

Discovery, Service, & Records Requests

TDCAA Prosecuting Crimes Against Children Conference
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Child Welfare Track

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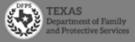
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Topics Covered in this Presentation



- Types of DFPS records and entitlement
- Open records requests
- Discovery requests
- Subpoena service and processing
- Redaction of records
- How to get what you need

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Types of DFPS Case Records

- Child Protective Services Investigations (CPS)
- Child Care Investigations (CCI)
- Adult Protective Services Investigations (APS)

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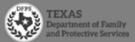
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Who is Entitled to DFPS Records?



- Texas Family Code
- Texas Human Resources Code
- Texas Administrative Code
- Court Order
- Production Scenarios

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Entitlement to DFPS Records

- Case records can only be released where specifically authorized by state or federal law or DFPS Rules
- State law enables DFPS to prescribe regulations to determine access to records
- When subpoenaed or otherwise requested, records may only be accessed in accordance with our rules or after a court order following *in camera* review and certain required judicial findings

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DFPS Records

All records...which were collected, developed, or used in a child abuse or neglect investigation, or in providing services...and which are under the custody and control of [DFPS]. . .shall include investigation records, as well as all records in the custody and control of [DFPS] which relate to the placement of a child....or which relate to the provision of other services to a child or the child's family

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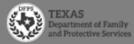


DFPS Records, cont.

Includes:

- a report of alleged or suspected abuse or neglect made and the identity of the person making the report; and
- except as otherwise provided . . . the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation or in providing services as a result of an investigation

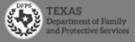
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CCI Records

- Abuse, neglect, and exploitation investigation records of child care operations are confidential... and not available to the general public
- However, Child Care Licensing (CCL) maintains a monitoring file for each operation and will have access to the investigation records pursuant to Tex. Hum. Res. Code §40.042(f)

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CCI Records

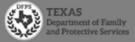
- Federal Child Abuse Prevention and Treatment Act (CAPTA)
- Tex. Hum. Res. Code §40.005 and §42.004
- Tex. Admin. Code Chapter 707

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APS Records

All records described in Tex. Hum. Res. Code §48.101 or §48.102 which were collected, developed, or used in an abuse, neglect, or financial exploitation investigation, or in providing services as a result of an investigation, and which are under the custody and control of DFPS

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APS Records, cont.

Includes:

- a report of abuse, neglect, or exploitation;
- the identity of the reporter;
- and generally, all files, reports, records, communications, and working papers used or developed in an investigation or in providing services as a result of an investigation
- Confidential by law
 - Tex. Hum. Res. Code § 48.101
- Agency Rules
 - Tex. Admin. Code Chapter 705

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Public Information Act

 Texas Department of
Family and Protective Services

Open Records Policy

SEARCH

ABOUT DFPS

OVERVIEW OF THE PUBLIC INFORMATION ACT

OVERVIEW OF THE PUBLIC INFORMATION ACT

The Texas Public Information Act is the Department of Family and Protective Services (DFPS) policy for responding to requests for information held by the agency. You may request records and information from DFPS by using the online request form or by mail. All requests must be in writing.

Government information is presumed to be available to the public but certain exceptions apply. DFPS may withhold information that is sensitive or confidential, or that would violate the privacy of an individual. DFPS will try to complete your request as soon as possible but will verify it will take them no more than fifteen days. DFPS may refuse the request as prescribed by law if the request is frivolous, harassing, or violates the law, or if it would be the actual cost of fulfilling the request.

You may read the Texas Public Information Act (CJCL)

▪ Most DFPS records, other than CPS, CCI and APS case files, are subject to the Public Information Act, as established in Tex. Gov't. Code §552

▪ Requests for these records, referred to as open records requests (ORRs), must be in writing, but may be submitted by multiple means (mail, fax, email)

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Public Information Act Requests
Open Records Requests
(cont'd)

Typical requests are for:

- Personnel records for DFPS employees
- Information on Contracts between DFPS and vendors, including child welfare providers such as medical providers and child placement agencies
- Statistical data, such as the number of children in care in a region or county, or the number of removals in a particular year

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- Medical information and treatment regarding the employee and or the employee's family is confidential
- Certain information (commonly referred to as Personally Identifiable Information, or PII) *is* confidential: employee home address, phone number, personal email, DOB, SSN, DL#, and information about an employee's family members
- Other information *may* be confidential: insurance, various payroll deductions, information of a highly personal nature

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Submitting an Open Records Request

A written request is required. It may be submitted by mail or electronically.

