

Releases, Subpoenas, and FOILS, Oh My!

I. Responding to FOIL requests

a. Does your office handle FOIL requests?

1. Directly?
2. Consultation on certain FOIL requests?

b. What is FOIL?

1. New York Public Officers Law, Article 6
2. "FOIL" stands for Freedom of Information Law
3. Purpose of the Law is to permit persons to make information requests of New York State and local governments.
4. The mechanics of the FOIL process are found in NY Public Officers Law §67(1)(b). In that section of the law, you will find such things as:
 - The requirement for the agency to have a procedure to make a FOIL request;
 - The requirement for the agency to have a person to direct the FOIL requests to; and
 - The authority to charge for the copying or reproduction of the information that is being released.
5. Is there any State agency that interprets FOIL?
 - The New York State Committee on Open Government, which is part of the New York Department of State.
 - The Committee on Open Government issues "advisory opinions"

c. What social services records are subject to a FOIL request?

1. According to the Committee on Open Government, any or all of them.
2. The advisory opinions seem to usually contain the following boilerplate language: "...first, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law."
3. What parts of Public Officers Law §87(2) contain the most pertinent grounds for denial, for our purposes?

records that:

- (a) are specifically exempted from disclosure by state or federal statute;
- (b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;
- (c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;
- (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;
- (e) are compiled for law enforcement purposes and which, if disclosed, would:
 - i. interfere with law enforcement investigations or judicial proceedings;
 - ii. deprive a person of a right to a fair trial or impartial adjudication;
 - iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
 - iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures. For the potential application of

this grounds for denial to DSS records, see *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67 (2017).

(f) if disclosed could endanger the life or safety of any person;

(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations;

iv. external audits, including but not limited to audits performed by the comptroller and the federal government;

(i) if disclosed, would jeopardize the capacity of an agency or an entity that has shared information with an agency to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures;

d. What exceptions to FOIL protect certain social services client records from disclosure?

1. Public Officers Law §67(2)(a) permits the local district to deny access to records that "...are specifically exempted from disclosure by state or federal statute."

2. Various confidentiality laws and regulations that pertain to all of the various types of client records maintained by the local district.

3. For DSS client records, can they be obtained by a FOIL request in certain situations, or is the law and/or regulation that pertain the client record confidentiality the only method for disclosure?

- Advisory opinion, FOIL- AO- 19205

- *Paine v Chick*, 50 AD2d 686 (3rd Dept., 1975)

- *Rabinowitz v. Hammons*, 228 AD2d 369 (1st Dept., 1996)

- *New York News, Inc. v Grinker*, 142 Misc. 2d 325 (Supreme Court, New York County, 1989)
- Advisory opinion FOIL-AO-16155 (2006)
- *Newsday v. Empire State Development Corporation*, 98 NY2d 359 (2002)
- *Castillo v Bailey*, 2010 N.Y. Misc. LEXIS 5152 *; 2010 NY Slip Op 32972(U) (Supreme Court, New York County, 2010)
- *Wise v Battistoni*, 208 AD2d 755 (2nd Dept., 1994)

e. What is the FOIL request response process?

The following are some of the possible ways in which a FOIL request might play out:

1. Provide the requested records in full.
2. Provide partial records, and deny the remainder of the request.
3. Deny the request in its entirety.
4. If there is a denial, the requestor can make an appeal to the County Records Officer to reconsider their denial.
5. If, after reconsideration, there is still a denial of the release of records, the requestor can bring a CPLR Article 78 proceeding.

f. Can a local district, in denying a FOIL request, chose to refuse to confirm whether or not the requested records exist?

Matter of Abdur-Rashid v. New York City Police Department, 2018 N.Y. LEXIS 723 *; 2018 NY Slip Op 02206.

