

**IN THE SUPREME COURT OF MISSOURI**

---

STATE EX REL DEPT. OF,	)	
SOCIAL SERVICES,	)	
	)	
Relator,	)	
	)	
vs.	)	Case No. SC93187
	)	
THE HONORABLE	)	
FREDERICK TUCKER,	)	
	)	
Respondent.	)	

---

Writ of Prohibition filed against  
The Honorable Frederick Tucker of the  
Circuit Court of Macon County, Missouri  
Lindsey Shaylee Ogle v. David Wayne Ogle  
Case Number 11MA-DR00044

---

**RESPONDENT'S BRIEF**

---

EDWARD L. CAMPBELL - 28112  
MISTINA D. HOLLENBECK - 48838  
The Campbell Law Firm, L.L.C.  
1902 South Baltimore, Suite 400  
Kirksville, Missouri 63501  
660/627-1241  
660/627-3299 (FAX)  
Attorneys for Petitioner/Mother in Circuit Court  
and Respondent in The Supreme Court

TABLE OF CONTENTS

RESPONDENT’S SUPPLEMENTAL STATEMENT OF FACTS ..... 1

RELATOR’S POINT RELIED ON ..... 2

RESPONDENT’S ARGUMENT ..... 2

CONCLUSION ..... 12

CERTIFICATE OF SERVICE .....14

TABLE OF AUTHORITIES

Section 210.150 (RSMo.) ..... 2, 6, 7, 8, 9, 12

Section 210.109 ..... 2

Missouri Supreme Court Rule 56.01 ..... 3, 8, 9

State ex rel. Missouri Ethics Com’n v. Nichols,

    978 S.W.2d 770 (Mo. App. E.D. 1998) ..... 3, 4, 5, 6, 7

State v. Jackson,

    353 S.W.3d 657 (Mo. App. S.D. 2011) ..... 5

Section 210.140 (RSMo.) ..... 6

Pitts v. Williams,

    315 S.W.3d 755 (Mo. App. W.D. 2010) ..... 8, 9

Missouri Supreme Court Rule 25.02 ..... 9

Section 210.135 (RSMo.) ..... 9

Section 210.152 (RSMo.) ..... 9

Missouri Department of Social Services, Children’s Division,

    Child Welfare Manual, Section 5 - Case Record Maintenance and Access,

    Chapter 2, Record Access

        2.1 ..... 9, 10

        2.5.2 ..... 10, 11

Section 452.375 (RSMo.) ..... 10

Section 210.145 (RSMo.) .....	11
<u>State ex rel. Plank v. Koehr,</u>	
831 S.W.2d 927 (Mo. 1992) .....	11
<u>State ex rel. Mo. State Bd. of Pharmacy v. Admin. Hearing Com'n</u>	
220 S.W.3d 822 (Mo. App. W.D. 2007) .....	11

## RESPONDENT'S SUPPLEMENTAL STATEMENT OF FACTS

It is undisputed that the underlying case involves the dissolution of the marriage of Lindsey Shaylee Ogle and David Wayne Ogle wherein the parties are each requesting custody of their two (2) minor children. The basic information for each hotline call is also undisputed and is as follows: On August 26, 2011 a hotline call was made regarding bruises, welts and red marks on the minor children; On September 27, 2011 a hotline call was made regarding bruises, welts and red marks on the minor children; On September 30, 2011 a hotline call was made regarding bruises, welts and red marks on the minor children; On January 9, 2012 a hotline call was made regarding statements that were made by one of the children about the father and bruises on the minor child; On May 21, 2012 a hotline call was made regarding possible sexual abuse and bruises to the minor children; On August 30, 2012 a hotline call was made regarding possible physical abuse to a minor child; On September 11, 2012 a hotline call was made regarding possible sexual and/or physical abuse to the minor children; On January 29, 2013 a hotline call was made and although it is unclear what the allegations were in this hotline, it appears it was regarding both minor children. The Father was alleged to be the abuser in each of the hotline calls. The Mother desires for the Circuit Court to have the identity of the hotline callers to prove that she did not make the hotline calls against Father. Both Mother and Father have requested and received records from the Relator of the hotline calls regarding their children. Both parents have received records from Relator which have been redacted, some heavily so, allegedly to protect the

