

ESTABLISHING A SUPPORT OBLIGATION

Investigative Subpoena

CS 405.12

SUPERSEDES

CS 405.12, Investigative Subpoena, March 25, 1996

REFERENCES

MCA 40-5-202

Definition

The investigative subpoena may be used during the course of an investigation when there is no pending administrative hearing action. It commands the custodian of specified information to provide the information to the CSED.

Policy

The Legislature has granted the CSED the authority to issue investigative subpoenas while providing services under Chapter 5 of Title 40 of the Montana Code Annotated. The investigative subpoena may be issued by the agency in furtherance of its legislative mandate. The investigative subpoena is a regulatory tool. As such, its use is exclusively reserved to the agency.

The CSED may issue an investigative subpoena if the following conditions are met:

- the investigation must be for the purposes outlined in Chapter 5 of Title 40 of the Montana Code Annotated;
- the information sought is relevant to the issue being investigated; and,
- the subpoena is reasonably specific to obtain relevant documents or described information.

Some of the more common uses of an investigative subpoena may be:

- before the use of a Notice of Parental Responsibility, to obtain the information called for in a paternity affidavit;
- before the use of a Notice of Financial Responsibility, to obtain the information called for in a financial affidavit; and,
- after an order has been issued to obtain information which will allow enforcement, such as bank account information.

The CSED's subpoena power is limited by the U.S. Constitution's protection from unreasonable searches and seizures. Thus, any information sought must be relevant to the issues being investigated. Further, the production of the information may not be unreasonably burdensome to the person subpoenaed.

No subpoena, whether regular or investigative, issued by the CSED hearing office or by the District Court, guarantees unlimited access to all information. Some information is beyond the reach of any subpoena. This information is called "privileged information." Examples of privileged information not subject to compelled disclosure are: mediation sessions under MCA § 40-4-301 et seq and § 39-71-2410; proceedings of the medical review panel, § 27-6-704; proceedings of the medical-legal panel, § 27-1-703; and the evidentiary privileges regarding communication between parties such as attorney and client, husband and wife, and doctor and patient.

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Some privileged information is conditional and may be susceptible to administrative subpoena. Examples include information in the possession of social workers, mental health counselors, direct-entry midwives, and health care providers.

Access to some information is limited by statute to judicial subpoenas or other court order and is not susceptible to administrative subpoena. These restrictive statutes, for the most part, prevent a state agency from disclosing information which it holds but may not prevent the disclosure of similar information held by one who is not a state agency, unless a privilege applies. Examples are: individual income tax records, corporation tax records, library records, electronic funds transfer, health maintenance organization records, non-privileged evidence given by a certified public accountant in the course of a licensure board proceeding, youth court records, confidential criminal justice information, out-of-wedlock birth, adult protective services information, confidential welfare information, records of the developmentally disabled, records of patients or former patients of mental health facilities, reports of stolen vehicles, information regarding a traffic accident not involving a conviction, and financial statements of warehouse operators and commodity dealers. Some information which is subject to statutory limitations on disclosure is already available to the CSED without a subpoena of any kind, such as some tax information and out-of-wedlock birth information.

Information regarding insurance transactions may be obtained through the use of a subpoena. It is arguable that student academic records maintained by the Montana University system are subject to administrative subpoena.

A party to the investigation or a third party may be served with an investigative subpoena. Service must be made by the sheriff of the county where the party resides, or where the documents are located.

If ordered to produce documents, the party should deliver the original documents, or clear copies of them, to the CSED.

The reasonable costs of preparing, copying and transmitting the documents requested are the responsibility of the CSED, as the CSED is the party requesting the investigative subpoena.

If the party fails to comply with the subpoena, an application for enforcement may be filed in the district court, or an administrative civil contempt action may be initiated under CS 503.5.

The CSED regional staff attorney should be consulted prior to an application for an investigative subpoena.

