

VOLUME NO. 41

OPINION NO. 49

CHILD ABUSE - Confidentiality of records;
PRIVACY - Confidentiality of records kept in connection
with abused and neglected children;
SOCIAL AND REHABILITATION SERVICES, DEPARTMENT OF -
Confidentiality of records kept in connection with
abused and neglected children;
MONTANA CODE ANNOTATED - Section 41-3-205.

HELD: Absent a court order, section 41-3-205, MCA,
prohibits the Department of Social and
Rehabilitation Services from disclosing case
records and reports of child abuse and neglect
to: (1) the natural parents or parent, or
other person having legal custody of a child
who is the subject of a dependency and neglect
action filed under section 41-3-401, MCA;
(2) health care professionals who are treating
a child suspected of being abused or
neglected; (3) the noncustodial parent of a
child who has been removed from the custodial
parent following an incident of abuse or

neglect; and (4) the natural parents or parent, or other person having legal custody of a child who has been abused or neglected while in the care of foster parents.

27 February 1986

David M. Lewis, Director
Department of Social and
Rehabilitation Services
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Dear Mr. Lewis:

You have asked my opinion on the following questions:

1. Does section 41-3-205, MCA, prohibit the Department of Social and Rehabilitation Services from disclosing information contained in departmental files to the natural parents and/or their attorneys in connection with a dependence and neglect action filed under section 41-3-401, MCA?
2. Does section 41-3-205, MCA, prohibit the Department of Social and Rehabilitation Services from disclosing information concerning the circumstances of abuse or neglect to professionals such as psychologists, physicians, treatment centers, etc., who provide treatment to the child who has been injured or damaged by the abuse or neglect of the child's parent or custodian?
3. Does section 41-3-205, MCA, prohibit the Department from disclosing information concerning allegations of abuse or neglect to the noncustodial parent when the child has been removed from the custodial parent because of a substantiated incident of abuse or neglect?
4. Does section 41-3-205, MCA, prohibit the Department from notifying the natural parent of a child who has been placed in

foster care that the child has been abused by the foster parents while in foster care?

My conclusion that section 41-3-205, MCA, prohibits disclosure in each of these situations is based on the plain language of the statute, Montana case law, and decisions from other states interpreting similar statutory language.

Section 41-3-205, incorporated within the child abuse, neglect, and dependency chapter of the Montana Code Annotated, states:

Confidentiality. (1) The case records of the department of social and rehabilitation services and its local affiliate, the county welfare department, the county attorney, and the court concerning actions taken under this chapter and all records concerning reports of child abuse and neglect shall be kept confidential except as provided by this section. Any person who permits or encourages the unauthorized dissemination of their contents is guilty of a misdemeanor.

(2) Records may be used by interagency interdisciplinary child protective teams as authorized under 41-3-108 for the purposes of assessing the needs of the child and family, formulating a treatment plan, and monitoring the plan. Members of the team are required to keep information about the subject individuals confidential.

(3) Records may be disclosed to a court for in camera inspection if relevant to an issue before it. The court may permit public disclosure if it finds such disclosure to be necessary for the fair resolution of an issue before it.

(4) Nothing in this section is intended to affect the confidentiality of criminal court records or records of law enforcement agencies.

The language is clear and unambiguous. It expressly limits disclosure of abuse and neglect records to an interagency interdisciplinary child protective team and to a court when relevant to an issue before it.

Strict disclosure limitations are enacted for a variety of reasons. Reports of child abuse often contain information about the most private aspects of personal and family life. The information may or may not be corroborated and can be very damaging to the integrity of the family unit if released indiscriminately. Confidentiality also encourages the public to report incidents of child abuse. Case workers and those providing information rely on the confidential nature of the case records. A further reason disclosure is limited is to alleviate the potential stigma to the abused or neglected child.

As you have noted in your legal memorandum, indiscriminate disclosure may additionally lead to civil liability. In Colorado a social worker acting on an anonymous tip of sexual abuse confronted the alleged perpetrator and victim, a father and daughter. The Department of Social Services after its investigation concluded that the allegations were unfounded and proceeded no further. A complaint was then filed by the family against the Department for slander, outrageous conduct, and negligence. On appeal the Colorado Court of Appeals held that summary judgment was improper where the Department may not have acted in good faith and remanded the case for trial on the defamation issues. Martin v. County of Weld, 43 Colo. App. 49, 598 P.2d 532 (1979). The Colorado confidentiality statutes at issue are similar in relevant part to their Montana counterparts. See § 41-3-203, MCA (persons investigating or reporting any incident of abuse or neglect are not immune from liability if acting in bad faith or with malicious purpose).