-  By mail to: Open Records Coordinator, PO Box 149030, Austin, TX 78714
-  By fax to: 512-339-5878
-  By email to: OpenRecordsRequests@dfps.texas.gov

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Ways of Requesting Information

Main methods of requesting records include:

- Discovery request
- Court order
- Subpoena
- General requests

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Discovery Overview

- Types of discovery in a DFPS case
- Deadlines
- Initial Disclosures
- Requests for Production
- Interrogatories
- Objections
- Pitfalls to avoid
- Expert Witnesses

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What is Discovery?

- The purpose of discovery is to allow both sides sufficient notice of the legal claims, defenses and underlying facts of the case
- Civil discovery is governed by the Texas Rules of Civil Procedure and should be liberally construed to allow the fullest knowledge of the facts and issues prior to trial
- Significant recent revisions to the Rules

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Discovery Levels and Types

- Discovery Levels 1, 2 and 3
- Discovery Period
- Types of Discovery:
 - Initial Disclosures, formerly known as RFD
 - Requests for Production
 - Interrogatories
 - Requests for Admissions
 - Requests for Certain Disclosures (Pre-262 Disclosures)
- Informal discovery and Rule 11 agreements

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Level 3 Discovery Plan

- Some Courts automatically enter Discovery Control Plans
- The Discovery Control Plan controls in the event of a conflict with the general discovery rules
- Discovery Control Plans can be requested by either side or entered on the Court's own initiative

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Discovery Responses

- Discovery responses, objections and privilege logs should be in written format and, in some cases, filed with the court
- A copy should be sent to all attorneys of record
- Discovery responses should be amended or supplemented *as necessary* to ensure the information is complete

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Disclosure of Certain Evidence Tex. Fam. Code § 262.014

- Prior to the 262/Adversary Hearing, defense counsel may request:
 - Name of any witness to be called;
 - Offense report used to refresh memory; and
 - Photos, videos or recording to be used as evidence.
- DFPS employees excluded
- Triggered by request from opposing counsel
- Deadlines?

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An Overview of Required Disclosures

- Recent revisions create a duty to disclose
- Initial Disclosures and Pre-Trial Disclosures
- Deadlines to respond
- Exemptions to Initial Disclosures
- Objections are not permitted for Initial Disclosures, Pre-trial Disclosures, or Expert Witness Disclosures

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Initial Disclosures

- Effective 1/1/21, the Rules require automatic disclosure of the following information:
 - Names of the parties to the suit
 - Name, address and phone # of any potential party
 - Legal theories and factual bases
 - Name, address and phone number of persons with relevant knowledge of the case, and a brief statement of that persons connection to the case
 - A copy of all documents that you may use to support your claims, unless used solely for impeachment

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Initial Disclosures (cont.)

- Any witness statements described in Rule 192.3(g)
- *Disclaimer:* Non-relevant items have been omitted
- Deadline to comply is 30 days after filing the first answer or general appearance
- Initial Disclosure Exemptions

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Pre-Trial Disclosures

- Pre-Trial Information to be disclosed:
 - The name, address and phone number of each witness
 - Identification of each witnesses you expect to present and those you may call if the need arises
 - Identification of each document or exhibit for trial
 - Identification of exhibits you expect to offer and those you may offer if the need arises
- Deadline: at least 30 days before trial
- Exemptions
- No objections or privileges permitted

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Testifying Experts

- Information to be disclosed for testifying experts:
 - The name, address and phone number of each witness
 - The subject matter on which the expert will testify
 - The general substance of the expert's mental impressions and opinions, and a brief summary of the basis for them
 - If the witness is not retained or controlled by you, then you must produce documents pertaining to the expert's mental impressions and opinions
 - Supplement as Needed

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Testifying Experts (cont.)

- If the expert is retained by, employed by or subject to your control, you must produce:
 - All documents, reports, models, things or other data that have been provided to, reviewed by or prepared by or for the expert in anticipation of testimony
 - The expert's current resume and bibliography
 - The expert's qualifications, including a list of all publications for the last 10 years
 - A list of all cases in which the witness has testified as an expert at trial or deposition over the last 4 years
 - A statement of compensation to be paid to the expert for the study and testimony in the case

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Testifying Experts (cont.)

- Most experts are not employed by DFPS
- How do you determine whether your testifying expert is subject to your control?
- Schedule to designate experts varies
 - For party seeking affirmative relief (termination of parental rights), the deadline is 90 days before the end of the discovery period
 - For all other experts, 60 days before the end of the discovery period

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Testifying Experts (cont.)

