

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-4

Date issued: February 8, 1988

Requested by: Alan Duppler
Mercer County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether N. D. C. C. ' 50-25.1-11 makes confidential that law enforcement agency information which results from an investigation of child abuse or neglect.

II.

Whether a person who is the subject of a report of child abuse or neglect waives confidentiality by making the content of that report public.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that N. D. C. C. ' 50-25.1-11 makes confidential that law enforcement agency information which results from an investigation of child abuse or neglect.

II.

It is my further opinion that a person who is the subject of a report of child abuse or neglect waives confidentiality requirements by making the content of that report public, but only to the extent that the person has authority to waive confidentiality requirements.

- ANALYSES -

I.

The confidential nature of child abuse and neglect reports, and information related thereto, is required by N. D. C. C. ' 50-25. 1-11, which provides:

50-25.1-11. Confidentiality of records - Authorized disclosures. All reports made under this chapter, as well as any other information obtained, are confidential and shall be made available to:

1. A physician who has before him a child whom he reasonably suspects may have been abused or neglected.
2. A person who is authorized to place a child in protective custody and has before him a child whom he reasonably suspects may have been abused or neglected and the person requires the information in order to determine whether to place such child in protective custody.
3. Authorized staff of the department, appropriate county social service board, and appropriate state and local child protection team members.
4. Any person who is the subject of a report; provided, however, that the identity of persons reporting under this chapter is protected.
5. Public officials and their authorized agents who require such information in connection with the discharge of their official duties.
6. A court whenever it determines that the information is necessary for the determination of an issue before the court.
7. A person engaged in a bona fide research purpose; provided, however, that no information identifying the subjects of a report is made available to the researcher unless the information is absolutely essential to the research purpose and the department gives prior approval.
8. A person who is identified in subsection 1 of section 50-25.1-03, and who has made a report of suspected child abuse or neglect, if the child is likely to or continues to come before the reporter in the reporter's official or professional capacity.

9. Parents or a legally appointed guardian of a child who is suspected to be abused or neglected; provided, however, that subsection 4 governs the availability of information to a parent or guardian who is also the subject of a report.

(Emphasis supplied.)

The 1975 North Dakota Legislative Assembly, which enacted the emphasized language as well as most of this statute, was the first to meet after the 1974 passage of Pub. L. 93-247, the Child Abuse Prevention and Treatment Act. Child Abuse Prevention and Treatment Act, Pub. L. 93-247, 88 Stat. 4 (1974). Pub. L. 93-247 authorized modest grants to states to assist in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs. 42 U.S.C. ' 5103(b)(1) (1987). It also tied continued receipt of federal funds related to child abuse or neglect under parts A and B of Title IV of the Social Security Act (AFDC and Child Welfare) to the enactment of state law concerning child abuse and neglect. 42 U.S.C. ' 5103(b)(4) (1987). In order to secure those funds, the state law was required to "provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents, or guardians." 42 U.S.C. ' 5103(b)(2)(E) (1987).

The United States Department of Health, Education and Welfare adopted regulations to measure compliance with the federal requirements. Those regulations provide that the quoted confidentiality requirement can "be satisfied only if a State has a law which makes . . . [all records concerning reports of child abuse and neglect] confidential and which makes any person who permits or encourages the unauthorized dissemination of their contents guilty of a crime." 45 C.F.R. ' 1340.3-3(d)(5) (1975). The federal regulation goes on to provide: "Such law may allow access to such records" but limits that access to a listing of agencies and persons from which the several subsections of N.D.C.C. ' 50-25.1-11 appear to be drawn. The legislative attempt to comply with these specific requirements is patent.

The Legislature, in identifying the categories of persons who may have access to confidential information, did not change the confidential nature of the records and information when they pass into the hands of any of the listed persons and agencies. The N.D.C.C. ' 50-25.1-11(5) group, into which law enforcement officials fall, must treat this information as confidential. It matters not that the information may have initially been provided to law enforcement officials. Both N.D.C.C. " 50-25.1-11 and 50-25.1-14 refer to reports and information obtained "under this chapter," a reference to N.D.C.C. ch. 50-25.1. If information is in the hands of a law enforcement agency as a result of a complaint, N.D.C.C. ' 50-25.1-03(1) requires any "police or law enforcement officer having knowledge of or reasonable cause to suspect that a child . . . is abused or neglected shall report the circumstances to the department [of human services] or the department's designee." Consistent with the provision of 45 C.F.R. ' 1340.3-3(d)(5) (1975), quoted above, the

Legislature has enacted a penalty for the unauthorized disclosure of reports of child abuse and neglect. That penalty, at N. D. C. C. ' 50-25.1-14, provides:

50-25.1-14. Unauthorized disclosure of reports --
Penalty. Any person who permits or encourages the unauthorized disclosure of reports made or confidential information obtained under the provisions of this chapter is guilty of a class B misdemeanor.

This penalty is provided for all unauthorized disclosures without regard to who makes the disclosure.