identity of the hotline callers. The Motion filed by Father and supported by Mother requests un-redacted copies of the Relator's records, including the identity of the hotline callers. The Qualified Protective Order entered by Respondent orders that the parties may only use the information obtained thereby for purposes of the litigation and further orders that the parties return or destroy any such documents at the end of the litigation.

### **RELATOR'S POINT RELIED ON**

**I. Relator's sole point is that it is entitled to an order prohibiting Respondent from ordering the disclosure of the identity of "hotline callers" reporting possible child abuse or neglect because the identity of private informants of child abuse or neglect is protected and cannot be released according to Section 210.150 RSMo. in that none of the statutory exceptions to disclosure is present in this dissolution case.**

### **Respondent's Argument**

Relator argues that Section 210.150 (RSMo.) prevents Relator from providing unredacted copies of Children's Services' Records and Reports in the dissolution of marriage action filed in Macon County, Missouri and styled Lindsey Shaylee Ogle v. David Wayne Ogle, Case Number 11MA-DR00044, including the identity of the hotline reporters. Relator's argument is essentially that the identity of the hotline callers is protected by Section 210.150 and that Section 210.109.3(3) requires that hotline callers be advised that "the reporter's name and any other personally identifiable information shall be held as confidential and shall not be made public" therefore their identity is not discoverable.

The parties obtained copies of the records of the hotline reports which were redacted, purportedly to remove information regarding the reporters' identities. Therefore, Father filed a Motion with the trial Court requesting unredacted copies of the hotline reports which was supported by Mother. The Motion was opposed only by the Relator. Pursuant to Supreme Court Rule 56.01, the parties should be entitled to unredacted copies of the hotline reports unless those matters are "privileged."

Supreme Court Rule 56.01 sets forth the scope of discovery in civil matters as follows:

b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

A similar situation arose in State ex rel. Missouri Ethics Com'n v. Nichols, 978

S.W.2d 770 (Mo. E.D. 1998) wherein a party to a civil suit issued a subpoena for records of the Missouri Ethics Commission. The Ethics Commission moved to quash the subpoena arguing that the requested records were confidential under Sections 105.955 to 105.963 (RSMo.), which motion was denied by the Trial Court. The Commission thereafter filed a Petition for a Writ of Prohibition to prohibit the Trial Court Judge from enforcing the order denying its Motion to Quash the subpoena. The Court of Appeals discussed the statutory scheme of Section 105.955 to 105.963, including the provisions making the commission's proceedings confidential and providing penalties for the breach of that confidentiality. *Id* at 772. The Court found that the statute involved "makes the matters before the M.E.C. confidential, it does not create a privilege which exempts those matters from discovery...The confidentiality of the M.E.C. investigation and proceedings may be preserved under appropriate protective orders which take into account the nature and scope of the confidentiality provisions of the statute." *Id* at 773. The Court discussed the concept of privilege at length, describing it as follows:

The concept of privilege is an exception to the usual rule of courts that all evidence material, relevant and competent to a judicial proceeding shall be revealed if called for." *Citing: Ex parte McClelland*, 521 S.W.2d 481, 483 (Mo.App.1975). "Justice operates upon disclosure, not secrecy. Society in general, and courts and legislatures in particular, have recognized that certain exceptions to that general rule must be made, either for the protection of basic

human individual needs or for the protection of the society itself.” *Quoting: McClelland*. Privileges which protect basic individual needs, such as lawyer-client, physician-patient, cleric-penitent, and self-incrimination are absolute. *Citing: McClelland*. Privileges which must sometimes yield to competing rights are deemed qualified. *Citing: McClelland. Id.*

While Relator has not specifically stated that the hotline caller’s identity is privileged, it effectively requests that the Court treat that information as if it were privileged in that it requests that this Court prohibit the parties from obtaining that information.

