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CPS CONFIDENTIAL RECORDS

House Bill 4232 as enrolled
Public Act 428 of 1998
Third Analysis (1-15-99)

Sponsor: Rep. Jack Horton
House Committee: Human Services
and Children
Senate Committee: Families, Mental
Health and Human Services

THE APPARENT PROBLEM:

The Lieutenant Governor's Children's Commission was established under Executive Order Number 1995-12 in May, 1995. The commission's explicit charge was to "review current laws, programs, procedures, policies, and training procedures that affect children, and create recommendations to help improve the quality of life for Michigan's children," and its conclusions were issued in July, 1996, in the report, "In Our Hands." As described in the report, the commission created five subcommittees to address early intervention, placement, permanency planning, post-termination, and confidentiality issues. The subcommittee concerned with confidentiality issues studied federal and state laws, and ethical considerations affecting decision-making in the child welfare system. Its adopted mission was to "provide a framework for gathering and sharing information on all alleged child abuse and neglect cases that encouraged an open, accountable, responsive system to ensure the protection of children."

One of the subcommittee's goals was defined as: "To create exceptions to confidentiality laws to allow the public to receive information in certain cases such as death or gross negligence." In response, the subcommittee proposed the following:

"To balance the legitimate need for limited confidentiality with the need to restore accountability and public trust in our child welfare system, the Michigan Child Protection Act will be amended to permit the director of the Family Independence Agency (FIA), or, if the director declines to act, the Ombudsman, discretionary authority to release information when it is in the best interest of the child to do so; it is in the best interest of the family to do so; a child dies; or if it is necessary to preserve the

integrity of the child protection system." (Recommendation #192)

Specifically, some feel that the FIA should be allowed to release some information from records that are currently considered confidential. An example would be a record that included a referral of suspected child abuse or neglect, and of the agency's response. Consequently, legislation has been proposed that would incorporate recommendation number 192 of the Lieutenant Governor's Children's Commission report to accomplish the goal of balancing the need to protect the privacy of those who may be the subject of reported child abuse and neglect with the need to release information when it is in the best interest of the child.

THE CONTENT OF THE BILL:

Under the Child Protection Law, the Family Independence Agency (FIA) is required to maintain a central registry, which contains confidential records on the agency's clients. The bill would amend the act to grant the agency director the discretion of releasing some records under certain circumstances. Under the bill, the director or his or her designated agent could release confidential records relating to referrals or reports of a substantiated report of child abuse or neglect if specific criteria were met, and a person who was identified in the records could appeal the director's decision to the circuit court. Similarly, if the director denied a request, the person making the request could file an appeal in the circuit court.

The director would have to make a decision on releasing information within 14 days after receiving a written request. After notifying the requester, the

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director could extend that time period for an additional 14 days if more time was necessary to research and compile the requested information. The bill would also specify that the director could not deny a request for specified information based upon a desire to shield a lack of performance or an inappropriate performance by the agency. Further, unsubstantiated information identifying an individual alleged to have perpetrated child abuse or neglect could not be released.

The bill would also specify that information could be released if it was in the best interest of the child to whom the information related. Under the bill, "the child's best interest" would be determined based on protection of the child's safety; preservation of the child's physical, mental, and emotional health; and consideration of the child's likelihood of establishing a successful and timely permanent family and community relationship. In addition, the bill would amend current provisions in the act, which allow information in the agency's central registry to be released to certain persons, to specify that information could be released to a person named in a report or record as a perpetrator, or alleged perpetrator, of child abuse or neglect, or to a victim who was an adult at the time of the request, provided that the identity of the reporting person was protected.

Release of Confidential Information. Under the bill, "specified information" in a child protective service record that related specifically to all referrals or substantiated reports of child abuse or neglect could be released at the director's initiative or upon request. Information released under the provisions of the bill could not include the following:

- Personal identification information of an individual identified in the record; however, this exclusion would not extend to information identifying a person alleged to have perpetrated child abuse or neglect if the allegation had been substantiated.
- Information provided in a law enforcement report.
- Any other information specifically designated as confidential under other laws.