II. Obtaining records via releases and subpoenas

a. Although we are primarily talking about obtaining records for trial, a few words about production of records to various parts of the local social services district:

1. Records for CPS:

- Social Services Law §415

- Social Services Law §416
2. Records for Child Support Enforcement:
 - Social Services Law §111-p
 - Social Services Law §111-r
 - Social Services Law § 111-s.
 - Social Services Law §144
- b. Outside of the CSEU subpoena, does an LDSS or its attorney have a general “agency” subpoena authority?
1. Legislative initiatives:
 2. Other agencies that do have agency subpoena authority?
 - As mentioned, a CSEU under Social Services Law §111-p.
 - A district attorney may issue a subpoena under the authority of Criminal Procedure Law §610.20(2), subscribed by themselves, for a court or grand jury proceeding.
 - New York State Department of Human Rights, Executive Law §295(7), 9 NYCRR 465.14
- c. Obtaining records for trial or hearing- Release vs. Subpoena: what is the practice? Our survey says...
- d. Records for hearing/trial: what is required?
1. Records in custody of court?
 - CPLR §2306(b)-
 - When a subpoena is judicially issued for records for trial, the subpoena usually requires that the records be delivered to the court.
 2. Certification to enter in to evidence?

- CPLR §4518- business records, requirement of certification for admissibility.
- CPLR §2307- a subpoena for government records may be satisfied by a certified copy of the records.

e. Requirements for obtaining particular types of records for hearing/trial

1. Medical records

1.1 Statutes/regulations

CPLR 2306

CPLR 2302(b)

Public Health Law §18.

HIPAA- 45 CFR 164.512- Uses and disclosures for which an authorization or opportunity to agree or object is not required.

Sidebar: what is a “covered entity?”

45 CFR 160.103

45 CFR 164.105- “hybrid entity,”

45 CFR 164.512- HIPAA disclosure exceptions that permit a covered entity to comply with Social Services Law §415 and Social Services Law §416:

(b) (1) Permitted uses and disclosures. A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:

ii. A public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect.

(c) Standard: Disclosures about victims of abuse, neglect or domestic violence.

(1) Permitted disclosures. Except for reports of child abuse or neglect permitted by paragraph (b)(1)(ii) of this section, a covered entity may disclose protected health information about an individual whom the covered entity reasonably believes to be a victim of

abuse, neglect, or domestic violence to a government authority, including a social service or protective services agency, authorized by law to receive reports of such abuse, neglect, or domestic violence:

(i) To the extent the disclosure is required by law and the disclosure complies with and is limited to the relevant requirements of such law;

(ii) If the individual agrees to the disclosure; or

(iii) To the extent the disclosure is expressly authorized by statute or regulation and:

(A) The covered entity, in the exercise of professional judgment, believes the disclosure is necessary to prevent serious harm to the individual or other potential victims; or

(B) If the individual is unable to agree because of incapacity, a law enforcement or other public official authorized to receive the report represents that the protected health information for which disclosure is sought is not intended to be used against the individual and that an immediate enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to the disclosure.

45 CFR 164.512- HIPAA disclosure exceptions that permit a covered entity to comply with a subpoena

(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by

such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and

(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:

(1) No objections were filed; or

(2) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

1.2 Will a release work?

A release (“authorization”) is specifically part of the HIPAA regulatory scheme and is mentioned in Public Health Law §18. However, releases/authorizations are easily revoked, and in a trial or hearing situation that might happen. There is also the HIPAA requirement involving notice if the subpoena is not issued by a court.

2. Substance abuse treatment records

2.1 Statutes/regulations:

NY Mental Hygiene Law §22.05(b)-

All records of identity, diagnosis, prognosis, or treatment in connection with a person's receipt of chemical dependence services shall be confidential and shall be released only in accordance with applicable provisions of the public health law, and any other state law, federal law and duly executed court orders.

The Federal law related to the confidentiality of substance abuse treatment records is 42 USC 290dd-2:

(a) Requirement. Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).

42 USC 290dd-2 goes on to set forth the circumstances under which records may be disclosed, including:

(b) Permitted disclosure.

(1) Consent. The content of any record referred to in subsection (a) may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g).

