



## **TRANSPARENCY: THE TENSION BETWEEN PRIVACY AND PUBLIC ACCOUNTABILITY**

### **QUESTIONS TO GUIDE THE COMMISSION'S DELIBERATIONS**

- What does the Commission see as the appropriate balance between family privacy rights and the public's need to know for system accountability when a child dies or nearly dies?
- What are the implications for privacy for the child and his or her surviving family members, if other records are available in the public arena?
- Are there changes the Commission might recommend to the Child Abuse Prevention and Treatment Act (CAPTA) regarding public disclosure of information regarding a child abuse or neglect fatality that would result in fewer children dying from abuse and/or neglect?
- Is it desirable to have greater consistency across states when it comes to public disclosure of information following a child abuse or neglect fatality? If so, what steps could the federal government take, if any, that would improve this consistency?

### **COMMON ARGUMENTS FOR AND AGAINST DISCLOSURE**

State and federal statutes have historically protected the privacy of family members involved with child protection agencies. The primary argument for limiting disclosure is the right to privacy of family members involved in the child protection system.

The second argument for limiting disclosure concerns the criminal investigation. Law enforcement frequently does not want certain information made public because it may compromise the ongoing investigation. District attorneys may similarly not want certain information revealed until formal discovery motions are filed.

Arguments for more complete disclosure typically come from the press, advocates, researchers, legislators, and the public. The press strongly takes the position that full disclosure of records, with reasonable redaction, is essential to public accountability.

Recognizing competing needs, Congress included language in CAPTA regarding states' requirements for disclosure in cases of near fatalities and fatalities.

## CONGRESS'S STATEMENTS AND ACTIONS ON PUBLIC DISCLOSURE

The CAPTA reauthorization in 1996<sup>1</sup> required states to provide assurances that they had a state law in effect to “allow for public disclosure of the findings or information about the case of child abuse or neglect, which has resulted in a child fatality or near-fatality.”

A year earlier, Congress worked toward reauthorizing CAPTA within a comprehensive welfare reform bill (H.R. 4 Work Opportunity Act of 1995)<sup>2</sup> that eventually was vetoed by then-President Bill Clinton.<sup>3</sup>

Before that veto, members of the House and Senate worked through a conference committee to resolve differences on the welfare reform bill. In that 1995 conference committee report, conferees wrote that it was their intent “to preserve the confidentiality of reports and case information pertaining to child abuse and neglect except in the instances specifically delineated in this act or when a state legislature has specifically authorized limited release of such information.”<sup>4</sup> The conference report drew a distinction between public disclosure and the sharing of case information between systems and professionals, establishing the latter as a “must” requirement. Meanwhile, public sharing of “factual information” regarding how a child abuse or neglect fatality or near-fatality case was handled was put forth as a “may” provision. The conferees wrote that public disclosure was important in order “to provide public accountability for the actions or inaction of public officials.”<sup>5</sup>

No further changes specific to this public disclosure provision were made when CAPTA was reauthorized in 2010. Still, the U.S. Senate did address the issue. The Committee on Health, Education, Labor, and Pensions (HELP Committee) stipulated that the Senate HELP Committee’s view was that the disclosure provisions require “mandatory public disclosure of information about a case of child abuse or neglect which has resulted in a child fatality or near fatality.”<sup>6</sup> The HELP Committee report said that this disclosure requirement “ensures improved accountability of protective services and can drive appropriate and effective systemic reform.” The committee stressed that “not all States are in compliance with these CAPTA requirements.” It then called upon the Secretary of Health and Human Services (HHS) “to develop clear guidelines in the form of regulations instructing the States of the responsibilities under CAPTA to release public information” in these cases. HHS also was expected to provide technical assistance to the states toward “developing the appropriate procedures for full disclosure of information and findings in these cases.”

## FEDERAL GUIDANCE TO THE STATES

Since 2011, the Children’s Bureau (CB) has relied on policy interpretation questions (PIQs) within the Child Welfare Policy Manual (CWPM)<sup>7</sup> to provide states with guidance about how to meet the CAPTA public disclosure requirement.

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<sup>1</sup> Public Law 104-225

<sup>2</sup> <https://www.congress.gov/bill/104th-congress/house-bill/4>

<sup>3</sup> <http://www.senate.gov/reference/Legislation/Vetoed/Presidents/ClintonW.pdf>

<sup>4</sup> U.S. House of Representatives, H.R. Report 104-430, Personal Responsibility and Work Opportunity Act of 1995, Conference Report to Accompany H.R. 4, December 20, 1995.