The bill would specify that information *could* be released by the director if there was clear and convincing evidence that either of the following were true:

- The release would be in the best interest of the child to whom the information related.

- The release would not conflict with the best interest of the child to whom the information was related, and one or more of the following were true: the release was in the best interest of a member of the child's family (including parents, legal guardians, grandparents, and siblings) or of an individual residing in the same home; the release clarified actions taken by the agency on a specific case; the report or record containing the specified information concerned a child who had died, or that child's family; all or part of the report or record containing the specified information had been publicly disclosed in a judicial proceeding; a child abuse or neglect complaint or investigation to which the report or record containing the specified information related had been part of the subject matter of a published or broadcast media story; or the report or record containing the specified information concerned a substantiated report of sexual abuse, serious injury, or life threatening harm involving the child or a sibling of the child identified in the request.

Regardless of the director's determination that specified information could be released, under the provisions of the bill certain information could not be released if one or more of the following were true:

- ** The request for release did not include sufficient information to identify the specific case to which the request related.
- ** A child abuse investigation related to the information was in progress and the report had not been substantiated or unsubstantiated.
- ** A hearing to determine whether a report or record should be amended or expunged from the central registry was pending.
- ** There was an ongoing criminal investigation and the local prosecuting attorney had determined that a release would interfere with the criminal investigation.
- ** The individual submitting the request was serving a prison sentence.
- ** The child to whom the record related was 18 years of age or older.

Notification Requirements. The bill would require that the director give written notice of a preliminary decision to release or to deny a request to release specified information at least 14 days before the information was released, or within 14 days after

making a decision to deny a request for release. Notice would have to be delivered by personal service or by registered or certified mail, return receipt requested and deliverable to the addressee only. The following would have to be included in the notice:

- The basis on which the specified information was being released, or the basis for denial of the request for release.
- A statement that the decision would become final unless information that could be the basis for a different decision were submitted to the director in writing within 14 days after the notice was given.
- A statement that there was a right to appeal a final decision, including information regarding where to file the appeal and a description of appellate procedures.

The director's decision would become final, if, within 14 days after giving notice, information were not received that could form the basis for a different decision. However, if the director did receive such information, he or she would be required to make a final decision to release or deny a request to release the specified information within seven days after its receipt. Notice of the final decision would have to be in writing and include, at least, notification of the right to appeal.

Should the director decide to release information under the provisions of the bill, the agency would be required to give notice of the decision to each of the following: each individual named in the report as a perpetrator or an alleged perpetrator of the child's abuse or neglect, unless the individual had been convicted of a crime relating to the abuse or neglect, and no appeal was pending; each parent or legal guardian of the child; each attorney representing the child who was the subject of the case, or representing an individual listed as a perpetrator, alleged perpetrator, parent, or legal guardian, if the agency had notice of that representation; and the child's guardian ad litem. Notification would also have to be given within 14 days before the specified information was released to an individual who had been named as a perpetrator, and who should have been, but had not been, notified. Further, if the individual requested expunction of the record within 14 days after the notice was given, the information could not be released until the procedures governing expunction under the act were completed. If such an individual did not request expunction within 14 days, the procedures for release of specified information, as

required under the provisions of the bill, would be followed, and the individual would not have a right to appeal the decision to release.

If the director denied a request for release of information, then only the requesting person would be notified.

Appeals. An individual who had the right to be notified under the above provisions could appeal the decision to release the information to the circuit court before the release. If an appeal were filed and the agency notified before the release, then the information could not be released until the circuit court's decision was upheld. In addition, if the director denied a request to release information, the person whose request was denied could file an appeal with the circuit court within 30 days after notice of the denial. The court would have to uphold a decision to release or deny release of information unless it found that the decision was an abuse of the director's discretion, based upon the criteria for releasing or not releasing specified information prescribed under the bill.

