § 4008(3)(D) permits confidential records to be provided, under appropriate limitations and procedures, for an audit or similar activity conducted in connection with the administration of the plan or program, and reads as follows:

3. Mandatory disclosure of records. The department shall disclose relevant information in the records to the following persons:

....

D. An appropriate state executive or legislative official with responsibility for child protection services, provided that no personally identifying information may be made available unless necessary to that official's functions...

22 M.R.S.A. § 4008(3)(D).

Application of State and Federal Law to the OPEGA Evaluation

We have found no cases construing the federal statutory confidentiality provisions outlined above. Maine's Law Court has recognized that these federal statutes are relevant in construing Maine child protection confidentiality statutes. *In Re Bailey M.*, 2002 ME 12, ¶ 17 (2002).

Of the two statutes, 42 U.S.C. § 5106a contains more liberal provisions for sharing information with government officials with program oversight responsibilities than does 42 U.S.C. § 671. However, the program evaluation function of OPEGA can reasonably be read to fit within the audit exceptions in both federal statutes, as well as the Maine statute.

It is important to note that this analysis relates to federal law confidentiality requirements that relate specifically to child protection records. Other federal confidentiality statutes that may apply to portions of the child protection files you seek to review may not contain exceptions sufficient to afford OPEGA access. For example, 42 U.S.C. § 1396a(a)(7) provides that state Medicaid agencies may only use or disclose individually identifiable health information for "purposes directly related to state plan administration." Federal Medicaid regulations interpret that phrase to mean information necessary to (1) establish eligibility, (2) determine the nature and amount of medical assistance, (3) provide services for recipients, or (4) conduct or assist in conducting an investigation, prosecution, or civil or criminal proceeding related to the Medicaid plan. 42 CFR § 431.302. Since the program evaluation OPEGA is embarking on does not concern a Medicaid program, there may be a question as to whether it is "related to the Medicaid plan" within the meaning of the regulations or is conducted for a purpose "directly related to state plan administration" within the meaning of the federal statute. Similar issues arise with respect to substance abuse treatment records, which are made confidential by two separate federal statutes and accompanying regulations. *See* 42 U.S.C. §§ 290dd-2 and 290ee-3, and 42 C.F.R. § 2.53. Again, the central question is determining whether an exception for audits applies to one undertaken outside the area of substance abuse services.

Until OPEGA has identified the files to be reviewed, it will not be possible to determine whether such other confidentiality statutes apply to the documents. Even if such documents are part of the files you seek to review, those particular documents may not be necessary for your purposes. As you are aware, the OPEGA statute, in § 997(4), establishes procedures whereby these issues can be addressed.

In summary, we believe that federal and state law confidentiality requirements specific to child protection records contain an exception that permits the Director and staff of OPEGA to access child protection records provided they are maintained in confidence in a manner consistent with the OPEGA statute.

Sincerely,

G. Steven Rowe
Attorney General

GSR/elf