<sup>5</sup> Ibid.

<sup>6</sup> United States Senate Report 111-378, December 18, 2010.

<sup>7</sup> [http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=68](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68)

In one PIQ, CB clarified that although CAPTA requires release of “either the findings or information,” CB has interpreted this provision to be “inclusive and not limiting.” CB reminded states, “The intent of this provision was to assure that the public is informed about cases of child abuse or neglect which result in the death or near death of a child. As with the use of the other ‘or’s’ in this provision (‘child abuse or neglect’ and ‘child fatality or near fatality’), we understand the language to be inclusive and not limiting.”<sup>8</sup>

CB also has been asked to address what is meant by its earlier response that CAPTA “requires” public disclosure. CB reminded states that they “must have procedures or provisions that allow the public to access information when child abuse or neglect results in a child fatality or near fatality. The State does not have discretion in whether to allow the public access to the child fatality or near fatality information; rather, the public has the discretion as to whether to access the information. In other words, the State is not required to provide the information to the public unless requested. However, once a request has been made, the State must provide the information.”<sup>9</sup>

Another PIQ addressed whether a state must “turn over all of the information in the entire case record” if that is requested. CB said that was not the expectation. Instead, the “State may determine its procedures in accordance” with other provisions of the CWPM and then can opt to “release the full investigation; a summary of the investigation; or a statement of findings and information about the incident among other options.” CB also reminded states that they must continue to comply with “other relevant Federal confidentiality laws,” specifically citing the Health Insurance Portability and Accountability Act of 1996 (HIPAA).<sup>10</sup>

CB considered the effects of disclosure on surviving siblings and other children that lived with the victim child. “The information about another child in the household who is not a fatality or near fatality victim is not subject to the CAPTA public disclosure requirement unless this information is pertinent to the child abuse or neglect that led to the fatality or near fatality. This information in fact may be protected by the confidentiality requirements applicable to titles IV-B/IV-E of the Social Security Act.”<sup>11</sup>

Finally, a PIQ sought to clarify for states exactly what “must be disclosed” to the public. CB responded that CAPTA requires, at a minimum, that the following be released:

- The cause of and circumstances regarding the fatality or near fatality
- The age and gender of the child
- Information describing any previous reports or child abuse or neglect investigations that are pertinent to the child abuse or neglect that led to the fatality or near fatality
- The result of any such investigations

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<sup>8</sup> Question #2, updated and reissued 8/06/13. Retrieved from [http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=68](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68)

<sup>9</sup> Question #4, updated and reissued 09/12/12. Retrieved from [http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=68](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68)

<sup>10</sup> Question #5, updated and reissued 09/12/12. Retrieved from [http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=68](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68)

<sup>11</sup> Question #7, updated and reissued 09/12/12. Retrieved from [http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=68](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68)

- The services provided by and actions of the State on behalf of the child that are pertinent to the child abuse or neglect that led to the fatality or near fatality

CB reiterated the necessity to be in compliance with other “relevant federal confidentiality laws” and noted that states “may allow” exceptions to the public disclosure provisions “in order to ensure the safety and well-being of the child, parents and family or when releasing the information would jeopardize a criminal investigation, interfere with the protection of those who report child abuse or neglect or harm the child or the child’s family.”<sup>12</sup>

## **CB SETS JUNE 29 DEADLINE FOR COMMENTS ABOUT FEDERAL GUIDANCE**

In March of this year, CB invited public comment to better understand how states are meeting the CAPTA public disclosure provisions.<sup>13</sup> ACF specifically asked for insight as to whether the responses in 2012 in the CWPM have led to improvements.

Individuals who have asked for specific information after a child died or nearly died from child abuse and neglect are asked to provide detail about what information was requested, what was received, and the “confidentiality provision” cited by the state in denying access to information, if applicable. Stakeholders also were asked to comment on any concerns they have with the definition of near fatalities in their state.

States, meanwhile, are encouraged to address the following questions:

- What challenges, if any, have you faced implementing the revised policy? Has the revised policy improved your disclosure process and policies?
- Are there challenges in applying the disclosure policy while also ensuring that you adhere to confidentiality protections?

Comments must be filed with CB on or before June 29, 2015.

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<sup>12</sup> Question #8, updated and reissued 09/12/12. Retrieved from [http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=68](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68)

<sup>13</sup> <http://www.gpo.gov/fdsys/pkg/FR-2015-03-31/pdf/2015-07390.pdf>