STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-2022-163

GOVERNMENT OVERSIGHT COMMITTEE OF THE MAINE STATE LEGISLATURE,

Plaintiff,

v.

JEANNE M. LAMBREW, Commissioner of the Maine Department of Health and Human Services,

Defendant.

ORDER ON MOTION TO COMPEL

INTRODUCTION

This case involves a dispute between the Government Oversight Committee ("GOC" or "the Committee") of the 130th Maine Legislature and the Department of Health and Human Services ("DHHS" or "the Department") over whether the GOC is authorized and entitled to receive otherwise confidential records in the custody and control of DHHS relating to the deaths of four young children in 2021. The dispute has apparently simmered over the summer and came to a head on September 22, 2022, when the GOC voted to issue a subpoena directed at DHHS Commissioner Jeanne Lambrew commanding her to produce at the Committee's October 19, 2022 meeting, "the complete child protection files for" the four identified children. The subpoena explained that "[t]he documents are being demanded as part of the Committee's further inquiry into matters discussed in the Office of

Program Evaluation and Government Accountability's report on your office's administration of child protection services."

In response to the subpoena, DHHS objected and informed the Committee that it "is unable to comply with [the subpoena]" because of state and federal confidentiality laws. On October 21, 2022 and acting pursuant to 3 M.R.S. §§ 430 and 994(8), the Committee filed a motion in this court to compel obedience to its subpoena. Briefing on the motion to compel was completed on November 21, 2022. The court held two unrecorded conferences with counsel for the parties on November 28 and 29, 2022. In the interest of obtaining a speedy resolution to this dispute, the parties have waived oral argument on the motion. Moreover, the court is aware of the importance of this case to the parties and the need for a prompt decision, and acknowledges the Committee's letter of October 25, 2022 requesting expedited consideration of this case. Accordingly, the court will dispense with a review of the procedural details of this matter and will proceed directly to a discussion of the governing law.

DISCUSSION

This case involves questions of statutory interpretation. The court starts with the recognition that the Legislature has declared that DHHS records pertaining to child protective activities are, generally speaking, confidential. Title 22 M.R.S. § 4008(1) provides:

> All department records that contain personally identifying information and are created or obtained in connection with the department's child protective activities and activities related to a child while in the care or custody of the department, and all information contained in those records, are confidential and subject to release only under the conditions of subsections 2 and 3.

Subsection 2 authorizes the Department to make optional disclosure of otherwise confidential records, while subsection 3 requires the Department to disclose the records. The parties agree that this case is controlled by section 4008(3)(D), which reads:

> The department shall disclose relevant information in the records to the following persons: ...
>
> D. An appropriate state executive or legislative official with responsibility for child protection services, provided that no personally identifying information may be made available unless necessary to that official's functions.

22 M.R.S. § 4008(3)(D).

The Department has already produced the child protective files pertinent here to the Office of Program Evaluation and Government Accountability ("OPEGA"). OPEGA has a specific statute authorizing it to obtain, and requiring state agencies to produce, records containing confidential or privileged information. 3 M.R.S. § 997(4). The Department's position is that OPEGA is the agency that is entitled by law to access otherwise confidential records, but the Committee itself is not. This appears to be consistent with the position of the Attorney General's Office since at least 2005.

In an advisory opinion dated September 23, 2005, the Attorney General (Rowe) was asked "whether or not OPEGA is authorized to access privileged and confidential files and records maintained by DHHS related to child protective services." 2005 Me. AG LEXIS 6, *1. In discussing the law that created OPEGA, the opinion made the following statement:

> The OPEGA statute contains a number of provisions that address access to records, with different standards applicable to the Committee, as distinguished from those

> applicable to OPEGA staff. Title 3, M.R.S.A. § 994(11) provides that information available to the Committee is governed by Title 3, M.R.S.A., Chapter 21, which addresses legislative investigating committees, and by the Freedom of Access Law ('FOAL'), Title 1, M.R.S.A., Chapter 13 (1989 & Supp. 2004). As a result, records that are confidential under the FOAL are not available to the Committee.

Id. *4-5.

What the Attorney General was pointing out at the time was that, while "the OPEGA statute creates an exception to state law confidentiality and privilege requirements," no such statutory exception applies to the Committee. *Id.* *7. Before this court, the Committee has not argued that it has such an exception.

Rather, the Committee has argued that DHHS must provide it with child protective files that are designated confidential by law because it is a "legislative official with responsibility for child protection services . . . ." Although the 2005 Attorney General opinion discussed section 4008(3)(D), it did so in the context of pointing out that it was consistent with federal confidentiality laws. 2005 Me. AG LEXIS 6, **14-15. *See also* 42 U.S.C. § 671(a)(8)(D). It did not consider whether OPEGA fit within the scope of section 4008(3)(D) because it did not have to, since OPEGA has its own statute allowing it to obtain confidential records.

In arguing that it is a "legislative official with responsibility for child protection services," the Committee contends that it is "essentially the watchdog for state government, . . . [and] is responsible for ensuring that all state programs, including the Department's child protection program, are being properly administered." *Committee Memorandum of Law* at 5. Further, the Committee argues that its "very function is to scrutinize state agencies to

ensure that they are delivering the services they are required to deliver and are doing so as effectively, competently, and efficiently as possible." *Id.* According to the Committee, a "'legislative official with responsibility for child protection services' must mean a legislative official who has oversight authority over those services, and the GOC's members fall squarely within that definition." *Id.* at 6.