(2) Method for disclosure. Whether or not the patient, with respect to whom any given record referred to in subsection (a) is maintained, gives written consent, the content of such record may be disclosed as follows:

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

42 USC 290dd-2 also permits the promulgation of regulations, including those related to court authorization for the release of records.

(g) Regulations. Except as provided in subsection (h), the Secretary shall prescribe regulations to carry out the purposes of this section. Such regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders under subsection (b)(2)(C), as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

The Federal regulations related to the confidentiality of substance abuse records, which begin at 42 CFR 2.1, were amended in 2017.

42 CFR 2.64 sets forth the “Procedures and criteria for orders authorizing disclosures for noncriminal purposes.”

(a) Application. An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which the applicant asserts that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given written consent (meeting the requirements of the regulations in this part) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(b) Notice. The patient and the person holding the records from whom disclosure is sought must be provided:

- (1) Adequate notice in a manner which does not disclose patient identifying information to other persons; and
- (2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order as described in § 2.64(d).

(c) Review of evidence: Conduct of hearing. Any oral argument, review of evidence, or hearing on the application must be held in the judge's

chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner which meets the written consent requirements of the regulations in this part. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

- (1) Other ways of obtaining the information are not available or would not be effective; and
- (2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) Content of order. An order authorizing a disclosure must:

- (1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;
- (2) Limit disclosure to those persons whose need for information is the basis for the order; and
- (3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

There is a further restriction placed upon communications made by the patient to the program found in 42 CFR 2.63 ("Confidential communications."). In the context of litigation, the communication may only be disclosed if the patient offers testimony or other evidence that pertains to the content of the confidential communications.

42 CFR 2.61 states that the legal effect of the order is only to authorize the disclosure or use of the patient information, it does not compel its disclosure. The regulation says that a subpoena has to be issued in order to actually compel the disclosure. In practice, you would have to have the Court sign both the order and a subpoena, and you would need to serve both upon the provider.

42 CFR 2.20 states the Federal law does not preempt State law as follows: if disclosure is permitted under the Federal law/regulations but is prohibited under State law, the State law prevails. However, no State law may either authorize or compel any disclosure that is prohibited by the Federal regulations.

2.2 Will a release work?

3. Mental health records

3.1 Statutes/regulations:

New York Mental Hygiene Law §33.13 clinical records; confidentiality

Subdivision (c) states that clinical records are not public records and may not be released, except for the 17 exceptions the law lists circumstances under which another person or agency may obtain those records.

One exception is subdivision (c)(1), which requires that any records are not to be released except pursuant to an order of a court of record requiring disclosure upon a finding that the interests of justice significantly outweigh the need for confidentiality...

Another exception is found in subdivision (c)7, which permits the patient to grant consent for the release of their records to a third party. It would seem likely that if a person has given your caseworker a release that they might well revoke it if you are taking further legal action against them.

So, when you want the judge to sign a subpoena to produce records for trial, it looks like you need to bring a motion, since the court is required to make a finding that the interests of justice significantly outweigh the need for confidentiality. In addition to that, CPLR 2302(a) requires that any subpoena for this type of records must be accompanied by a court order.

What is the Federal law/regulation? HIPAA, but under the preemption analysis, the State law is more stringent, as a court is obliged to finding that the interests of justice significantly outweigh the need for confidentiality, while under HIPAA no such finding is required-remember the discussion above about obtaining medical records.

3.2 Will a release work?

Yes for the caseworker to obtain the records to monitor order compliance, but probably not for production to the court for a trial.

Sample papers: OSC, Affirmation, Subpoena and Order with Findings for the production of mental health treatment and substance abuse treatment records.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

In the Matter of a Proceeding Under Article 10 of
the Family Court Act

ORDER TO SHOW CAUSE
For Submission Only

Child's name (DOB: mm/dd/yyyy),

Family No.:

Docket No.: NN-

A Child Under the Age of Eighteen Years
Alleged to be Abused and Neglected by

NAME,

Respondent.