Procedures

UPON AGENCY REQUEST:

Caseworker

1. Prepares and executes CS 405.8A Affidavit of Necessity. Checks SEARCHS Participant Text Information (PRX) screen for indication that information should be protected; if found, attaches note to affidavit warning OALJ, and arranges for protection of information upon receipt.

NOTE: Adjusting Affidavit Language--Requesting Information in CSED Form. The caseworker should consult a CSED Staff Attorney if questions of special usage or language arise. For example, if the investigative subpoena is being used to compel a party to provide the specific information called for in a CSED paternity or financial affidavit, the language should be

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adjusted to request production of the information rather than production of described documents. See step 3 for corresponding adjustments to the language in the Investigative Subpoena itself.

Supervisor

2. Reviews affidavit and case file to determine whether the requested evidence is necessary, whether the request is unduly burdensome, and whether the form and content is correct.
 - a. If the request is inappropriate or if information is incorrect, returns file to caseworker with appropriate case notes.
 - b. If the request is appropriate and correct, makes appropriate case notes and returns file to caseworker with any necessary corrections.

Caseworker

3. Makes any corrections to affidavit, and prepares original and one copy. Prepares original and one copy of CS-405.12A, Investigative Subpoena. Forwards original affidavit and subpoena form to Hearings Assistant. Retains one copy of each document in case file.

NOTE 2:

Adjusting Subpoena Language--Requesting Information in CSED Form. The caseworker should consult a CSED Staff Attorney if questions of special usage or language arise. For example, if the investigative subpoena is being used to compel a party to provide the specific information called for in a CSED paternity or financial Affidavit, the language should be adjusted to command the party to produce the information rather than the documents, records, or files, and to inform the party he/she may comply informally by sending the requested information to the CSED in the form of a completed, signed, and notarized paternity or financial affidavit, with any appropriate attachments. If the party chooses to appear in person to provide the information, procedures in step 9 apply.

Hearings Assistant

4. Checks completed subpoena form for completeness, form, and accuracy. Forwards acceptable packets to Hearing Officer for review and signature. If unacceptable, returns to caseworker for correction.

Hearing Officer

5. Reviews investigative subpoena and affidavit. Determines whether the requested information/documents are relevant and whether production would be unduly burdensome. If acceptable, signs investigative subpoena and returns to Hearings Assistant. If unacceptable, writes "Denied" across face of document, initials, and returns to Hearings Assistant.

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Hearings Assistant

6. Affixes Department seal to signed subpoena form, makes three copies of the executed form. Arranges for service by certified mail, restricted delivery, return receipt requested; or, requests sheriff's praecipe from caseworker and arranges for sheriff's service. Retains original affidavit in hearing file. Retains one copy of subpoena for hearings file, and sends one copy to caseworker. If subpoena is denied, returns to caseworker.

Caseworker

7. Upon receipt of copy of issued subpoena, files in case file and monitors for return of service.
 8. Upon return of service, notes date of service in the case file. Forwards original subpoena and sheriff's return to the Hearings Assistant. Retains a copy of sheriff's return of service in case file.
 9. If in responding to investigative subpoena party insists on delivering information to CSED orally (see step 3, NOTE 2), arranges for party to give information under oath, and documents information given. Two most common methods of obtaining and documenting sworn oral information are given below--both require in-person interviews at CSED office:
 - 1) Caseworker asks questions already printed in existing document, such as CSED paternity or financial affidavit, and completes form using answers given; caseworker then asks party to read completed document and sign declaration that information is true, in presence of a notary.
 - 2) Caseworker arranges for party to be placed under oath at beginning of interview (regional office notary can administer oath), and for interview to be tape recorded; caseworker conducts interview by asking and obtaining answers to necessary questions.
- Other methods are also available; caseworker should consult with CSED Staff Attorney to determine method most suitable to particular case.
10. If party does not respond to subpoena, consults CSED staff attorney regarding enforcement options.