The Court of Appeals in State ex rel. Missouri Ethics Com’n v. Nichols described how to determine whether a statute creates a true privilege:

A statute creates a discovery or evidentiary privilege where it specifically uses the word “privilege” in that context, prohibits the state from obtaining disclosure of the confidential information, or prohibits the use of confidential information in evidence. [*Citations Omitted*]. ...Generally, where a statute prohibits disclosure of the records of an administrative body or other entity or makes its processes confidential, courts have held that no discovery or evidentiary privilege is created with respect to those records in the absence of further specific statutory language creating a privilege. Such statutes mandate confidentiality but do not create a privilege. *Id.* (*See also: State v. Jackson, 353 S.W.3d 657, 661 (Mo. App. S.D. 2011)*).

The Missouri Ethics Commission statute in State ex rel. Missouri Ethics Com'n v. Nichols contained criminal penalties for its violation, as does Section 210.150.4 (RSMo.). Id at 774. The Court determined that even with the criminal penalties provision the statute “is a simple confidentiality provision, not a true privilege.” Id. The Court of Appeals explained that the statutory mandate of confidentiality could be complied with by a protective order. Id.

The only mention of the word “privilege” in Sections 210.108 to 210.190 is Section 210.140 which states that “Any legally recognized privileged communication, except that between attorney and client or involving communications made to a minister or clergyperson, shall not apply to situations involving known or suspected child abuse or neglect... and shall not constitute grounds for failure ... to give or accept evidence in any judicial proceeding relating to child abuse or neglect.” Therefore, the legislature clearly did not create a privilege in the protection of the identity of hotline callers and merely made that information confidential and not available to the public pursuant to State ex rel Missouri Ethics Comm'n v. Nichols. Id.

Relator argues that if the identities of the hotline callers are discoverable then the promise to the reporter that their identifying information shall be confidential and not made public will be an empty one. However, no one in this case has requested that the hotline callers' identifying information be made public. All that is requested is that it be discoverable by the parties and a protective order, as was issued by Respondent, protects the confidentiality of the information. *See: State ex rel. Missouri Ethics Comm'n v. Nichols* at

774. “Because discovery may seriously implicate the privacy interests of litigants and third parties, trial courts have implicit power to use protective orders to preserve confidentiality and protect against public disclosure.” Id.

Even if Section 210.150 does create a privilege, the Respondent’s Court is still entitled to the unredacted records. Section 210.150.2 (RSMo.) states as follows:

2. Only the following persons shall have access to investigation records contained in the central registry:

(4) Any child named in the report as a victim ... or the parent, if not the alleged perpetrator ... but the names of reporters shall not be furnished to persons in this category. Prior to the release of any identifying information, the division shall determine if the release of such identifying information may place a person's life or safety in danger. If the division makes the determination that a person's life or safety may be in danger, the identifying information shall not be released. ...

(5) Any alleged perpetrator named in the report, but the names of reporters shall not be furnished to persons in this category. Prior to the release of any identifying information, the division shall determine if the release of such identifying information may place a person's life or safety in danger. If the division makes the determination that a person's life or safety may be in danger, the identifying information shall not be released. However, the

investigation reports will not be released to any alleged perpetrator with pending criminal charges arising out of the facts and circumstances named in the investigation records until an indictment is returned or an information filed;

(6) A ...juvenile court or other court conducting abuse or neglect or child protective proceedings or child custody proceedings ... with a need for such information in order to carry out its responsibilities under the law to protect children from abuse or neglect; ...

Notably, Subsection (6) of Section 210.150.2 does not contain the same restriction regarding the names of reporters as do Subsections (4) and (5).

