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Local Commissioners Memorandum

Transmittal:	08-OCFS-LCM-14
To:	Local District Commissioners
Issuing Division/Office:	Division of Child Welfare and Community Services
Date:	September 26, 2008
Subject:	Best Interests Determinations on Fatality Reports
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Attachments:	The following forms are attached in “read only” format: OCFS-4888, LDSS Attestation of Best Interests Recommendation for Fatality Reports OCFS-4889, Best Interests Recommendation
Attachment Available Online:	Yes. Usable forms are available on the OCFS intranet at: http://ocfs.state.nyenet/admin/forms/CWCS/

I. Purpose

The purpose of this Local Commissioners Memorandum (LCM) is to inform local departments of social services (LDSS) of a change in the New York State Office of Children and Family Services' (OCFS) legal interpretation and practice pertaining to best interests determinations when the release of a fatality report completed under Section 20(5) of the Social Services Law (SSL) has been requested. Effective immediately, a best interests determination will be required for all fatality reports requested to be released by OCFS regardless of whether the request is for a child-specific report or a more general request for multiple reports. A best interests determination pertains to whether the disclosure of a fatality report would be contrary to the best interests of the surviving siblings or other children in the household. This LCM sets forth guidelines for making best interests determinations.

II. Background

In response to a request for release of a child-specific fatality report pursuant to Section 20(5) of the SSL, the commissioner of OCFS may disclose such fatality report when OCFS has determined that disclosure would not be contrary to the best interests of the child's surviving siblings or other children in the household. In determining whether disclosure will be contrary to the best interests of the surviving siblings or other children in the household, the OCFS commissioner is required by law to consider the interest in privacy of the child's family and the effects which disclosure may have on efforts to reunite and provide services to the family.

Previously, OCFS made best interests determinations only in response to requests for child-specific fatality reports (i.e., requests for fatality reports on specific named children). Best interests determinations were not made when there was a general request for multiple fatality reports (e.g., requests for all of the reports in a particular county for a specified period of time). The problem this created is that a requestor who wanted to obtain a child-specific fatality report could do so by making a general request that would encompass the specific report sought. In considering how to address this problem, OCFS concluded that it is contrary to the overall intent of the law to release fatality reports, where release would be contrary to the best interests of the surviving siblings or other children in the household, simply because the requestor was sophisticated enough to phrase the request in general rather than child-specific terms. Therefore, effective immediately, a best interests determination will be mandatory for all fatality reports requested to be released by OCFS, regardless of whether the request is for a child-specific report or a more general request for multiple reports.

III. Program Implications

Effective immediately, a best interests determination will be mandatory for all fatality reports requested to be released by OCFS, either through the Freedom of Information Law (FOIL) or through any other means. Upon receipt of a FOIL request or other request for a fatality report(s), OCFS will assign the request a FOIL index number, enter the request into a tracking system, and then route the request within OCFS to the Division of Child Welfare and Community Services (CWCS). The office of Regional Operations and Practice Improvement (ROPI) within the Division of CWCS will photocopy the requested fatality report(s) and send the report(s) with a letter to the appropriate LDSS requesting a review of the case(s) and a recommendation on whether to release the fatality report(s) based on a best interests determination.

The first issue to consider is whether there are any surviving siblings or other children in the household. It is possible that there may now be siblings born since the fatality or other children in the household that were not present in the household at the time of the fatality or the issuance of the fatality report. Accordingly, OCFS will send all of the fatality reports covered by a request to the LDSS for a best interests determination, even where there were no surviving siblings or other children in the household at the time of the fatality or issuance of the fatality report. If there are no surviving siblings or other children in the household at the time that OCFS requests a recommendation from the LDSS, the LDSS should communicate that information to OCFS. In that instance, there will be no need to conduct a best interests determination, as there is no basis to withhold the fatality report where there are no surviving siblings or other children in the household at the time of the request.

Where there are one or more surviving siblings or other children in the household, the guidelines listed below provide considerations for counterbalancing the children's and family members' individual privacy rights and the public's interest in obtaining potentially sensitive information. In determining whether disclosure of a fatality report would be contrary to the best interests of the surviving siblings or other children in the household, the following factors should be taken into account:

- In the judgment of your staff, yourself and other community service providers involved with the family, will disclosure likely make the child(ren) susceptible to psychological harm or suffer embarrassment and humiliation?
- Will disclosure of information in the fatality report place the child(ren) at significant risk of physical or emotional harm as a result of the subject of the report's reaction to the disclosure?
- Will disclosure of information in the fatality report likely create a situation where the child(ren) could suffer prejudice or negative treatment from such persons as teachers, school administrators, friends, peers, or potential employers?

