

January 16, 2019

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES

**EXECUTIVE SUMMARY**

**ALL COUNTY LETTER NO. 18-140**

This letter provides counties with guidance regarding sharing CWS case records with Indian tribes and/or their representatives. In addition, this letter outlines specific circumstances in which counties shall exempt tribes from incurring monetary fees for receiving copies and/or transmissions of CWS case records.



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GAVIN NEWSOM  
GOVERNOR

January 16, 2019

ALL COUNTY LETTER NO. 18-140

TO: ALL COUNTY WELFARE DIRECTORS  
ALL CHILD WELFARE SERVICES PROGRAM MANAGERS  
ALL COUNTY CHIEF PROBATION OFFICERS  
ALL TITLE IV-E AGREEMENT TRIBES  
ALL ADOPTION REGIONAL OFFICES

SUBJECT: **TRIBAL ACCESS TO CHILD WELFARE CASE RECORDS**

REFERENCES: [CALIFORNIA RULE OF COURT \(CRC\) 5.552\(a\)](#); [MANUAL OF POLICIES AND PROCEDURES \(MPP\) 31-002\(c\)\(5\)](#), [MPP 31-105](#); [SOCIAL SECURITY ACT \(TITLE IV-E\) 471\(a\)\(8\), \(9\)](#), [TITLE IV-E 471\(c\)](#); [TITLE 20 UNITED STATES CODE \(USC\) 1232\(g\)](#); [TITLE 25 USC 1911\(c\)](#), [USC 1912](#), [USC 3205](#); [TITLE 42 USC 671\(a\)\(8\), \(9\)](#), [USC 671\(c\)](#); [TITLE 25 UNITED STATES CODE OF FEDERAL REGULATIONS \(CFR\) 23.107](#); [TITLE 45 CFR 205.50\(a\)\(1\)\(i\)](#), [CFR 205.50\(a\)\(2\)](#); [VOLUME 81 FEDERAL REGISTER \(FR\) 38778](#), [FR 38811](#); [WELFARE AND INSTITUTIONS CODE \(WIC\) 224.4](#), [WIC 346](#), [WIC 827](#), [WIC 827\(a\)\(1\)\(A\), \(E\), \(F\), \(H\), \(K\), \(L\), \(M\), \(N\)](#), [WIC 827\(a\)\(5\)](#), [WIC 827\(f\)](#), [WIC 10850, \(a\), \(b\), \(c\), \(d\), \(f\), \(h\)](#)

The California Department of Social Services (CDSS) is committed to protecting the essential tribal relations and the best interests of Indian children by promoting practices in accordance with the Indian Child Welfare Act (ICWA). Collaboration and information sharing between county child welfare services (CWS) agencies and Indian tribes are crucial practices to ensure the well-being of Indian children whenever tribes intervene or participate in CWS cases. This letter provides counties with guidance regarding sharing CWS case records with Indian tribes and/or their representatives. In addition, this letter outlines specific circumstances in which counties shall exempt tribes from incurring monetary fees for receiving copies and/or transmissions of CWS case records.

## BACKGROUND

California recognizes there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting children who are members or citizens of, or are eligible for membership or citizenship in and the biological children of, a federally recognized Indian tribe. Meaningful collaboration with tribes is fundamental for compliance with the ICWA. Tribes may exercise their right to participate in CWS cases and referrals both in and out of court proceedings. If the child is an Indian child as defined by the ICWA, the county should share case and referral records with the tribe's child protective representatives in order to achieve meaningful collaboration with tribes and achieve the best outcomes for Indian children. A CWS case record, as defined in the [MPP 31-002\(c\)\(5\)](#), which also includes records outlined in [CRC 5.552\(a\)](#), and for purposes of this letter, refers to electronic and/or written records for each child receiving child welfare services including but not limited to, the following documentation:

- Emergency Response Protocol ([MPP 31-105](#))
- Case notes documented by the county social worker
- Assessments
- Safety plans
- Referrals made to community-based organizations, county agencies, or tribal organizations
- All documents filed in a juvenile court case (i.e., jurisdiction report, disposition report, 6-month review, etc.)
- Reports to the court by probation officers and court appointed special advocate (CASA) volunteers
- Documents made available to probation officers, CWS workers and CASA volunteers in preparation of reports to the court
- Documents relating to a child concerning whom a petition has been filed in juvenile court that are maintained in the office files of probation officers, CWS programs, and CASA volunteers
- Transcripts, records, or reports relating to matters prepared or released by the court, probation department or CWS agency
- Documents, video, or audio tapes, photographs, and exhibits admitted into evidence at juvenile court hearings

## CONFIDENTIALITY

Title IV-E of the Social Security Act mandates that records related to foster care be kept confidential, subject to certain exceptions, in order for states to receive federal funding for foster care and related services to children and their families.<sup>1</sup> Federal regulations also require confidentiality of these records.<sup>2</sup>