The Montana confidentiality statute was recently interpreted in two related Montana Supreme Court decisions. In Wyse v. District Court of Fourth Jud. Dist., 195 Mont. 434, 636 P.2d 865 (1981), an attorney petitioned the Court for a writ of review of a district court order finding him guilty of contempt for the unauthorized release of information contained in a dependent and neglected child file. The writ of review

was denied and the Court strictly interpreted the language of section 41-3-205, MCA. The Court stated:

The statute is clear that information relating to dependent and neglected children will not be released unless a court order is obtained.

Wyse v. District Court of Fourth Jud. Dist., 195 Mont. at 438, 636 P.2d at 867. This decision underscores the principle that anyone seeking confidential information must first obtain a court order for a determination of relevancy before the information may be released.

The second Montana Supreme Court decision arising out of the same factual circumstance was a disciplinary action taken against the petitioner in Wyse by the Commission on Practice. Matter of Wyse, 41 St. Rptr. 1780, 688 P.2d 758 (1984). In this case the Court elaborated on its prior holding and discussed the statutory terms "public disclosure" and "unauthorized dissemination":

The provisions relating to "public disclosure" are not synonymous with nor intended to be synonymous with the term "unauthorized dissemination." Any unauthorized dissemination, public or private, is prohibited under section 41-3-205(1). The term "public disclosure" comes into play if request is made to the court to permit the same and the court finds such public disclosure necessary for the fair resolution of an issue before it.

41 St. Rptr. at 1786, 688 P.2d at 763 (emphasis added).

The two Wyse decisions do not address any of the factual situations presented in your opinion request. The Court was faced only with an attorney in Montana who surreptitiously gained case records for unrelated litigation in another state. The questions you have asked arguably present situations where the child's best interests would be furthered by immediate disclosure by the Department of Social and Rehabilitation Services (hereinafter Department), e.g., the release of a case record to a physician treating a child suspected to be the victim of abuse or neglect. However, the words of the statute and the Wyse decisions are clear: Any disclosure absent a court order is prohibited.

Challenges concerning the confidentiality statutes of other states have typically arisen following the judicial denial of a petition for discovery in a termination of parental rights proceeding. These cases can be roughly analogized to the first question you have asked concerning the Department's disclosure to natural parents in a dependency and neglect action filed under section 41-3-401, MCA. Ray v. Department of Human Resources, 155 Ga. App. 81, 270 S.E.2d 303 (1980) (right of discovery exists in a juvenile court proceeding for termination of parental rights subject to relevancy determination following in camera inspection); Nunn v. Morrison, 227 Kan. 730, 608 P.2d (1980) (where adversaries allowed full access to "social file" and Kansas law permitted disclosure to "parties," defendant natural mother in a deprived child proceeding had right to examine a report in the file); Matter of Damon A. R., 112 Misc. 2d 520, 447 N.Y.S.2d 237 (1982) (attorney of child who was the subject of a delinquency proceeding allowed full access to abuse and neglect reports on statutory grounds and for the purpose of allowing the attorney to prepare a thorough defense). These cases are more instructive to a district court faced with a petition for disclosure than they are to the Department faced with a request for information. Disclosure occurs under the authority of the district court, and the Department is prohibited by the plain language of the statute from independently disseminating any information.

A Montana district court in any proceeding affecting the parent-child relationship must ensure that the parties are afforded due process. As our Supreme Court noted in an early abuse and neglect appeal:

There are ... few invasions by the state into the privacy of the individual that are more extreme than that of depriving a natural parent of the custody of his children.

In Matter of Guardianship of Doney, 174 Mont. 282, 285, 570 P.2d 575, 577 (1977). The due process clause of the Fourteenth Amendment of the United States Constitution requires that parents be permitted a fair hearing on their fitness before children may be taken away from them in a dependency proceeding. Stanley v. Illinois, 405 U.S. 645 (1972). A hearing in which a parent was denied access to abuse and neglect reports that were

used to terminate parental rights would not comport with basic notions of due process including the rights of representation, confrontation of witnesses, and introduction of evidence.

Section 41-3-205(3), MCA, establishes a procedure whereby a party may petition a district court for release of records, thereby invoking the in camera review process. The petitioning party could be inter alia a parent, a physician, or the Department. This procedure provides a process for recognition of the basic due process rights of the parent, guardian, or other person having legal custody of a child subject to a dependency and neglect action. When case records are relevant to an issue before a court they must be released.

Attorneys acting on behalf of parents are similarly barred from receiving information directly from the Department. The Montana Supreme Court addressed this issue in the second Wyse decision:

No application was made here to the court for the right to disseminate, privately or publicly, the information in the juvenile proceedings. The zeal of a lawyer to protect his client is not a sufficient excuse for the abuse of the confidentiality provisions of section 41-3-205, MCA, without application to the court for permission to disseminate the information.