Clearly the Macon County Circuit Court is a “court conducting child custody proceedings” and Respondent’s order for Relator to disclose the subject information certainly suggests that the Court has determined that it has “a need for such information in order to carry out its responsibilities under the law to protect children from abuse or neglect.”

The Missouri legislature, in enacting Section 210.150, could have easily made the subject information non-discoverable by clearly defining such matters as privileged for purposes of Rule 56.01(b). However, not only is that information not privileged, it is available to the Court under Section 210.150.2(6).

In Pitts v. Williams, 315 S.W.3d 755, 765 (Mo. App. W.D. 2010), the Court determined that Children’s Division records could not be withheld by the Division pending

the outcome of a criminal investigation. The Court pointed out that with respect to Missouri Supreme Court Rule 25.02, relating to discovery in criminal cases, “[s]ection 210.150.2(5) is not worded in such a way as to limit the scope of discovery that Rule 25.02 would otherwise authorize.” Id. Section 210.150.2(5) is the section regarding access to the records by the alleged perpetrator. Nothing in the totality of Section 210.150.2 is worded in such a way as to limit the scope of discovery that Rule 56.01 would otherwise authorize and would be available under Section 210.150.2(6) (RSMo.).

There are significant protections for reporters of child abuse which would be wholly unnecessary if their identities were not discoverable. For example, Section 210.135 provides immunity from liability for reporters under circumstances not involving false reports, bad faith or ill will.

Furthermore, if the identity of a reporter was not at least discoverable, it would be impossible to enforce provisions such as Section 210.152.6 which permits alleged perpetrators to subpoena any witness for their de novo judicial review hearing “except the alleged victim or the reporter.”

The Missouri Department of Social Services, Childrens’ Division, has created a Child Welfare Manual which instructs its workers regarding the various issues set forth therein. Section 5, Case Record Maintenance and Access, Chapter 2, Record Access states:

2.1 CA/N Investigations/Family Assessments ...

The confidentiality of the reporter is essential. Therefore, prior to sharing the

reporter's name, supervisory consultation and approval is necessary. The identity of the reporter should only be disclosed to the following with regard to CA/N Investigations, Family Assessments and/or Non-Caretaker Referrals: Appropriate federal, state, or local government agencies with a need for such information in order to carry out its responsibility under the law to protect children from child abuse or neglect;

A Grand Jury, Juvenile Officer, Prosecuting Attorney, Law Enforcement Officer involved in the investigation of CA/N, Juvenile Court or other court conducting CA/N or child protective proceedings, and other government entities with a need for such information in order to carry out its responsibilities under the law to protect children from CA/N ...

The Children's Division Manual permits the release of the reporter's name to a "court conducting CA/N or child protective proceedings, and other government entities with a need for such information in order to carry out its responsibilities under the law to protect children from CA/N." Respondent's Court would fall into these two categories as both a Court and a government entity that is required to determine custody pursuant to Section 452.375 (RSMo.) in accordance with the best interests of the children, considering any history of abuse, and to order custody or visitation rights in a manner that will best protect the children.

Section 5, Chapter 2 (2.5.2) of the Children's Division Child Welfare Manual also states that with respect to the release of information to "Courts in Missouri Other Than

Juvenile Courts: Staff shall appear in courts outside juvenile court if a subpoena has been served for the person and/or for the record. ... Upon being called to testify, staff should state to the judge the following: **‘The information in the record is confidential as provided by Section 210.150 of the Revised Statutes of Missouri and I may only disclose it if ordered to do so by the court.’** ... The family record or a copy of it may be left with the court upon verbal order of the judge.” If the Children’s Division Child Welfare Manual instructs the workers to disclose information if ordered by the Court, it is unclear why Relator refuses to comply with Respondent’s Court order.

