



Michigan Supreme Court

State Court Administrative Office

Friend of the Court Bureau

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Steven D. Capps
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MEMORANDUM

DATE: October 23, 2014

TO: Circuit Court Judges
Circuit Court Administrators
Friends of the Court

FROM: Steven D. Capps, Director

RE: Confidentiality and Access to Records Under MCR 3.218
Rescinds SCAO Administrative Memorandum 2003-07

Section 19 of the Friend of the Court Act (MCL 552.519) provides that the State Court Administrative Office (SCAO), Friend of the Court Bureau (FOCB), shall develop and recommend guidelines for conduct, operations, and procedures for operation of friend of the court (FOC) offices. The Friend of the Court Act also requires that each FOC take all necessary steps to adopt office procedures to implement the act, Supreme Court rules, and the recommended policy and procedures of the FOCB. [MCL 552.503(6).]

Effective January 1, 2014, the Michigan Supreme Court approved changes to MCR 3.218, Access to FOC Records. This memorandum will help FOC offices understand and implement the court rule provisions.

This memo also updates [Model LAO 1](#). Courts with an existing LAO based on Model LAO 1 must rescind that LAO, as the court rules referenced within the LAO have changed. Courts rescinding that LAO may choose to reissue a new LAO based on the revised Model LAO 1 attached to this policy

If you have any questions or comments about this policy, please contact Daniel Bauer at 517-373-5975, or bauerd@courts.mi.gov.

Overview and General Applicability

MCR 3.218 specifies the ways individuals or agencies can access FOC records. Unless specifically allowed by MCR 3.218, court staff must refuse to provide access to FOC records. This includes requests under the Freedom of Information Act, a subpoena authorized by another section of the Michigan Court Rules, or any other request for information that is not authorized under MCR 3.218.

Information in FOC records often has a dual nature as both a record of the FOC (governed by Michigan Court Rules) and a Title IV-D record (governed by Title IV-D of the Social Security Act, various state laws, and policies published by Michigan's Office of Child Support (OCS)). The information in FOC records that is not governed by Title IV-D (e.g., custody or parenting time investigations) is governed only by the court rule. Title IV-D policy does not affect how the FOC maintains non-Title-IV-D information.

FOC staff must ensure that any release of Title IV-D information complies with both the court rule and with Title IV-D requirements.

MCR 3.218 classifies those individuals or agencies that may access the FOC records into two groups: those that can access only *nonconfidential* information and those that can access both *confidential and nonconfidential* information. The rule also provides procedures for FOC citizen advisory committees to access FOC records, and general information regarding denials of access to FOC records.

A. Definitions

An FOC record is “any case-specific information the FOC maintains in any media.” This includes paper files, imaged files, recorded DVDs, or any other media storage mechanisms. The rule limitation to “any case-specific information” clarifies that general summary statistics (e.g., performance measures) are not records governed by the rule. Recordings of judicial and referee hearings are governed by MCR 8.119 and are not considered FOC records. Recordings of referee hearings maintained under MCR 3.215(D)(4)(a) are specifically and solely governed by that court rule.

Paragraph (A)(3) lists confidential items. This list includes:

- Staff notes.
- Confidential information to or from the Department of Human Services (DHS) child protective services unit regarding suspected child abuse or neglect.

Professional FOC staff are mandated reporters of suspected child abuse or neglect. When making a report of suspected abuse or neglect of a child, the FOC can disclose any information necessary to facilitate the investigation. Likewise, if the DHS staff contacts the FOC for information during an investigation reported by another individual, the FOC staff can share its information.

- Records from alternative dispute resolution (ADR), including records from mediation sessions as defined in MCR 2.412.

The confidentiality rules for mediation are governed by MCR 2.412, even if the FOC maintains records related to the mediation.

- Communications from minors.
- Grievances and any responses.

These materials may be disclosed only to the individual who submitted the grievance, a citizen's advisory committee under MCR 3.218(D), or the FOCB.

- Information made confidential by court order.

If a court order prohibits the release of information, that information is confidential. This includes case-specific orders and general orders such as Supreme Court Administrative Order No. 2002-3 that makes a party's address confidential when the case has a family violence indicator.¹

- Information subject to a privilege, but only if the privilege is claimed.