Matter of Wyse, 41 St. Rptr. at 1786, 688 P.2d at 765. This admonition would apply equally to attorneys representing any of the individuals or parties discussed in this opinion.

The second question you have asked is whether the Department may disclose information to health professionals treating an abused or neglected child. The Montana statute is silent on this point. Research indicates that most state statutes expressly provide for dissemination to a physician treating a suspected victim of abuse or neglect. Our Legislature chose not to provide such an exemption from confidentiality. A doctor is included on interagency interdisciplinary child protective teams as described in section 41-3-108, MCA. These teams are allowed access to records for

assessing needs, formulating a treatment plan, and monitoring the plan. § 41-3-205(2), MCA. However, in communication submitted with your opinion request you have indicated that in practice the doctor on the protective team is not always the treating doctor of the abused child.

Where a youth has been abused or neglected or is in danger of being abused or neglected the Department may petition for temporary investigative authority and protective care (commonly known as a TIA petition). See §§ 41-3-401, 41-3-402, MCA. After such a filing the court may direct the child or parents to undergo medical and psychological evaluation or counseling as part of an "order for immediate protection of youth." § 41-3-403(2), MCA. The TIA petition can be used as a vehicle to carry the Department's request for disclosure of confidential records. Upon petition by the Department the court could order disclosure of confidential case records to the examining health professionals as part of its order for immediate protection. Regardless of the confidentiality inherent in all doctor-patient relationships, the Department is barred by the terms of section 41-3-205, MCA, from physician disclosure absent a court order.

Your third question addresses disclosure to a noncustodial parent when the child has been removed from a custodial parent because of a substantiated incident of abuse or neglect. As the above discussion has indicated, the confidentiality statute contains no special exemptions. Where the Department determines that it is essential that a noncustodial parent receive confidential information, a petition for disclosure must be filed. This request could accompany a petition filed pursuant to emergency protective service, § 41-3-301(1), MCA, or temporary investigative authority, §§ 41-3-401, 41-3-402, MCA.

Your final question asks whether the Department may inform the natural parents of a child who has been placed in foster care that the child has been abused by the foster parents. Section 41-3-205, MCA, prohibits such notification to the same extent it bars disclosure in other situations. The Department's duty lies primarily with providing protective services for the abused child, encouraging reports of abuse and neglect, ensuring the confidentiality of case records, and

otherwise arranging for the youth's well-being. Nowhere in chapter 3 of Title 41 is the Department given a duty to notify natural parents of difficulties their children experience.

This primary duty to the abused child was highlighted in a recent appellate opinion of the Oregon Court of Appeals, Brasel v. Children's Services Division, 56 Or. App. 559, 642 P.2d 696 (1982). Brasel was a wrongful death action brought by the parents of an 18-month-old girl who died as a result of injuries suffered in a day care center certified by the Children's Services Division (CSD) of the State. The plaintiffs alleged that the defendant agency was negligent in failing to inform them of a prior incident of child abuse. CSD argued that it was forbidden to disclose the existence of the child abuse report by Oregon's confidentiality statute. The appellate court agreed:

[The confidentiality statute] forbids public access to reports and records of child abuse. We take it to forbid as well publication to prospective users of a certified day care facility the fact that a report involving the facility had been made. CSD's duty, in regard to reports of child abuse, is to investigate and to take appropriate action to protect the children; it is not authorized to advise parents of reports of child abuse. It follows that CSD had no duty to disclose the report.

Brasel v. Children's Services Division, 642 P.2d at 699-700. The Oregon confidentiality statute is similar in relevant part to section 41-3-205, MCA. Brasel is instructive because it highlights the Department's duty to the abused child and strictly construes the confidentiality statute. In Montana the Wyse decisions have similarly construed section 41-3-205, MCA. For this reason the Department is prohibited from making disclosures of continuing abuse to parents and, under the reasoning of Brasel, may be protected from alleged negligence for such a refusal to disclose.

WHEREFORE, IT IS MY OPINION:

Absent a court order, section 41-3-205, MCA, prohibits the Department of Social and Rehabilitation Services from disclosing case

records and reports of child abuse and neglect to:
(1) the natural parents or parent, or other person having legal custody of a child who is the subject of a dependency and neglect action filed under section 41-3-401, MCA; (2) health care professionals who are treating a child suspected of being abused or neglected; (3) the noncustodial parent of a child who has been removed from the custodial parent following an incident of abuse or neglect; and (4) the natural parents or parent, or other person having legal custody of a child who has been abused or neglected while in the care of foster parents.

Very truly yours,

MIKE GREELY
Attorney General