

Obtaining DFCS Records in Child Molestation Cases

Under both federal and Georgia law, a defendant who is accused of child molestation, or any type of child abuse, can seek a court order to obtain privileged records in the possession of the Department of Family and Children Services (DFCS).

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the U.S. Supreme Court held that an accused child abuser has a right under the due process clause of the 14th Amendment to discover exculpatory evidence gathered by the State. However, the court also held that defendants do not possess unrestrained authority to search through records maintained by state child protection agencies due to the state's interest in protecting the sensitive information they uncover. Rather, the defendant is entitled to have the court review the records *in camera* to determine if they contain any exculpatory information. If such evidence is discovered, the court is then required to turn those records over to the defense.

Due to the confidential nature of DFCS files, access by third parties is prohibited except as provided by statute. Thus, according to *Ellis v. State*, 289 Ga. App. 452, 657 S.E. 2d 562 (2008), a defendant is not entitled to the court's in-camera inspection of DFCS documents as a matter of course. Not even a standard discovery request for the information is sufficient. In order to gain access to the state's evidence, a defendant must follow the proper procedure outlined in O.C.G.A § 49-5-41. Under the statute, the defendant must petition the trial court to subpoena the records and make a determination as to whether "such records may be necessary for determination of an issue" before the court and are "otherwise admissible under the rules of evidence." A particularized motion requesting that the court subpoena the file and quoting the relevant case law for support is required.

Fortunately for defendants, the trial court is the only appropriate gate-keeper of the DFCS records. In *Pollard v. State*, 260 Ga. App. 540, 580 S.E. 2d 337 (2003), the court found it improper for a trial court judge to direct DFCS to turn over its records to the prosecution to review them for exculpatory materials.

If, after conducting an *in camera* review of the DFCS records, a judge determines that they contain exculpatory evidence, the judge must turn over the actual records to the defense. In *Dodd v. State*, 293 Ga. App. 816, 668 S.E. 2d 311 (2008), it was held that a summary of the records is not enough. However, a judge may determine that the records contain no exculpatory evidence. If a defendant wishes to challenge a judge's *in camera* inspection or if the defendant believes the judge wrongfully withheld some documents, the burden is on the defendant to show what materials were suppressed and how they were materially exculpatory. Therefore, it is imperative for criminal defense attorneys to request that the records be filed under seal with the court so that they will later be available for the appellate court.

In every child molestation case, we aggressively seek to obtain any and all DFCS records involving the child as well as his/her family. Not only do we seek to obtain records concerning the investigation of the present allegations, but often times DFCS will possess records concerning previous investigations. Many times, we are able to uncover prior false allegations that the child has made in the past that were investigated by DFCS but perhaps not by law enforcement. Other times, we have been able to uncover evidence in DFCS files that suggested that someone else may have abused the child. Therefore, it is critical that the motion requesting DFCS records be broad enough

to encompass any prior investigations.