Relator argues that because the fact of a report is inadmissible, then the hotline caller’s identity should be protected. Section 210.145.18(1) (RSMo.) states: “18. In any judicial proceeding involving the custody of a child the fact that a report may have been made pursuant to sections 210.109 to 210.183 shall not be admissible. However: (1) Nothing in this subsection shall prohibit the introduction of evidence from independent sources to support the allegations that may have caused a report to have been made...” Certainly the identity of the reporter could lead to the discovery of admissible evidence which may be introduced from independent sources regarding allegations involved in a report. Furthermore, inadmissibility does not make the information undiscoverable. State ex rel. Plank v. Koehr, 831 S.W. 2d 927, 927 (Mo. 1992) and State ex rel. Mo. State Bd. of Pharmacy v. Admin. Hearing Com’n, 220 S.W.3d 822, 826 (Mo. App. W.D. 2007.)

The issue before the Court is whether or not the unredacted records of the Children’s

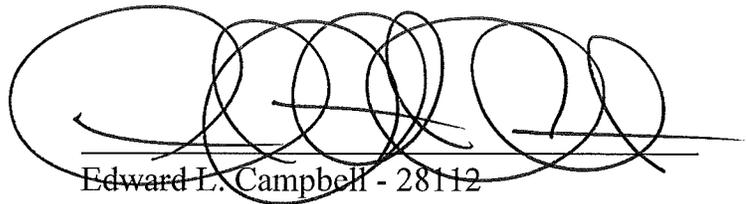
Division regarding hotline reports made on the children who are the subject matter of the custody case pending before the trial Court, including the identity of the reporters, are discoverable. Respondent believes that they are discoverable by the parties under the Missouri Supreme Court Rules and therefore available to the Court under the appropriate rules of evidence and that they are also and should be made available to this Court under Section 210.150.2(6) .

Respondent hereby requests this Court deny Relator's request for an Order prohibiting Respondent from ordering the release of unredacted Children's Division records, including the identity of the hotline callers, so that Respondent's order may be enforced or in the alternative that Respondent's Order be limited as necessary to ensure the confidentiality of the reports while allowing justice to be served by permitting open and full discovery to the parties pursuant to the Supreme Court Rules.

### **CONCLUSION**

Respondent and the children's Mother believe that the hotline records, including the identity of the hotline caller, should be and are confidential. However, confidential does not equal privileged. For this very reason, Respondent issued the protective order rather than simply an unrestricted order for the information to be provided. Relator's argument seems to be that if the parents whose children are the subjects of the hotline calls are entitled to the identity of the hotline callers, this will create a "chilling effect" on the reports of child abuse because reporters will be unwilling to risk public disclosure. Relator's argument goes far

beyond the issue at hand, which is a Qualified Protective Order requiring the Relator to disclose all of its records regarding the parties' children, including the identities of the hotline reporters, to the attorneys for each party and the Guardian Ad Litem for the minor children and prohibiting the parties or persons receiving said records and information from using or disclosing it for any purpose other than the divorce proceeding and ordering the parties or persons receiving said records or information to return the records to Relator or destroy the same at the end of the litigation. Any claim that this Qualified Protective Order somehow permits the information to be disclosed to the public disregards the specific language of the Qualified Protective Order.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.

Edward L. Campbell - 28112

Mistina Hollenbeck-Harris - 48838

The Campbell Law Firm, L.L.C.

1902 South Baltimore, Suite 400

Kirksville, Missouri 63501

660/627-1241

Attorney for Petitioner/Mother in Circuit  
Court and Respondent in the Supreme Court

IN THE SUPREME COURT OF MISSOURI

---

STATE EX REL DEPT. OF,	)	
SOCIAL SERVICES,	)	
	)	
Relator,	)	
	)	
vs.	)	Case No. SC93187
	)	
THE HONORABLE	)	
FREDERICK TUCKER,	)	
	)	
Respondent.	)	