The question, then, is whether the term "legislative official with responsibility for child protection services," broadly includes a legislative oversight committee with generalized authority "to oversee program evaluation and government accountability matters?" 3 M.R.S. § 992(1). Or stated otherwise, does that term include only those officials whose functions include a clearly identifiable job connection to and responsibility for child protection services?

The Committee acknowledges that it has no *direct* responsibility "for delivering child protection services." *Committee Memorandum* at 6. But it nevertheless maintains that its oversight role is sufficient to qualify it as a "legislative official with responsibility for child protection services."

The court appreciates the desire of the Committee to examine for itself the source documents from the Department concerning an evaluation being conducted by the Committee and OPEGA. The duty of the court, however, is to give effect to the Legislature's intent as expressed in the language of 22 M.R.S. § 4008(3)(D). For the reasons explained below, the court is persuaded that the state official, either executive or legislative, who seeks to compel disclosure of confidential child protection records by relying on section 4008(3)(D), must be an official whose duties and functions are more than general oversight of all "program evaluation and government accountability matters." 3 M.R.S. § 992(1). *See also* 3 M.R.S. § 994 (describing the duties

of the Committee, none of which mention "child protection services"). Rather, in the court's view, the mandatory exception to the confidentiality of child protective records contained in section 4008(3)(D) was meant to apply to those officials whose job functions and duties include a real obligation for child protection services. *Cf. Cleveland v. City of Los Angeles*, 420 F.3d 981, 988-90 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006).

In attempting to determine the meaning of statutory language, the court must begin with the language itself. If the language is unambiguous, the court must give effect to the plain meaning of the statutory text. When a term in a statute is undefined, it should be given its common and ordinary meaning. In *Cleveland v. City of Los Angeles*, the 9th Circuit Court of Appeals considered what it meant for an employee to have the "responsibility to engage in the prevention, control, or extinguishment of a fire." *Id.* at 988-89. After reviewing various dictionary definitions of the word "responsibility," the Court concluded that for someone "to have the 'responsibility' to engage in fire suppression, they must have some real obligation or duty to do so. If a fire occurs, it must be their job to deal with it." *Id.* at 990.

Likewise, in the context of section 4008(3)(D), an official "with responsibility for child protection services" must be someone who has an actual obligation or duty to deal with child protection services in some capacity. That this is the common-sense meaning of section 4008(3)(D) is confirmed by the language precluding the disclosure of personally identifying information "unless necessary to that official's functions." This suggests to the court that the "official with responsibility for child protection services," must be someone whose actual job functions include child protection services in some identifiable way.

The court's conclusion is buttressed by an examination of the statute that created OPEGA, with the Committee given an oversight role. As pointed out by the Department and the Attorney General in the 2005 advisory opinion, the OPEGA law contains an explicit and detailed provision for the acquisition and handling of confidential information. Specifically, "state agencies and other entities subject to program evaluation must provide the office [OPEGA] access to information that is privileged or confidential as defined by Title 1, chapter 13, which governs public records and proceedings." 3 M.R.S. § 997(4). "Information that is made available to the Committee," on the other hand, "is governed by . . . Title 1, chapter 13, which governs public records and proceedings." 3 M.R.S. § 994(11). The court interprets these provisions of law the same way the Attorney General did in 2005, namely, that records that are confidential under Maine's Freedom of Access Law are not available to the Committee but must be provided to OPEGA.

Indeed, one looks in vain for any provision of law relating to the Committee that suggests that it can access records that are declared privileged or confidential. It strikes the court as being highly unlikely that this omission was merely an oversight. The Legislature that created OPEGA and described the Committee's duties and powers, was keenly aware that OPEGA would need to obtain otherwise confidential information and records if it were to properly carry out its statutory responsibility of program evaluation. For that reason, it gave OPEGA clear statutory authorization to access such confidential information and equally clear direction as to how to responsibly handle it. In the court's view, the Legislature's failure to grant the Committee its own statutory authority to compel the disclosure of confidential information, or any direction as to how it should be treated once obtained, was deliberate.

And if that is true, and the court believes it is, one must assume that the Legislature intended that the Committee's access to confidential information as part of its oversight role, would depend on whether it could fit itself within whatever exception to confidentiality exists in whatever agency or program being evaluated at the time. In the context of this case and DHHS child protective files, that would mean having the Committee qualify as a "legislative official with responsibility for child protection services." Whether the Committee could obtain access to the confidential records of other agencies or program would depend, of course, on the particular statutory language in question.

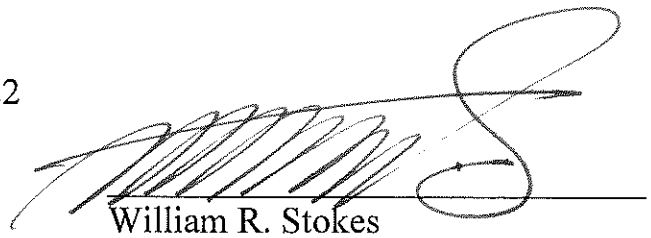
The court finds it implausible that the Legislature intended that the Committee's access to confidential information would be so variable, unspecified, and unpredictable. Rather, it seems much more logical to the court that had the Legislature intended the Committee to have the power to compel the disclosure of confidential information, such as that contained in the Department's child protection files, it would have granted it clear and unequivocal authority to do so, as it did with OPEGA.

CONCLUSION

The entry is:

The Government Oversight Committee's Motion to Compel Compliance with Subpoena is DENIED.

Dated: December 5, 2022



William R. Stokes
Justice, Superior Court