FOC records contain information that may be nondiscoverable due to the privileged nature of the information. Some documents may include a mixture of privileged and nonprivileged information. Release of those documents would violate the privilege unless privileged information is redacted from the documents before they are released.

Not all privileges are absolute, and privileges must be raised by someone with standing to raise them. The FOC office might receive a request to access a record that would be nonconfidential under these rules if a privilege were not raised. On receiving such a request, the FOC staff should notify the person with the right to raise the privilege of the request. If the privilege is raised, the FOC office shall treat the record as confidential, and release the information only as allowed by MCR 3.218.² A list of privileged communications is included in Appendix A.

Professional reports disseminated under MCR 3.219 remain nonconfidential, because MCR 3.219 "...specifically provides for the protection or release of friend of the court records," as allowed under MCR 3.218(A).

- Any information classified as confidential under Title IV-D of the Social Security Act.

The rule also confirms that when contracted employees (e.g., staff of a company operating the MiSDU, evaluating a special project, or developing, modifying, and running the MiCSES application) work for an entity that has access to FOC records, then the contracted employees have the same access to FOC records as the contracting entity.

¹ For more information, see OCS Title IV-D Memorandum 2009-017 at <https://mi-support.state.mi.us/Policy/AT2009-017.pdf>.

² See section E for information on denying access to FOC records, and other alternatives for the public to obtain access to the records sought.

Finally, for purposes of this court rule, governmental agencies are “...any entity exercising constitutional, legislative, executive, or judicial authority, when providing benefits or services.”

B. Access to Nonconfidential Information

An FOC office must provide “a party; a third-party custodian; guardian or conservator; guardian ad litem or counsel for a minor; lawyer-guardian ad litem; an attorney of record; and the personal representative³ of the estate of a party” with access to nonconfidential records.

The rule allows for release of information to a governmental agency, but only on the person’s request and only if the information is necessary to receive services from the agency. For example, many recipients of support apply for housing assistance from the Michigan State Housing Development Authority (MSHDA). The MSHDA requires documentation of all child support or spousal support payments received, but its rules prohibit it from accepting the information from the applicant. Under the provisions of the new rule, the FOC is able to provide that information.

An active-duty service member can request disclosure to an officer in the Judge Advocate General (JAG) corps. The JAG attorney may receive nonconfidential information to aid the active-duty service member who is a party to the case under MCR 3.218(B)(2), without filing an appearance.

C. Access to Both Confidential and Nonconfidential Information

The court rule authorizes access to both confidential and nonconfidential information to individuals working for certain entities, including:

- Other agencies and individuals as necessary to implement the state plan for child support under Title IV-D of the Social Security Act (for this state or another Title IV-D agency) or as required by the court, state law, or regulation that is consistent with the state’s Title IV-D plan.
- The DHS, as necessary to report suspected abuse or neglect, or to allow the DHS to investigate or provide services to a party or a child on a case.
- Other IV-D agencies (for instance, another state’s IV-D agency, or another nation’s IV-D agency counterpart).
- Auditors from state or federal agencies, but only as required to perform their audit functions of an FOC matter.
- Corrections, parole, or probation officers, when in the opinion of the FOC, access would assist the office in enforcing a provision of a custody, parenting time, or support order.

³ While MCR 3.218 allows the FOC to release support account information to a personal representative, it does not allow the FOC to disburse money to the personal representative. Under MCL 552.502a(e), the personal representative of an estate of the party is not a recipient of support.

- Michigan law enforcement personnel who are conducting an investigation related directly to an FOC matter, and to federal law enforcement officers pursuant to a federal subpoena in a criminal or civil investigation.⁴

These rules allow the FOC to disclose information to meet its statutory duties and release information when appropriate to assist the FOC in ensuring that support is paid or to allow other agencies to do their jobs with respect to an FOC matter. For example, the FOC can send an income withholding notice (IWN) that includes otherwise confidential information (name, date of birth, social security number) to an employer, because disclosure of such information is necessary for the employer to properly confirm the identity of the individual before withholding the employee's income.