Upon reading and filing the attached affirmation of Susan M. Lettis, Esq., Attorney for the Otsego County Department of Social Services, and upon all previous proceedings made herein, let the following persons:

Name, LMSW
Otsego County Addiction Recovery Services
242 Main Street
Oneonta, NY 13820

Respondent name and address

Name, Esq., Attorney for Respondent
Address

Name, Esq., Attorney for the Child
Address

Any other parties to be put on notice

SHOW CAUSE AT A TERM OF THIS COURT to be held in the Family Court Hearing Room, County Office Building, 197 Main Street, Cooperstown, New York 13326 on **Tuesday, February 13, 2018 at 9:00 in the forenoon of that day, on submission only**, or as soon thereafter as counsel may be heard why an order should not be made and entered herein pursuant to 42 CFR 2.64, ordering that Name, LMSW appear in Otsego County Family Court in the above-referenced matter on February 14, 2018 at 11:15 in the forenoon, to provide testimony and records regarding Respondent Name, and for such other and further relief as the Court may deem just and proper.

AND, sufficient cause being shown, let service of a copy of this order, along with the papers upon which it was granted, by regular mail or facsimile or email, or personal service, upon the persons above listed, if made on or before February _____, 2018 be deemed good and sufficient service.

Enter: February _____, 2018

Hon. Brian D. Burns
Family Court Judge

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

In the Matter of a Proceeding Under Article 10 of
the Family Court Act

Child's Name (DOB: mm/dd/yyyy),

AFFIRMATION

Family No.:

Docket No.: NN-

Children Under the Age of Eighteen Years
Alleged to be Abused and Neglected by

Name,

Respondent.

I, Susan M. Lettis, Attorney for Otsego County Department of Social Services, duly admitted to practice law in the State of New York, affirm under penalty of perjury:

1. I am an attorney for the Otsego Department of Social Services. This affirmation is submitted in support of an Order to Show Cause to subpoena Name, LMSW, to testify and produce records pursuant to 42 CFR 2.64. This affirmation is made upon personal knowledge and information and belief, the sources of which are a review of the proceedings, case notes, and relevant statutes and case law.
2. The Otsego County Department of Social Services filed a petition for a violation of a court order on October 20, 2017, against Respondent Name. A hearing on this matter is scheduled for February 14, 2018 at 11:15am before Hon. Brian D. Burns.
3. The Petitioner alleges, among other things, that the Respondent failed to comply with substance use disorder treatment.
4. The information and records necessary to prosecute this violation petition are confidential, pursuant to 42 CFR 2.63, and thus, this motion, on notice to the person holding the information and records, Respondent, Respondent's counsel, and other attorneys of record is necessary to obtain a subpoena.
5. The Otsego County Department of Social Services is unable to secure admissible evidence without this subpoena. Public interest and need for disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the treatment services. The hearing scheduled for February 14, 2018 is part of an ongoing child neglect matter in Otsego County Family Court,

and it is a part of the procedure to secure permanency for the Respondent's child.

WHEREFORE, the Department of Social Services respectfully requests that the Court sign a subpoena and an order, to order Name, LMSW, to appear on February 14, 2018 before Your Honor, to provide testimony and records regarding Respondent Name, and for such other and further relief as this Court deems just and proper.

Dated: February , 2018

Susan M. Lettis, Esq.
Otsego County Department of Social Services

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

In the Matter of a Proceeding Under Article 10 of
the Family Court Act

SUBPOENA DUCES TECUM

Child's Name (DOB: mm/dd/yyyy),

Family No.: xxxx

Docket No.: NN-xxxxx-17/17A

A Child Under the Age of Eighteen Years
Alleged to be Abused and Neglected by

Name,

Respondent.