- Duty to supplement still applies
- Testifying expert disclosure does not apply to consulting only expert under Tex. R. Civ. P. 195
- Expert witness communications are protected, somewhat
- Draft reports are not subject to disclosure

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Redacted Case Files

- Immediately forward written discovery requests to DFPS
 - The request will go to Records Management (RMG)
- Records that are lengthy take longer to redact
- Be proactive!
- If not ready within 30 days, reach out to opposing counsel and ask for additional time to produce the file
- If counsel agrees, you MUST reduce the agreement to writing to comply with Rule 11

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Requests for Production (RFP)

- Formal requests for written documents are known as Requests for Production and Inspection
- All parties may seek production of relevant documents from the other parties
- What is relevant information?
 - *Any document that pertains to termination of parental rights, or to defenses to termination, is relevant and within the scope of discovery*

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RFP's (cont.)

- Requests must be in written format and seek relevant information
- The request must contain specific requests that are not vague or overbroad
- The RFP may be served on you through the e-file manager or in person
- For documents that do not need to be e-filed, service in person, certified mail and facsimile is sufficient
- Your deadline to respond is 30 days, unless served by mail, which allows you an extra 3 days to respond

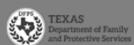
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Interrogatories (Rogs)

- Interrogatories are written questions to inquire about any matter within the scope of discovery, except testifying experts
- While the interrogatories may inquire about specific legal or factual contentions, they may not be used to require the State to marshal all of the proof it intends to offer at trial

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Interrogatories, cont.

- Service rules are the same as RFP
- Responses to Rogos are due 30 days from the date of service and must be verified by a DPFS employee
- The attorney for DFPS may not verify the responses

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Requests for Admission

- A proper Request for Admission should request that the other party admit the truth of any matter within the scope of discovery
- The important takeaway from Requests for admissions is that they must be answered or properly objected to within 30 days
- If you fail to timely respond, the admission will be deemed admitted without the necessity of a court order

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Objections

- Objections to discovery must be made on or before the deadline to respond to discovery
- If you are objecting to Interrogatories, Requests for Production or Request for Admission, your objection must state the specific legal and factual basis for the objection
- If you are able to respond in part, you must produce those documents or respond to that part of the interrogatory
- If you do not timely object to the discovery request, you waive your objections

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Objections (cont.)

- A discovery request is valid if it seeks relevant information or information that is likely to lead to the discovery of relevant information
- An objection to discovery requests will be sustained if it seeks information that is not relevant or if it seeks information that will not lead to admissible evidence
- You also may object to discovery requests that seek information not reasonably available to DFPS

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Objections (cont.)

- Some of the more common objections to discovery in child welfare litigation are in response to discovery requests that are overbroad, unreasonably cumulative or duplicative
- In addition, if the parent seeks information not in your possession that can be obtained by the parent in a more convenient way, an objection is appropriate

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Privilege Logs and Protective Orders

- A party must withhold information it claims is privileged
 - To be in compliance, you must state in writing that information is being withheld or material responsive has been withheld, identify the request to which the information relates, and identify the specific privilege asserted
- Once the withholding statement is made, the other side may request that you identify the information in a privilege log

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Privilege Logs (cont.)

- When dealing with redacted case files, you will likely need to assert a privilege as to removal staffings, DPS criminal history checks, reporter information, audio/visual recordings and forensic interviews
- You could also be proactive and request a protective order to shield the disclosure of sensitive or privileged information

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IMPACT Case Management System

- The IMPACT case file is the official case file for DFPS
- The “external” case binder usually contains third party documents gathered by DFPS caseworkers
 - Always ensure that the external file is included in the redacted case file
- Who is Custodian of Records?
- “Marked-up” copies of the case file are super important
 - Always request a copy

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Pitfalls to Avoid

- The duty to supplement your responses continues throughout the discovery period
- Delays in getting DFPS case files are real!
 - In the event that opposing counsel doesn't agree to more time, be prepared to file a *timely* request to the court
- In the event your discovery is untimely or incomplete, the other side may file a Motion to Compel discovery
- If the Court rules in favor of the other side, the Court may assess attorney's fees or not allow you to call witnesses at trial

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Pitfalls (cont.)