Under MCL 722.623(1)(a), professional FOC staff members are mandated reporters of child abuse or neglect. The rule permits the FOC staff to disclose confidential or nonconfidential information to the DHS when making that report. Similarly, the FOC can provide access to confidential and nonconfidential information to the DHS to assist it in providing services to a child.

In certain circumstances, corrections, parole, and probation officers have limited access to the FOC records. Typically, this will occur when the officer is confirming the person's compliance with a child support order (e.g., looking at the payment record), when a condition of parole or probation is compliance with other court orders or the underlying conviction is for failure to pay support. However, corrections, parole, or probation officers cannot use the FOC as a general resource to obtain information about a party to the case outside of these two scenarios.

Michigan law enforcement personnel have access to confidential and nonconfidential information to conduct a criminal investigation related directly to some activity involving the FOC. For example, if a parent makes threats against FOC staff, the FOC may share information about the parent with law enforcement personnel sufficient to allow an investigation.

D. Information Requested by a Citizen Advisory Committee (CAC)

A CAC reviews and investigates grievances in three circumstances: when a party to a domestic relations matter files a grievance concerning office operations directly with the CAC; as part of a random selection and review of grievances submitted directly to the FOC; and where a grievance alleges that a decision was made based on gender rather than the best interests of the child.

A CAC may hold a formal or informal hearing on a submitted grievance. 1998 PA 551 modified the Friend of the Court Act to require the FOCs, under the chief judge's supervision, to provide the CACs with a random selection of grievances, case records,

⁴ When a federal law enforcement officer subpoenas the FOC records in a criminal or civil investigation, the information disclosed pursuant to a federal subpoena under this rule must also comply with Title IV-D confidentiality regulations if the request is for Title IV-D information. The FOC should contact the FOCB before complying with a federal subpoena. The FOCB analysts can review the facts of the case, discuss the implications of releasing Title IV-D information with the OCS, and suggest a course of action to the FOC in how to comply with the subpoena and Title IV-D regulations at the same time.

and other information pertaining to the case of a party who has filed a grievance with the CAC, which may aid the CAC's formal or informal hearing. The act further states that a CAC may access information regarding the procedures used by the office to carry out its responsibilities as defined by statute, court rule, or the FOCB's policies or procedures, as well as access information regarding the administration of the FOC office, including budget and personnel information. The court rule requires that certain types of information remain confidential. Pursuant to federal law, the release of information concerning the location of a party should not be disclosed when a family violence indicator is set for the case. The CAC should use the following procedures to obtain information to do its work:

1. Requests for information regarding office procedures [MCL 552.504b(1)(c).]

The CAC shall submit a written request in letter format to the chief judge, with a copy to the FOC, when asking for information from the FOC. The CAC shall give a sufficient description of the information requested to allow the FOC to comply with the request, and must specify how the information is to be received (e.g., in the FOC office, at a committee meeting, obtaining copies). If the chief judge approves the request, the chief judge will send a letter to the CAC with a copy to the FOC stating that access will be allowed. If a request is denied, the letter should specify what information will be provided, if any, or how the CAC can narrow its request to obtain a more favorable determination.

2. Request for case records pertaining to a grievance [MCL 552.504b(1)(a).]

The CAC should submit its request to the FOC in writing. Within five business days of the receipt of the request, the FOC director or designated employee shall review the request and determine whether information is confidential under MCR 3.218. If the request does not ask for information that is confidential, it should be approved. If the request asks for information that is confidential, the FOC must notify the parties of the request.

If notice is required, the FOC director or designated employee shall notify the interested parties and the CAC that they have 14 days from the date of the notice to submit written comments on the request to the judge assigned to the case.

After 14 days, the judge assigned to the case shall determine whether to approve the request, deny the request, or approve the request subject to terms and conditions to protect the rights of a party or the well-being of a child. The judge may impose such terms and conditions as are appropriate to protect the rights of a party or the well-being of a child. The judge's decision is intended to be an administrative decision, not a decision on the merits of the legal issues raised. Once the administrative decision is made, any party may file a formal motion to obtain a decision on the merits.

