

JEFFREY M. HINDOIEN
Deputy Attorney General
JAY PORTEEN
Assistant Attorney General
MT Department of Justice
P.O. Box 201401
Helena, MT 59620-1401
T: 406.442.2026
Jeff.Hindoien@mt.gov
Jay.Porteen@mt.gov

FILED

OCT 24 2019

ANGIE SPARKS, Clerk of District Court
By ~~K KRESGE~~ Deputy Clerk

COUNSEL FOR PETITIONER

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

MONTANA DEPARTMENT
OF JUSTICE,

Petitioner,

v.

MONTANA DEPARTMENT OF
PUBLIC HEALTH AND HUMAN
SERVICES,

Respondent.

Cause No. ADV 2019-1481

Hon: MIKE MENAHAN
PRESIDING JUDGE

**PETITION FOR *IN CAMERA*
REVIEW, DECLARATORY RELIEF
AND DISCLOSURE ORDER**

COMES NOW the Petitioner Montana Department of Justice (DOJ) and
hereby alleges as follows:

1. DOJ is an Executive Branch agency existing and operating under the general authority of Title 2, Chapter 15, MCA.

2. The Respondent Montana Department of Public Health and Human Services (DPHHS) is also an Executive Branch agency existing and operating under the general authority of Title 2, Chapter 15, MCA.

3. One of the many statutory responsibilities of DPHHS is to investigate reports of child abuse and neglect under the provisions of Title 41, Chapter 3, Part 2, MCA.

4. The Legislature has established an “Office of the Child and Family Ombudsman” (“Ombudsman”) within DOJ and has assigned certain specified duties and responsibilities to the Ombudsman. The Legislature’s action in creating the Ombudsman was based on its finding that “an independent, impartial and confidential ombudsman serves to protect the interests and rights of Montana’s children and families” and serves to “strengthen child and family services by working in collaboration with [DPHHS] and with appropriate county attorneys in [abuse and neglect] cases under review.” *See* § 41-3-1209, MCA.

5. One of the specific powers and duties assigned to the Ombudsman by the Legislature is to respond to requests for assistance regarding actions, omissions, decisions, etc. on the part of DPHHS in abuse and neglect matters. *See* § 41-3-1211, MCA. A request for assistance means a request by a person asking the Ombudsman

for assistance in protecting the rights or interests of a child or family in Montana. *See* § 41-3-1210(4), MCA.

6. Subject to limited exceptions, the Ombudsman is required to investigate any request for assistance. After an investigation is completed, the Ombudsman provides DPHHS with “any findings, conclusions and recommendations.” *See* 41-3-1212, MCA. At the Ombudsman’s request, DPHHS “shall inform [the Ombudsman] in a timely manner about any action taken to address or any reasons for not addressing [the Ombudsman’s] findings, conclusions, and recommendations.” *Id.*

7. If the investigation uncovers acts or omissions on the part of DPHHS that, in the assessment of the Ombudsman, could have or did cause harm to the children or family and DPHHS did not or could not resolve the concerns, the Ombudsman provides DPHHS with its findings, conclusions and recommendation regarding those circumstances in the form of a written document entitled “Findings Report.” Since 2014, the Ombudsman has provided approximately fifty (50) “Findings Report” documents to DPHHS based on requests for assistance.

8. On or about May 2, 2019, DOJ received a request from a member of the media for a copy of all Findings Reports that the Ombudsman had previously transmitted to DPHHS. Another request was subsequently received from a different journalist.

9. The Ombudsman is authorized “to share relevant findings related to an investigation, subject to disclosure restrictions and confidentiality requirements, with individuals or entities legally authorized to receive, inspect or investigate reports of child abuse or neglect.” *See* § 41-3-1211(5), MCA.