- When requesting records from a non-party, you can serve a subpoena duces tecum on the witness
 - However, subpoenas may not be used to circumvent the discovery rules
 - Records from opposing parties must be obtained using the normal discovery process
 - The Subpoena Duces Tecum is oftentimes served on the caseworker shortly before trial
- If a DFPS employee is served with a subpoena duces tecum, file a Motion to Quash the subpoena
 - If filed within 3 days, the subpoena is automatically stayed

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Discovery Requests

Requesting the deidentified DFPS case file (De-ID):

- Caseworker makes OneCase request, including supporting documentation

or

- Attorney on case sends an email to RMG requesting redacted file
 - What do you need?
 - When do you need it?
 - Who will receive it?

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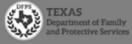


Requesting DFPS Case Records

The [DFPS Website](#) provides step-by-step instructions if you are a:

- Law enforcement officer
- County attorney
- District attorney
- Representing someone involved in a case
- And others...

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Quick and Basic

- Primarily geared to Law Enforcement Officers
- Response time is 7 business days
- We provide most recent investigation report from IMPACT

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Detailed and Thorough



Subpoenas

- Primarily geared to prosecutors
- Prefer a 30-day response window
- We provide all requested records – including “any and all” requests

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Detailed Statement of Regard cont.



- More than 12,000 employees
- 8,000 are caseworkers
- Subpoenaed every 21 minutes during the workweek
- Subpoena policy & training

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Criminal Prosecution Subpoena

- Does not require correct Custodian of Records (COR)
- May be served by email, directly to RMG
 - Records@dfps.texas.gov
- Give as much notice as possible with clear details on what is needed and when

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Criminal Defense Subpoenas

- Must name the correct Custodian of Records (COR)
- In accordance with Tex. Code Crim. Proc. Art. 24.04, may be served by personal delivery or email
- Like all subpoenas, are reviewed by DFPS Regional Legal in the event of entitlement issues

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Civil Subpoenas

- Must be served by personal delivery to COR in accordance with Tex. R. Civ. Pro. 176.5(a)
- Emailed civil subpoenas will not be accepted
- Cannot use to circumvent discovery requirements

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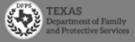


Redactions under DFPS Rules

Required redactions for CPS, CCI, and APS cases vary based on the status of the requestor and the surrounding circumstances, and can include, but are not limited to:

- Information tending to reveal identity of the reporter
- Portions of record to which requestor is not entitled
- SSNs, driver's license numbers, and other sensitive information
- Criminal history information obtained by DFPS
- Other information required by law

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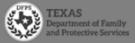


**How Can We Protect
Unredacted Records?**



- You are responsible for what happens to shared information
- Some protective strategies:
 - Rule 11 Agreement
 - Protective Order
 - Warning Headers

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Protective Orders

When confidential case records are released, protective orders are useful to:

- Restrict the use of sensitive materials
- Prohibit reproduction or dissemination of materials
- Require destruction of materials once case becomes final
- Deter improper conduct by being enforceable by contempt
- Reduce risk of harm to victim, reporter, or investigation participant

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**Exercising Your Entitlement
to Records**

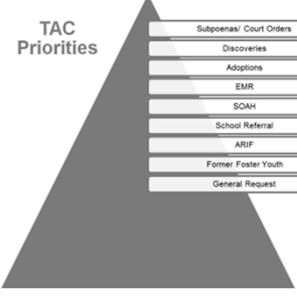


- RMG is your best source for obtaining agency records
- RMG can research, access & provide complete case information
- We provide IMPACT, external reports, audio and video recordings, and photos
- Avoid the back-channel approach
 - Caseworkers may not provide everything available

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Texas Administrative Code (TAC)



The diagram is a pyramid divided into two sections. The left section is labeled 'TAC Priorities' and contains a vertical list of items: Subpoenas/ Court Orders, Discoveries, Adoptions, EMR, SOAH, School Referral, ARIF, Former Foster Youth, and General Request. The right section of the pyramid contains a bulleted list: TAC Pyramid (§702.223), Diligent search efforts, and Lead times needed.

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Records Retention

- All DFPS records are maintained in accordance with the agency retention schedule
- Public Website
- Dependent on type of record
 - Division
 - Disposition at closure
- At times cases are merged

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Release Procedure

- RMG will release to DFPS staff, who will deliver the records
- RMG will send direct to requester via GovQA
 - Secure link
 - Make an account
 - Download promptly

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The logo of the Texas Department of Family and Protective Services. It features a circular emblem with a star in the center, surrounded by a wreath and the words "TEXAS" and "Department of Family and Protective Services".

RMG Contact Information

- Records Management Group
 - Records@dfps.texas.gov
- RMG Attorney – Sarah Best
 - Sarah.best@dfps.texas.gov

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QUESTIONS?

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