Upon making a determination that no notice is required, or after a court order granting access is effective, the FOC director or designated employee shall notify the CAC and shall immediately facilitate access.

E. Denials and Other Access

The FOC may refuse to provide information that it did not create or author (MCR 3.218[E]), and may redirect the requestor to the person or entity that created the record. For example, the FOC often receives requests for copies of orders or for copies of tax returns that the other party provided pursuant to a support review. The FOC may refuse to provide access to those records, and refer the requesting individual to the clerk of the court or the party who provided the tax return.

The FOC may receive requests for access to its records from persons or companies who are not listed as having a right to access its records. Some examples include companies seeking credit information, private child support collection agencies, or even people trying to act on behalf of a party using a release or a power of attorney. The FOC should deny those requests. Only individuals listed in MCR 3.218 have standing to access the FOC records.

A limited English proficient (LEP) individual can use an interpreter to assist them in accessing the records the LEP individual otherwise has access to. The interpreter is the mechanism the court uses to facilitate access to the FOC records; it is not a disclosure.

Any person denied access to the FOC records may file a motion under MCR 3.218(F) for an order of access with the judge assigned to the case or, if none, the chief judge.

F. Methods of Access

The FOC director or designated employee has discretion concerning how documents should be provided. Whenever possible, the manner in which documents are provided should correspond to the requested method.

The FOC director may authorize other methods of access if the requested method would be burdensome or disruptive to the office. The local circuit court should adopt an administrative order under MCR 8.112(B) to make reasonable regulations necessary to protect the FOC records and prevent excessive and unreasonable interference with the discharge of the FOC functions. [MCR 3.218(G).]

When records are reviewed in the FOC office, staff should ensure that only the information allowed to be shared under the court rule is available. This requires the FOC office to segregate confidential information before the individual begins reviewing the file. The FOC should consider designating a private area, if available, for the individual to review the records. The area should be removed from the general waiting room to provide some privacy for the individual. Further, the FOC should establish policies to ensure that the individual does not remove or alter any of the information in the file, and does not have access to information in any other file.

The FOC staff should be present at all times to ensure that the documents are protected while records are being inspected. This applies both to inspection of printed material, or any imaged material where a paper file does not exist. The FOC personnel present during review of imaged material should be prepared to provide technical assistance as needed.

Costs for copies should be charged in accordance with the court's local administrative order. [MCR 8.119(J)(4)(b).]

In general, information should not be provided orally unless necessary. If information is

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provided over the phone, there must be a means to identify the individual to whom the information is given and ascertain that the person is entitled to receive the information. A record should be made of the release of information.

The FOC staff may be called to testify at a hearing or trial. During testimony, FOC staff must avoid disclosing information from the FOC records that would violate the rule, including any disclosure that would violate federal Title IV-D requirements.

APPENDIX A

Privileged Communications

The following table contains selected information concerning privileged communications. The table is not an exhaustive collection. It will be updated periodically, supplied as a replacement appendix, and remain available on the Michigan Supreme Court website at <http://courts.mi.gov>.

Communication	Statute
Communication between a domestic relations mediator and party and the parties in the presence of a mediator.	MCL 552.513
Minister or Christian Science practitioner/confessions.	MCL 600.2156
Physician/information disclosed in treatment.	MCL 600.2157
Domestic Violence Counselor/victim.	MCL 600.2157a
Husband/Wife/testimony against the other. See MCL 780.169 and 552.1328(8)	MCL 600.2162
Teachers, guidance officers, school executives, or professional persons engaged in character building in public schools or other educational institutions who record students' behavior.	MCL 600.2165
Licensed professional counselor or limited licensed counselor and client.	MCL 333.18117
Information relative to the care and treatment of a dental patient.	MCL 333.16648
Information from designated medical research projects.	MCL 333.2632
Pharmacist, scientific investigator, hospital, pharmacy, or other person licensed registered or permitted to dispense or conduct research with respect to a controlled substance, concerning identity of patient or research subject.	MCL 333.7516
Counselor in family counseling service and the person counseled.	MCL 551.339
Certified social worker, social worker, social work technician, employee, or officer of an organization that employs them and a client.	MCL 333.18513