Both N. D. C. C. ' 50-25.1-11 and the federal statute and regulations upon which it is patterned contemplate the confidential treatment of child abuse and neglect investigation records and information. Both also contemplate that the records and information will be used by those in positions which require that information. These policies were harmonized by a law which allows certain persons and agencies access to the records and information, but which requires those granted access to maintain confidentiality. A violation of confidentiality by someone who obtains the information through a grant of access under N. D. C. C. ' 50-25.1-11 is subject to the same criminal penalty as a violation of confidentiality by a person to whom a report is initially made.

The fact that information resulting from the investigation of a report of child abuse and neglect made under N. D. C. C. ch. 50-25.1 is confidential does not in any way violate the rights of a criminal defendant, should a crime arising out of the circumstances reported be charged. That possibility has plainly been contemplated by the Legislature. N. D. C. C. ' 50-25.1-11(4) requires that this confidential information be made available to "[a]ny person who is the subject of a report; provided, however, that the identity of persons reporting under this chapter is protected."

If the identity of the reporter is essential to the defense, N. D. C. C. ' 50-25.1-11(6) places that information in the hands of "a court, whenever it determines that the information is necessary for the determination of an issue before the court." The authority of a court to make such determination, and the process by which such a determination is made, is described in Pennsylvania v. Ritchie, 107 S.Ct. 989, (1987). According to the Ritchie court, an in camera review of confidential records by the trial court will permit that court to determine if the state's interest in maintaining the confidentiality of records concerning child abuse must yield to the criminal defendant's sixth and fourteenth amendment right to discover favorable evidence. The Supreme Court of Minnesota very recently followed Pennsylvania v. Ritchie in directing such an in camera review. State v. Paradee, 403 N.W.2d 640 (Minn. 1987). The rule prescribed in Pennsylvania v. Ritchie and State v. Paradee is exactly that which was described in the federal regulations some twelve years earlier. 45 C.F.R. ' 1340.3-3(d)(5)(viii).

II.

The confidentiality provisions of N. D. C. C. ' 50-25.1-11 are intended to protect the privacy interests of the child and the child's parents or guardians (and also those of "reporters" of suspected abuse or neglect). See also 42 U. S. C. ' 5103(b)(2)(E). It has always been the law of North Dakota that such personal rights may be waived. N. D. C. C. ' 1-01-08. When a privacy right is involved, and the holder of the right publicizes information made confidential in order to protect the privacy right, it is inescapable that a waiver of the right has occurred. The far more difficult question involves determining whether the person waiving is waiving his own rights (which he may do) or waiving the rights of someone else (which in most instances he may not do).

If the privacy right is that of the "subject" of a report of suspected abuse or neglect, that right may be waived by the subject pursuant to N. D. C. C. ' 1-01-08. Likewise, the privacy rights of the subject may, in effect, be waived by the actions of those charged with prosecuting crimes insofar as it may be necessary to accomplish that prosecution.

If the privacy right is that of a child, the child may waive, pursuant to N. D. C. C. ' 1-01-08, if the child has been determined competent to make such waiver. Ordinarily, parents act on behalf of their minor children, and in many circumstances may be able to so act with regard to information made confidential pursuant to N. D. C. C. ' 50-25.1-11. However, if the circumstances are such that the child's parent is also the "subject" of the report, it is unlikely that the parent/subject is competent to waive the child's rights to privacy. While the North Dakota Supreme Court has never treated this issue specifically, it has addressed the power of parents to waive a juvenile's right to counsel in juvenile proceedings. In these circumstances, the North Dakota Supreme Court has stated:

A juvenile . . . may waive . . . [the] right [to counsel] when she is represented by her parents, guardian, or custodian . . . [citing In Interest of D. S., 263 N. W. 2d 114, 119 (N. D. 1978)]. Whether or not the parent, guardian, or custodian is capable of representing the juvenile in the proceeding is one of the facts which must be considered when applying the totality of circumstances test when determining whether or not the juvenile has knowingly and voluntarily waived her right to counsel.

Huff v. K. P., 302 N. W. 2d 779, 782 (N. D. 1981). In the case of In Interest of D. S., the court refused to treat a parental waiver of counsel as binding where the parents' interests were at odds with those of the child's. This analysis is applicable to determinations as to whether or not the child who is a victim or an alleged victim of child abuse or neglect has waived the privacy rights.

Unless a parent is capable of representing the child in the waiver of these rights, no waiver should be inferred. The parent is not capable of

representing the child if, in the totality of circumstances, it appears that the child's interests and the parents' interests in such a waiver are at odds.

A parent who is not the subject of a report may waive the parental interest in privacy pursuant to N. D. C. C. ' 1-01-08. Likewise, such a parent may waive the child's right to privacy if the totality of circumstances demonstrate that the parent is capable of representing the child in the waiver. Of course, in such circumstances, there is a far smaller likelihood of the child's interests being at odds with the parent's interests.

Because the question of the valid waiver of a child's privacy rights, by a parent, is governed by a totality of the circumstances, such questions must necessarily be addressed on a case-by-case basis.

- EFFECT -

This opinion is issued pursuant to N. D. C. C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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ATTORNEY GENERAL' S OPINION 88-4
February 8, 1988
Page 7