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<sup>1</sup> [Title IV-E § 471\(a\)\(8\) & \(c\)](#) [[42 USC § 671\(a\)\(8\) & \(c\)](#)]

<sup>2</sup> [45 CFR 205.50\(a\)\(1\)\(i\) & \(a\)\(2\)](#)

The [WIC § 10850](#), in part, governs confidentiality requirements for social service records. It incorporates the federal requirements for and exceptions to confidentiality of records related to foster care into California law. Specifically, Section 10850 requires that records concerning applications for and receipt of social services be kept confidential. It provides exceptions for inspection of records directly connected to the administration of the relevant social services program and for use in investigations, prosecutions, or criminal and/or civil proceedings brought in connection to the social services program.<sup>3</sup> Moreover, it expressly does not prohibit the sharing of records with other public agencies to the extent sharing is necessary for the administration of federally assisted social services programs.<sup>4</sup> The statute vests in the CDSS the power to make rules and regulations governing the custody, use, and preservation of these confidential records, including the sharing of confidential records among various agencies.<sup>5</sup>

Federally recognized Indian tribes are sovereign entities and thus should be treated equally as other governmental entities. Agencies within a tribe, or officially designated by the tribe to serve the tribe, should be treated as any similar governmental agency in our federal government, another state government or a foreign government. Thus, as needed in performance of their duties, confidential information related to the provision of child welfare services, including investigations into whether abuse, neglect, or exploitation has occurred, may be shared with appropriate tribal agencies under federal and state law.<sup>6</sup>

## ACCESS TO RECORDS

The extent to which counties provide CWS case records to tribes will vary depending on several factors which can include whether the tribe has been identified as the child's tribe or whether the tribe is requesting to be a party at the child custody proceeding, all while adhering to the requirements set forth under [WIC § 827](#). Generally, Section 827(a) creates categories of officials, interested persons and entities who have a right to inspect juvenile case records without first obtaining a court order. In 2014, the Legislature added subdivision (f) to clarify that certain tribal representatives fall within several categories of entities entitled to inspect juvenile case records. The relevant interested persons, including those persons serving in a similar capacity for an Indian tribe, who have the right to inspect juvenile case records are:

1. Court personnel ([WIC § 827\(a\)\(1\)\(A\) & \(f\)](#));
2. Attorneys for parties, judicial or other hearing officers, probation officers, and law enforcement personnel actively participating in criminal or juvenile proceedings involving the child whose records are sought ([WIC § 827\(a\)\(1\)\(E\) & \(f\)](#));

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<sup>3</sup> [WIC § 10850\(a\)](#)

<sup>4</sup> [WIC § 10850\(d\)](#)

<sup>5</sup> [WIC § 10850\(f\)](#)

<sup>6</sup> [25 USC § 3205; Title IV-E, § 471\(a\)\(8\), \(a\)\(9\) & \(c\) \[42 USC § 671\(a\)\(8\), \(a\)\(9\) & \(c\)\]; WIC § 10850 \(a\), \(b\), \(c\), \(d\), & \(h\)](#)

3. The attorney representing the petitioning agency in a dependency proceeding ([WIC § 827\(a\)\(1\)\(F\) & \(f\)](#));
4. Members of child protective agencies ([WIC § 827\(a\)\(1\)\(H\) & \(f\)](#));
5. Members of children's multidisciplinary teams, persons or agencies providing treatment or supervision of the child ([WIC § 827\(a\)\(1\)\(K\) & \(f\)](#));
6. Judicial or other hearing officers assigned to family law cases addressing custody and/or visitation, and family court mediators, persons appointed by the family court to conduct custody evaluations, investigation or assessments, and court-appointed counsel for the child, who are actively participating in the case ([WIC § 827\(a\)\(1\)\(L\) & \(f\)](#));
7. Probate investigators acting within the scope of their statutory or court-appointed duties to conduct an investigation in a probate guardianship case ([WIC § 827\(a\)\(1\)\(M\) & \(f\)](#)); and
8. Child support agencies for the purpose of establishing paternity and for establishing and enforcing child support orders ([WIC § 827\(a\)\(1\)\(N\) & \(f\)](#))

Within the categories of persons or entities entitled to inspect juvenile case records, [WIC § 827\(a\)\(5\)](#) also identifies a limited number of persons, whether they be tribal, local, state or foreign government officials, who also have the right to copies of the juvenile case records. Of the tribal persons serving in similar capacities to those listed above, only the first four categories are entitled to copies of juvenile case records. The remaining categories of persons remain permitted to inspect the case record, but must seek a court order from the state court to obtain copies of records, just as any non-tribal person not identified in Section 827(a)(5) would have to obtain a court order for copies.