TO: **Name, LMSW**
Otsego County Addiction Recovery Services
242 Main Street
Oneonta, NY 13820

YOU ARE COMMANDED to appear before the Family Court of the State of New York, County of Otsego, at County Office Building, 197 Main Street, Cooperstown, New York on **February 14, 2018 at 11:15 in the forenoon** of said day, as a witness in a proceeding pending before the said Court in the above referenced matter. You are further ordered to bring all documents and records regarding **Respondent (DOB: mm/dd/yyyy) dated May 30, 2017 to September 16, 2017.**

PLEASE NOTE THAT NO PERSONAL APPEARANCES ARE NECESSARY SO LONG AS THE CERTIFIED COPIES ARE SENT AND RECEIVED BY THE OTSEGO COUNTY FAMILY COURT, 32 CHESTNUT STREET, COOPERSTOWN, NEW YORK 13326 TO ARRIVE BY Wednesday, February 14, 2018, 9:00 AM.

DATED: February __, 2018

By Order of the Court

Hon. Brian D. Burns
Family Court Judge

PLEASE TAKE NOTICE:

On the day and the hour you are to appear in Court you will be advised that you have the right to the services of an Attorney and that you may request an adjournment to retain an Attorney and to consult with him or her. However, it will be helpful to you and to the Court, if you desire an Attorney to have him or her present with you on the date you are to appear. It is wise to contact your attorney well ahead of the court date.

At a Term of the Family Court of the State of New York, held in and for the County of Otsego on the day of February 2018.

PRESENT: Hon. Brian D. Burns
FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF:

In the Matter of a Proceeding Under Article 10 of
The Family Court Act

ORDER

Child (DOB: mm/dd/yyyy)

Family No.:
Docket No.: NN-

A Child Under the Age of Eighteen Years
Alleged to be **Abused and Neglected** by

Name,

Respondent.

Upon the Order to Show Cause entered February , 2018, and motion brought by the Otsego County Department of Social Services, on Submission Only, and said Order to Show Cause, supporting affirmation of Susan M. Lettis, Esq., and a judicial subpoena deuces tecum to Otsego County Addiction Recovery Services for a certified copy of records of Respondent, having been served and filed in this Court, and upon due consideration of the applicable laws including HIPAA, 45 CFR Part 164, which does not allow disclosure of protected health information except as expressly permitted (including by court order), 42 USC 290 dd-2, and related regulations at 42 CFR Part 2 which require that records subject to their provisions be kept confidential unless an appropriate order authorizing disclosure is made, Mental Hygiene Law §33.13, which requires that all clinical records maintained pursuant to the provisions of §33.13 be kept confidential, unless disclosure is ordered by a court of record upon finding that the interests of justice significantly outweigh the need for confidentiality, and CPLR 2302, which requires that a subpoena to compel the production of clinical records maintained pursuant to the provisions of Mental Hygiene Law §33.13 be accompanied by an appropriate court order, and upon finding that the facts and circumstances necessitating disclosure of certain objective data pertaining to alleged evaluation and/or treatment of Respondent at Otsego County Addiction Recovery Services outweigh the possible adverse effects upon successful treatment and rehabilitation of the said Respondent,

the physician-patient relationships, and the treatment program, and that the interests of justice significantly outweigh the need for confidentiality, and that good cause and need for disclosure have been shown, it is hereby

ORDERED, that the motion brought by the Order to Show Cause is hereby granted, and it is further

ORDERED, that Otsego County Addiction Recovery Services shall produce a copy of its records regarding Respondent from May 30, 2017 to September 16, 2017 to this Court by Wednesday, February 14, 2018 or any recessed or adjourned dates; and it is further

ORDERED, that any information disclosed by Otsego County Addiction Recovery Services pursuant to this Order and the subpoena shall not be re-disclosed by any person, and particularly not to the child who is the subject of these proceedings, nor to any other children of the Respondent, and further, that the use of such information be strictly limited to this proceeding; and it is further

ORDERED, that at the conclusion of these proceedings, any written protected health information provided by Otsego County Addiction Recovery Services, including any copies made, be returned to Addiction Recovery Services.

Hon. Brian D. Burns

ENTER: February , 2018

Affirmation in response to an OSC requesting a subpoena for the testimony of a mental health provider:

Family Court of the State of New York
County of OTSEGO

In the Matter of

Name A ,

Petitioner,

- against -

Name B ,

Respondent.