Proceedings on an appeal that had been filed under the provisions of the bill would be considered confidential, and none of the records of these proceedings could be released unless the court upheld a decision to release specified information or reversed the denial of a request for release. The court would have to conduct its review so that a person whose request for information was denied did not have access to that information during the appeal proceedings. Further, if the court reversed the director's decision to release or to deny release of specified information in an appeal, the court could order the agency to pay the appellant's costs and reasonable attorney fees that were related to the appeal.

Fees. The agency could charge a fee for a copy of specified information released under the provisions of the bill in the same manner as a public body was authorized to charge a fee under the Freedom of Information Act (FOIA).

Confidentiality. Currently, the act specifies persons to whom confidential records in the central registry may be released. The bill would add that a record could also be made available to the parent of a child who was the subject of a report of child abuse or neglect. In addition, the provisions of the bill could not be construed to subject a record that was deemed confidential under the act to disclosure under the FOIA.

Annual Report. The agency within the FIA that was responsible for administering and providing services

would be required to make an annual comprehensive report to the legislature. The report would have to include policy relating to Children's Protective Services, including, but not limited to, major policy changes and court decisions affecting the administration of the act, and statistical information on the following:

- Total reports of abuse and neglect, including the number of substantiated and unsubstantiated reports.
- The characteristics of the perpetrators of abuse and neglect, and the age, relationship, socioeconomic status, race, and ethnicity of child victims.
- The occupation or description, as specified under the Child Protection Law, of the person who first made the report, or other description, if the person isn't within a group required to report under the act.
- Statistics relating to the central registry, such as the number of individuals and their characteristics.
- Statistics related to the basis for determining that reported child abuse or neglect cases were unsubstantiated.

Petition for Jurisdiction of a Child. Currently, the act specifies that the FIA must submit a petition to have the court take jurisdiction of a child within 24 hours after the agency has concluded by a preponderance of the evidence that a child has been sexually abused or "severely physically injured," as defined under the act. A petition must be submitted if one or more of the following applies: the FIA has reasonable cause to believe that a child, or a sibling of a child, has been abused by a parent, guardian, or custodian, or a person 18 years of age or older who resides in the child's home; the parent's rights to another child have been terminated because the court has assumed jurisdiction over the child as a result of neglect; or the parent's rights to another child have been voluntarily terminated following the initiation of proceedings to have the court assume jurisdiction over the child as a result of neglect. House Bill 4232 would specify, instead, that a petition would have to be submitted if the FIA had reasonable cause to believe that a child, or a sibling of a child, had been abused. In addition, a petition would have to be submitted if the FIA

determined that the child was at risk of harm, and the parents' rights had been terminated, either voluntarily or because the court had assumed jurisdiction over the child.

MCL 722.622 et al.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency (HFA), the provisions of the bill would result in an indeterminate cost to the Family Independence Agency (FIA). The HFA estimates that the FIA would generate a small amount of revenue in copy fees. However, this would likely be offset by increased labor and materials costs. Most of the information required is currently included in the FIA annual report (1-13-99)

The Family Independence Agency estimates that the costs of providing information could be charged using the same method utilized for requests made under the Freedom of Information Act (FOIA). The FIA also estimates that there will be labor costs involved to process requests. These costs are indeterminate, since it is unknown at present how many requests the agency will receive. (1-15-99)

ARGUMENTS:

For:

Under the federal Adoption Assistance and Child Welfare Act of 1980 (42 USC 6031), those states with established, federally approved, plans are reimbursed for foster care payments provided for children who are removed from their homes due to child abuse or neglect. However, under the act, state child protection agencies must still make reasonable efforts to prevent the unnecessary separation of children from their parents, and to protect the best interest of the child, and this dual mandate sometime creates conflict. In many situations, the process involved in striving to reunify a child with his or her birth parents can take years. On the other hand, if a child is not removed from the home, abuse and neglect may continue. Similarly, the general public is quick to condemn a child protection agency that fails to act to protect children, and equally quick to condemn one that violates parental rights should charges of abuse or neglect prove to be unfounded.