When dealing with officials from the federal government, other states or foreign governments, counties typically verify the individual's right to inspect and/or receive copies of confidential information. Such verification documents the county's compliance with federal and state confidentiality requirements. Similar verification is appropriate when working with tribal representatives and should assure the county CWS agency is meeting their obligation to share information with the appropriate tribal representatives, while not creating barriers for tribes. Counties should confirm the identity and role of the tribal representative similar to that for other governmental representatives, or those serving in similar capacities. Verification can be done in a variety of ways, including but not limited to, providing a business card, official tribal email, signed affidavit under penalty of perjury, or tribal letterhead identifying the person as one of the tribal entities entitled to inspect and/or receive copies of the juvenile case file. It is important that verification is functional and accessible for tribes who are out of state or otherwise at a distance from the county.

Additionally, tribes may participate in CWS cases in various capacities, with a single individual filling multiple roles or multiple individuals in different roles. Participation may include but is not limited to the following:

- Party in a child custody proceeding via formal intervention pursuant to the ICWA ([25 USC 1911\(c\)](#)) and state law ([WIC § 224.4](#))

- Provider of culturally relevant services, including but not limited to input on placement
- An interested person as authorized by the court pursuant to [WIC § 346](#)
- Member of the child & family team (CFT)
- Member of the multidisciplinary team (MDT)

Regardless of the capacity of tribal participation, access to information regarding the child, the family, and the case will be necessary for meaningful input from the tribal representatives. It is therefore essential that the county share as much information as possible as early as possible to ensure the best possible outcome for an Indian child.

### **Reason to Know**

The ICWA creates a duty to provide notice to tribes when the party seeking foster care placement, pre-adoptive placement, termination of parental rights, and adoptive placement, knows or has reason to know, the child subject to the proceeding is an Indian child ([25 USC § 1912](#)). Proper noticing ensures that tribes have an opportunity to participate in Indian child dependency proceedings. For the purpose of verifying Indian membership or citizenship status, federal regulations require the CWS agency to use “due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify” the child’s membership or citizenship status ([25 CFR § 23.107](#)). A tribe is entitled to the information necessary to conduct the appropriate records review to make the determination as to membership or citizenship status and eligibility of an Indian child.

As noted in the comments and responses to the recently implemented Bureau of Indian Affairs regulations, “While it is true that a petition may contain confidential information, providing a copy of the petition with notice to Tribes is a government-to-government exchange of information necessary for the government agencies’ performance of duties. Tribes are often treated like Federal agencies for the purposes of exchange of confidential information in performance of governmental duties. See, e.g., Indian Child Protection and Family Violence Prevention Act, [25 USC 3205](#) (2012); Family Educational and Privacy Rights Act, [20 USC 1232\(g\)](#) (2012). The substance of the petition is necessary to provide sufficient information to allow the parents, Indian custodian, and Tribes to effectively participate in the hearing.”

The confidentiality laws discussed above are consistent with this observation and permit the sharing of information via notice, even where ultimately the child is determined not to be an Indian child as defined by the ICWA.<sup>7</sup>

### **EXEMPTION FROM COPYING FEES**

Assessing copying fees to tribes is a barrier to both ICWA compliance and to effective government-to-government collaboration. Tribes share the same goals as local child

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<sup>7</sup> [81 FR 38778, 38811](#) (June 14, 2016)

welfare agencies in achieving the best possible outcome for children who must be removed from parental custody. To work with counties to achieve these goals, tribes must have as much information as possible, to the extent permitted by law, to have meaningful participation in the decision-making and service-providing process.

A tribe in which the child is a member or citizen, or is eligible for membership or citizenship, may request and is entitled to access the juvenile case records pertaining to that child which include the records in the dependency court legal file and the CWS case record. When a tribe intervenes in a child custody proceeding, they become a party to the proceeding and are entitled to records consistent with any other party to a case. Therefore, unless the CWS agency charges other parties for copies, the CWS agency should not assess any monetary fee for the provision of records to tribes or their representatives.

Additionally, when a tribe has not intervened but is participating in the proceeding, the CDSS strongly encourages county agencies to refrain from charging tribes for copies or requiring them to bring their own copy equipment and make copies themselves. As discussed above, certain identified representatives of the tribe, in addition to the right to inspect the child's CWS case record, are also entitled to copies of the CWS case record and can do so without obtaining a court order. The county CWS agency should not charge a fee for copies of the records to tribes or their representatives who have the right to obtain copies of CWS case records, unless they charge similar fees to the equivalent county, state or foreign governmental entities.

For the tribal entities which are not entitled to copies but who obtain court orders authorizing them to receive copies, the CDSS strongly encourages the county CWS agency to provide copies of the CWS case record at no additional cost upon receipt of the court order.

If you have any questions or concerns, please email the Child Welfare Policy and Program Development Bureau at [ChildProtection@dss.ca.gov](mailto:ChildProtection@dss.ca.gov) or email the Office of Tribal Affairs at [TribalAffairs@dss.ca.gov](mailto:TribalAffairs@dss.ca.gov).

Sincerely,

***Original Document Signed By:***

GREGORY E. ROSE  
Deputy Director  
Children and Family Services Division

c: County Welfare Directors Association (CWDA)