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June 15, 2022

Director Todd Landry
Office of Child and Family Services
Department of Health and Human Services

Dear Director Landry:

You have requested my advice on whether confidential records and information relating to the Department of Health and Human Services' (DHHS) child welfare services may be directly released to the Government Oversight Committee (GOC). My view is that the law allows release to GOC's investigative arm, the Office of Program Evaluation and Government Accountability (OPEGA), but not to GOC directly. While GOC directs OPEGA, the two entities are discrete.[1]

Federal law permits states to pass laws enabling "entities or classes of individuals authorized by the State" to receive confidential child protective information.[2] Maine enacted Title 22, Section 4008, which lists circumstances where discretionary and mandatory disclosures may be made by DHHS. As Chief Deputy Attorney General Chris Taub said before the GOC on May 18, 2022, the closest that statutory authority comes to empowering legislators to receive confidential child protective information is 22 M.R.S. §4008(3)(D). It is my view that Title 22, Section 4008(3)(D), in concert with 42 U.S.C. §671(a)(8)(D), should be read to allow the disclosure of confidential records and information by DHHS, under appropriate limitations and measures, for an audit or similar activity. Those provisions should then be construed with OPEGA's enabling statutes under Title 3.

The statutory framework for OPEGA allows DHHS to disclose confidential information for purposes of program evaluation. Title 3, Section 997(4), states: "Upon request of the office[3] and consistent with conditions and procedures set forth in this section, state agencies and other entities subject to program evaluation must provide the office access to information that is privileged or confidential as defined by Title 1, chapter 13, which governs public records or proceedings." To the extent that information is confidential pursuant to state statute, Title 3, Section 997(4) is a clear expression of legislative intent that OPEGA staff are to be given access to that information,

[1] 3 M.R.S. §991 et seq.
[2] The Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §5106a (b)(2)(B)(viii)(VI).
[3] This is defined as the OPEGA office at 22 M.R.S. §992(3).

following the procedures that statute outlines. It is similarly clear that the information is to go no further. Title 3, Section 997 specifically addresses what is to be done with the confidential material received and distilled to work product by OPEGA. If GOC were intended to receive the information undergirding OPEGA's reports, that provision would say so.

OPEGA has the resources and authority to receive, digest, and synthesize, in a confidential setting, the information GOC has expressed interest in. Beyond receiving records, OPEGA is empowered to have targeted, in-depth conversations with stakeholders about what the materials mean in context. This comprehensive analysis would not be possible during review of a cold record in executive session.

I would be remiss not to mention the lens through which the above-referenced provisions should be analyzed. The federal law that Title 22, Section 4008 stems from has conformed since inception to the principle that families interacting with the child welfare system have rights. CAPTA expressly states that a state child welfare agency must employ "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*..." The primary rights at play here are the right to privacy and the right to be free from abuse and neglect. Where disclosure can serve to prevent abuse or neglect, through interagency cooperation for instance, privacy rights are outweighed. Conversely, if the requesting entity is not explicitly defined as having responsibility for child protective services it would follow that privacy must be safeguarded. By using OPEGA as designed, to assist all of us interested in improving the welfare of Maine's children in recognizing themes and targeting areas for improvement, the appropriate balance is achieved.

It is my advice that DHHS works with OPEGA to define the information OPEGA needs to fulfill its directive from GOC; that DHHS and OPEGA negotiate and agree upon terms of disclosure and preservation of confidentiality;[4] and that DHHS comply with OPEGA's request for confidential child protective information and records under these terms.

Sincerely,

Ariel Gannon, Assistant Attorney General
Chief, Child Protection Division
Maine Office of the Attorney General

[4] Such terms should ensure that disclosure would not undermine or inhibit any ongoing criminal investigation or prosecution and would not violate federal law including but not limited to HIPAA, FERPA or 42 CFR Part 2.