The provisions of the bill, however, could enhance the public's trust in the state's child protection system. All too often, allegations are made by the media, after the death of a child, that relatives or neighbors had reported suspicions of abuse, and that the agency failed to follow through on the reports. Under current

law, the agency may not release information on such reports or investigations, except to entities such as law enforcement agencies, legal counsel, child placement agencies investigating prospective adoptive parents, and juvenile court staff investigating prospective foster parents. While the agency may claim, in a typical case, that there wasn't sufficient evidence to remove the child from its home, such instances often carry the appearance of a "cover-up," or at least the suspicion that the agency hides behind the confidentiality provisions of the Child Protection Law.

Under the bill, however, the agency could answer such claims and verify whether investigations were conducted by revealing information that, currently, is deemed confidential. For example, the agency could release records demonstrating that a complaint of suspected child abuse had been received, the dates of the complaint, and information on the agency's response -- whether or not the complaint was investigated, the conclusions reached, and the basis for those conclusions. By revealing the full extent of the agency's involvement in these investigations, it is likely that the general public will be more aware of the difficulties encountered by the agency when intervening in suspected cases of abuse or neglect.

Against:

The bill would allow the release of information concerning alleged or substantiated reports of child abuse or neglect. However, in acknowledgment of the constitutional privacy rights of the persons involved, this type of information has always been deemed confidential. Some may say that it is difficult to see how a child's best interests would be served by disclosing information that jeopardizes a child's, and a family's, right to privacy.

Response:

The provisions of the bill represent a balance between the need for more disclosure of records concerning child abuse and neglect, and a respect for the privacy rights of a family. For example, an individual's personal identification information would not be released unless it had been substantiated that the person was the perpetrator of child abuse or neglect. In addition, the right to appeal a decision prior to release of the information gives individuals the opportunity to have a hearing by an impartial third party.

Against:

The provisions of the bill are designed to increase public confidence in the child protection system by allowing public scrutiny of FIA activities. Granted that this provision would allow a greater opportunity for

community response, there is also a concern that the agency would only release information that served its best interests.

Response:

The provisions of the bill are designed to exclude this possibility. For example, House Bill 4232 specifies that the director of the FIA may not deny a request for specified information based upon a desire "to shield a lack of or an inappropriate performance by the [agency]." In addition, under the bill, individuals would have the right to an appeal before the specified information was released. Further, the bill defines what type of information may be released.

Against:

Under the bill, the identity of a person identified in the agency's central registry as being the perpetrator of child abuse or neglect could be made available to the public. A person identified in this manner may appeal to the circuit court the director's decision to release the information. However, some are concerned that many of the individuals most likely to be subjected to this publicity are, typically, persons unable to afford the costs of such an appeal. Instead, it is argued that an appeal in this instant should be made to an outside agency, such as the Office of Children's Ombudsman in the Department of Management and Budget. That office also has the responsibility of investigating suspected cases of child abuse.

Against:

According to the American Civil Liberties Union (ACLU), releasing information of suspected criminal activity prior to any adjudication by the courts is premature and violates an individual's right to privacy; the right not to have one's reputation tarnished by the dissemination of allegations of wrongdoing outweighs the public's need for reassurances that the FIA is meeting its responsibilities.

The provisions of the bill *could* result in information being released in situations where the individual later was proven innocent of the charge. Under the bill, unsubstantiated information relating to the personal

identification of an individual alleged to have perpetrated child abuse or neglect could not be released. However, information about "substantiated" allegations could be released. Some point out that a "substantiated" allegation is not the same as a conviction of child abuse. According to the FIA, the agency rarely gives out information that is later proven wrong, but there have been highly publicized incidents in other states where this has occurred.

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