**AFFIRMATION IN RESPONSE
TO MOTION**

File No.:

Docket No.: V-

I, Susan M. Lettis, Assistant Attorney for Otsego County, duly admitted to practice law in the State of New York, affirm under penalty of perjury:

1. I am an Assistant County Attorney of Otsego County. This affirmation is submitted in response to a motion for one subpoena pursuant to Mental Hygiene Law section 33.13 regarding the above-referenced matter. This affirmation is made based upon personal knowledge, upon information and belief, and upon review of relevant statutes and case law.
2. It came to the attention of the Otsego County Attorney's Office that Ms. X, Esq., intends to call Name C, LCSW, as a witness on behalf of her client, Name B. Name C would be called to testify regarding confidential information concerning Name B's mental health.
3. Name C, LCSW, is an employee at the Otsego County Mental Health Clinic.
4. Subsection (c) (1) of MHL § 33.13 requires a court order be made, with specific findings, prior to confidential information being released. As such, I communicated the same to Ms. X, explaining that Name C will not be able to testify without a court order *with the proper findings*. I instructed her on how to obtain a court order, and I pointed out a sample affidavit and a proposed order with the findings written in the order.

5. Subsequently, I received Ms. X's motion for a court order, and a proposed order which was drafted *without* the required findings as described in MHL § 33.13 subsection (c) (1).

6. It appears that Ms. X relies on subsection (c) (7) of MHL § 33.13. This section states that confidential information may be released:

“ . . . with the consent of the patient or client or of someone authorized to act on the patient's or client's behalf, to persons and entities who have a demonstrable need for such information and who have obtained such consent, provided that disclosure will not reasonably be expected to be detrimental to the patient, client or another provided . . .”

7. Ms. X asserts in her affirmation that “to the extent applicable, upon information and belief, Name C has determined that disclosure of his findings will not reasonably be expected to be detrimental to the respondent, his patient.”

8. I submit that in order for subsection (c) (7) of MHL § 33.13 to apply, contrary to what Ms. X suggests, the provider *must* make such a determination. In the present case, although Ms. X states that this has happened, it has not. Name C has made no determination that his testimony will not be detrimental to Name B. I submit that it would be rare for any practitioner to determine what the outcome of his or testimony would be, because the practitioner cannot predict, and has no control over, the questions that will be asked while under oath, and where his or her answers may lead.

9. Furthermore, *even if* Name C made such determination, MHL § 33.13 is *permissive*. It does not state that confidential information *shall* be released when certain conditions exists. It allows for disclosure, but it does not compel disclosure.

10. As such, Otsego County believes it is best practice to compel such testimony with a court order which contains the appropriate findings as listed in subsection (c) (1) of MHL § 33.13.

11. Otsego County diligently protects the confidentiality of the residents in which we serve. We strive to maintain high standards especially regarding mental health records and information, which are among the most protected types of records in our society. It is dangerous to treat the release and sharing of mental health records so casually.

12. Otsego County has no objection to the disclosure of these records so long as this Court makes the required findings and order. I have attached a proposed order to this affirmation which I respectfully ask the Court to use, if this Court orders that these confidential records and testimony be provided.

Wherefore, I respectfully request that the Court only allow disclosure of the mental health records and information, and testimony regarding the same by Otsego County Employee Name C, LCSW, after this Court has made the proper findings pursuant to Mental Hygeine Law, as outlined in the proposed order attached hereto, and for such other and further relief as this Court deems just and proper.

Dated: March 9, 2017

Susan M. Lettis, Esq.
Assistant County Attorney
Otsego County Attorney's Office
197 Main Street
Cooperstown, NY 13326
(607) 547-4210

The following is a response to a motion where the attorney has made the application appropriately:

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

In the Matter of

Name A,

Petitioner,

-against-

Name B,

Respondent.