---

Writ of Prohibition filed against  
The Honorable Frederick Tucker of the  
Circuit Court of Macon County, Missouri  
Lindsey Shaylee Ogle v. David Wayne Ogle  
Case Number 11MA-DR00044

---

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the forgoing Respondent's Brief was filed electronically via Missouri CaseNet and electronically served on this 7<sup>th</sup> day of June, 2013, to the following:

VIA Missouri CaseNet E-Service:  
Ronald R. Holliger  
Attorney for Relator  
P.O. Box 899  
Jefferson City, Missouri 65102

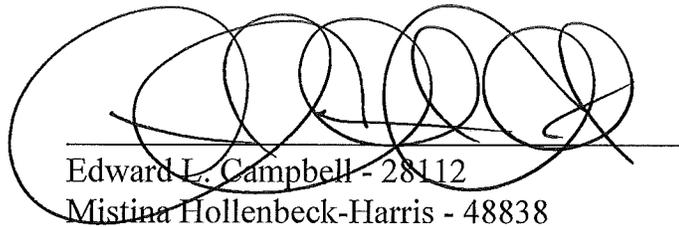
And

VIA Missouri CaseNet E-Service:  
Steven Raymond

100 North Washington Street  
P.O. Box 179  
Shelbyville, MO 63469

And

VIA Electronic mail to:  
The Honorable Frederick Tucker  
Macon County Circuit Court  
101 East Washington Street  
Macon, MO 63552  
rick.tucker@mo.courts.gov

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

Edward L. Campbell - 28112

Mistina Hollenbeck-Harris - 48838

The Campbell Law Firm, L.L.C.

1902 South Baltimore, Suite 400

Kirkville, Missouri 63501

660/627-1241

Attorneys for Petitioner/Mother in Circuit  
Court and Respondent in the Supreme Court

IN THE SUPREME COURT OF MISSOURI

---

STATE EX REL DEPT. OF,	)	
SOCIAL SERVICES,	)	
	)	
Relator,	)	
	)	
vs.	)	Case No. SC93187
	)	
THE HONORABLE	)	
FREDERICK TUCKER,	)	
	)	
Respondent.	)	

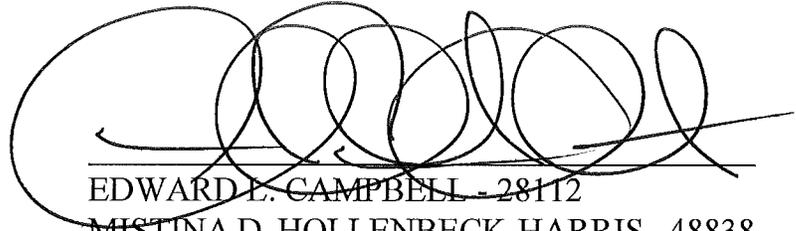
---

Writ of Prohibition filed against  
The Honorable Frederick Tucker of the  
Circuit Court of Macon County, Missouri  
Lindsey Shaylee Ogle v. David Wayne Ogle  
Case Number 11MA-DR00044

**CERTIFICATE OF COMPLIANCE PURSUANT TO SUPREME COURT RULE  
84.06(C)**

COMES NOW, the undersigned attorney for Respondent/Mother, and hereby certifies that the Respondent's Brief filed in the above-described appeal is in compliance as follows:

1. Respondent's Brief contains the information required by Rule 55.03.
2. Respondent's Brief complies with the word limitations contained in Rule 84.06(b).
3. Respondent's Brief contains three thousand one hundred and twenty-five (3,125) words.
4. Respondent's Brief contains two hundred fifty-four (254) lines of type.



EDWARD L. CAMPBELL - 28112

MISTINA D. HOLLENBECK-HARRIS - 48838

The Campbell Law Firm, L.L.C.

1902 South Baltimore, Suite 400

Kirksville, Missouri 63501

660/627-1241

660/627-3299 (FAX)

Attorneys for Petitioner/Mother in Circuit Court  
and Respondent in The Supreme Court