10. Montana Code Annotated § 41-3-205(1) provides that both (1) “case records . . . concerning actions taken under [Title 41, Chapter 3] and (2) “all records concerning reports of child abuse and neglect” must be kept confidential except as provided by § 41-3-205, MCA. Further, the Ombudsman may not be compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the Ombudsman’s official duties. *See* § 41-3-1213, MCA.

11. One of the exceptions under which records relating to reports of child abuse and neglect may be disclosed is a disclosure to “the news media, if disclosure is limited to confirmation of factual information regarding how the case was handled and if disclosure does not violate the privacy rights of the child or the child’s parent or guardian, as determined by [DPHHS].” *See* § 41-3-205(3)(p), MCA.

12. After assessment and consideration of the media request for a copy of a Findings Report, DOJ has determined that not only the requested Findings Report, but also all other Findings Report documents can be redacted in a manner that removes any information that could potentially identify any individual involved with

the subject of the Findings Report, and therefore not implicate any individual privacy rights.

13. The Montana Supreme Court has recognized that, when appropriately employed, redaction offers a means for disclosing relevant public information while protecting a privacy interest. *See Krakauer v. State of Montana*, 2019 MT 153, ¶ 33, 396 Mont. 247, 445 P.3d 201. Further, DOJ also recognizes its obligation to allow access to public information upon request pursuant to Article II, Section 9 of the Montana Constitution except where the demands of individual privacy clearly exceed the merits of public disclosure.

14. Based on that assessment, DOJ made the determination that it would redact the Findings Report documents and place them on the DOJ website space for the Ombudsman so that they would be available to not only the media requestor, but also to the public in general.

15. DPHHS has advised DOJ, however, that it (1) disagrees with DOJ's assessment regarding the efficacy of redaction and (2) views the Findings Reports (even as redacted) as confidential and not subject to disclosure under the Montana Constitution or Title 2, Chapter 6, Part 10, MCA.

16. DPHHS has further advised that it disagrees with DOJ's practice of providing copies of the Findings Reports to Disability Rights Montana (DRM) upon request under the authority of § 41-3-205(3)(f), based on DRM's status as the State

of Montana's designated Protection & Advocacy program under 42 U.S.C. 15043(a)(2).

15. Under the Uniform Declaratory Judgments Act, §§ 27-8-101 *et seq.*, MCA, DOJ is entitled to seek and secure a declaration from this Court as to both (1) whether the redacted Findings Reports constitute public information as defined in § 2-6-1002(11), MCA and (2) whether DOJ is authorized to provide unredacted Findings Reports to DRM upon request under § 41-3-205(3)(f), MCA.

16. DOJ is seeking leave of Court, through the filing of a *Motion for Order Authorizing Filing Under Seal* filed concurrently herewith, to file copies of the Findings Reports (both redacted and unredacted) under seal so that the Court can conduct an *in camera* review of the documents and render a declaration as to both (1) the public or confidential status of the redacted Findings Reports under Montana law and (2) the status of the Findings Reports under § 41-3-205(3)(f), MCA for purposes of providing them to DRM upon request.

WHEREFORE, DOJ respectfully petitions this Court to take jurisdiction regarding DOJ's request for a declaratory judgment, conduct an *in camera* review of the above-referenced documents, and afford DOJ, DPHHS and any other interested parties the opportunity to present arguments to the Court. Following consideration of those arguments, DOJ respectfully requests that the Court then render a declaratory judgment as to both (1) the public or confidential status of the

redacted Findings Reports under the Montana Constitution and Title 2, Chapter 6, Part 10, MCA and (2) the status of the Findings Reports under § 41-3-205(3)(f), MCA for purposes of providing them to DRM upon request and issue an Order authorizing (or prohibiting) disclosure of the Findings Reports consistent with the declaratory judgment rendered by the Court.

DATED this 24th day of October, 2019.

MONTANA DEPARTMENT OF JUSTICE

By: 

JEFFREY M. HINDOIEN

Deputy Attorney General

JAY PORTEEN

Assistant Attorney General