- Has the child(ren) already experienced violations of their sense of personal privacy as a result of prior public disclosure and will additional disclosure of child welfare information exacerbate their feelings of violation?
- Will the delivery of social services to reunite the family likely be undone or set back due to the release of information?
- Will disclosure of actions taken or services provided to the deceased child or that child's surviving siblings or other children in the household, including but not limited to health care (e.g., prevention or treatment of pregnancy, diagnosis or treatment of sexually transmitted diseases), or other care and counseling relating to diagnosis and treatment of drug, alcohol, or mental health issues likely create a situation whereby the child's surviving siblings or other child(ren) in the household will be discouraged from seeking these services in the future?
- Will disclosure of information in the fatality report likely cause the surviving siblings or other children in the household to be traumatized to the extent where they become unable to assist either the family or criminal court in disposition of the case and/or it disrupts the child(ren)'s efforts to resume life as usual and overcome the trauma of the fatality?

Please note, it may be found that disclosing certain information in the fatality report would not be contrary to the best interests of the child's surviving siblings or other child(ren) in the household but disclosing other information would be contrary to such interests. The best interests determination is made based on the report as a whole, so all information in the report should undergo a best interests determination.

Because most requests for disclosure of fatality reports arise under FOIL, OCFS will use the FOIL time frames for responding to requests for disclosure of fatality reports. The LDSS will be given ten business days to make a best interests determination on a request for a fatality report(s) and provide a recommendation to the applicable OCFS Regional Office on the OCFS 4888, *LDSS Attestation of Best Interests Recommendation for Fatality Reports* form, which can be found at <http://ocfs.state.nyenet/admin/forms/CWCS/>. This form will be provided to the LDSS with the request for a best interests determination(s) and is to be submitted to the applicable OCFS Regional Office for review and further processing of the request. The OCFS Regional Office staff will be available to provide technical assistance to LDSS staff in making the best interests determination. The LDSS is encouraged to be as specific as possible in the description of why surviving siblings or other children in the household will be further traumatized or emotionally harmed by the release of the fatality report. The OCFS-4889, *Best Interests Determination* form, can be found at <http://ocfs.state.nyenet/admin/forms/CWCS/> and is available to

guide the LDSS through the best interests determination process. Completion of this form is optional.

Upon receipt of the recommendation from the LDSS, OCFS Regional Office staff will review the recommendations and, where necessary, discuss the recommendations with the LDSS. OCFS Regional Office staff will make an initial determination whether the fatality report(s) will be released and will notify the LDSS of the decision. If the LDSS disagrees with OCFS' initial determination, the LDSS will have the opportunity to submit additional information that may have an impact on the initial determination to the OCFS Regional Office. The time frame within which the LDSS must provide this information will be determined through discussions with OCFS Regional Office, but it will be a brief period. OCFS Regional Office staff will then review the additional information provided by the LDSS and reach a final determination with the assistance of OCFS Home Office staff, if needed. The entire best interests determination process shall not exceed 45 days from OCFS' receipt of the initial request for disclosure.

If the determination is that disclosure would not be contrary to the best interests of the surviving siblings or other child(ren) in the household, OCFS will then provide the report(s) to the requestor. If the determination is that disclosure of one or more of the requested reports would be contrary to the best interests of the surviving siblings or other child(ren) in the household, OCFS will advise the requestor that the request has been denied in whole or in part. Under FOIL, requestors whose requests are denied in whole or in part have the right to appeal the denial to the OCFS FOIL Appeals Officer. The OCFS FOIL Appeals Officer will review the denial of the FOIL request and make an independent determination whether to uphold or affirm the denial. The LDSS will not be consulted by the FOIL Appeals Officer in making this determination. Requestors whose appeals are denied by the OCFS FOIL Appeals Officer may contest the denial in New York State Supreme Court through a proceeding under Article 78 of the Civil Practice Law and Rules.

Please share this LCM with appropriate staff within your agency.

/s/ Laura M. Velez

Issued By:

Name: Laura M. Velez

Title: Acting Deputy Commissioner

Division/Office: Division of Child Welfare and Community Services