RESPONSE TO MOTION

Family No.:

Docket No.: O-

O-

V-

I, Susan M. Lettis, Assistant County Attorney for Otsego County, duly admitted to practice law in the State of New York, affirm under penalty of perjury:

1. Otsego County was put on notice of the Petitioner's application to release and disclose substance use disorder records and mental health records as outlined in Attorney X's affirmation filed on or about September 1, 2017.
2. Upon information and belief, Attorney X has made the proper application for the testimony of Otsego County employee, Name C, LMSW, and the records of Addiction Recovery Services, following the appropriate federal regulations.
3. Otsego County has no objection of the disclosure and release of such records so long as proper findings are made by this Court as required by state and federal law.
4. Attached hereto is a proposed order which has the required findings for the release of such records.

WHEREFORE, Otsego County respectfully requests that the proposed order be signed so that Otsego County will be in compliance with all federal and state laws if the Petitioner's application to release and disclose such records is granted, and for such other and further relief as this Court deems just and proper.

Dated: September 11, 2017

Susan M. Lettis
Assistant County Attorney
Otsego County Attorney's Office
197 Main Street
Cooperstown, NY 13326
(607) 547-4208

Here is an order that includes the appropriate findings:

At a Term of the Family Court of the State of New York, held in and for the County of Otsego in the _____ day of March 2017.

PRESENT: Hon. John F. Lambert
Family Court Judge

In the Matter of

Name A.,
Petitioner,

ORDER

File No.:

- against -

Docket No.: V- -16/16A

Name B.,

Respondent.

Upon the motion brought by Attorney X., Esq., Legal Aid Society of Mid-New York, Inc., Attorney for Respondent, Name B., made returnable on March 15, 2017, on submission only, and upon the affirmation in response to the motion submitted by Susan M. Lettis, Esq., Assistant County Attorney for Otsego County, requesting that a court order be entered with the appropriate findings as required by Mental Hygiene Law § 33.13, compelling the testimony of Name C., LCSW;

And upon due consideration of the applicable laws including Mental Hygiene Law, which requires that all clinical records and information maintained pursuant to the provisions of §33.13 be kept confidential, unless disclosure is ordered by a court of record upon finding that the interests of justice significantly outweigh the need for confidentiality, and CPLR 2302, which requires that a subpoena to compel the production of clinical records maintained pursuant to the provisions of Mental Hygiene Law §33.13 be accompanied by an appropriate court order; and

Upon finding that the facts and circumstances necessitating disclosure of certain information pertaining to alleged evaluation and/or treatment of Respondent, Name B., at Otsego County Mental Health Clinic, outweigh the possible adverse effects upon successful treatment and rehabilitation of the said Respondent, the physician-patient relationships, and the treatment program, and that the interests of justice significantly outweigh the need for confidentiality, and that good cause and need for disclosure have been shown, it is hereby

ORDERED, that the motion brought by Attorney X., Esq., attorney for Respondent is granted in so far as it incorporates the language of the proposed findings and order as submitted by the County Attorney's Office; and it is

ORDERED, that Name C., LCSW, shall appear in Otsego County Family Court on March 20, 2017 at 1:30 in the afternoon and at any recessed or adjourned date, provided that Respondent's attorney has provided advance notice in writing to Mr. C. of the adjourned date, to give testimony in this action on the part of the Respondent.

ORDERED, that any information disclosed by Otsego County pursuant to this Order shall not be re-disclosed by any person, and particularly not to the child(ren) who are the subject of these proceedings, nor to any other children of the Petitioner or Respondent, and further, that the use of such information be strictly limited to this proceeding; and it is further

ORDERED, that at the conclusion of these proceedings, any written protected health information provided by Otsego County, including any copies made, be returned to the Otsego County Attorney's Office.

ENTER:

Dated: March _____, 2017

Hon. John F. Lambert
Family Court Judge

4. Law enforcement records

4.1 Statutes/regulations:

For the purposes of the production of State/local police or county sheriff records at trial or hearing, you might need to utilize CPLR 2307, as their records would fall under that statute like other State/local government records. There isn't necessarily any confidentiality that attaches to those records, so obtaining those subpoenas under CPLR 2307 will usually be more a formality than anything else.

III. Questions/Final Comments