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DISCOVERABILITY OF DEPARTMENT OF SOCIAL SERVICE RECORDS IN CHILDHOOD LEAD PAINT POISONING CASES: PRIVILEGE OR PREJUDICE?

I. INTRODUCTION

Massachusetts' Childhood Lead Paint Poisoning Prevention and Control Act (Lead Paint Statute), significantly revised in 1987 and 1994, increases a landlord's liability for exposing a child under six years of age to a rental unit containing lead-based paint.¹ The Lead Paint Statute provides that the state must establish a program to systematically and comprehensively screen the blood lead levels of all children under the age of six.² The directors of the program must report violations of the maximum allowable blood lead levels to the state for enforcement of immediate abatement or containment of the child's premises by the individual landlord.³ Furthermore, the Lead Paint Statute holds a landlord in violation strictly liable for damages suffered as a result of illegal levels of lead paint on the premises, regardless of whether or not the owner willfully violated the law or whether he or she knew or should have known of the presence of such lead paint.⁴ Given the strict liability nature of the Lead Paint Statute, a landlord's defenses are centered around attacking the factual and legal causes of the child's injuries or damages.

In recent years, many plaintiffs have successfully brought actions against their landlords under the provisions of the Lead Paint Statute. A plaintiff need only prove that a child under six resides at a premises with high levels of lead paint, and that child has suffered injuries.⁵ Since the Lead Paint Statute holds a landlord strictly liable, defense attorneys have limited avenues of defense. Therefore, attorneys must attack legal and fac-

¹ MASS. GEN. L. ch. 111, §§ 190 *et seq.* (West Supp. 1994).

² MASS. GEN. L. ch. 111, § 193-194.

³ MASS. GEN. L. ch. 111, § 193-194.

⁴ MASS. GEN. L. ch. 111, § 199(a) provides, in pertinent part: "[t]he owner of any premises shall be liable for all damages to a child under six years of age at the time of the poisoning, upon proof that said child's blood lead level equals or exceeds the blood lead level at which the department defines lead paint, that are caused by his failure to comply with the provisions and requirements of § 194, § 196(a) or § 197 and regulations pursuant to said provisions." MASS. GEN. L. ch. 111, § 199(a). The 1994 amendments to the statute provide limited circumstances under which an owner of a residential property is not subject to strict liability. MASS. GEN. L. ch. 111, § 197.

⁵ See MASS. GEN. L. ch. 111, § 190 *et seq.*

tual causation, in the hopes of eliminating or reducing the landlord's liability for the minor plaintiff's damages.

Defense attorneys may disprove legal causation by finding other potential and probable causes for a plaintiff's injuries. Plaintiffs often claim that they have suffered neuropsychological, developmental, emotional and mental injuries as a direct result of their lead paint poisoning. Ordinarily, a family record, such as that assembled by the Department of Social Services (DSS), may uncover pertinent information indicating other possible causes for the plaintiff's physical and mental deficiencies.⁶

Childhood exposure to lead is merely one factor which may result in neuropsychological, educational and developmental impairments.⁷ Socio-economic status, the quality of the home environment, and maternal intelligence also combine to vary the correlation between lead paint exposure and the resulting childhood injuries.⁸ A number of experts in the scientific and medical communities believe that social and genetic factors play an essential role in a child's intellectual and behavioral development.⁹ In diagnosing the effects of lead paint on a child, experts in childhood lead paint poisoning frequently take into account such confounding factors as family history and environment, to better understand the causes of the child's injuries.¹⁰ Family structure, parental income, and parental and sibling education are a few

⁶ See *Department of Social Services v. Stein*, 612 A.2d 880 (Md. 1992) (holding that the records from DSS are discoverable under judicially controlled circumstances).

⁷ See Stuart J. Pocock, et al., *Environmental Lead and Children's Intelligence: A Systematic Review of the Epidemiological Evidence*, 309 BRIT. MED. J. 1189, 1193 (1994) (discussing the relationship between children's IQ and their lead burden); Peter A. Baghurst, et al., *Environmental Exposure to Lead and Children's Intelligence at the Age of Seven Years*, 327 NEW ENG. J. MED. 1279, 1279 (1992) (surveying the effects of lead and environment on the IQ levels of children).

⁸ Pocock, *supra* note 7, at 1193; Baghurst, *supra* note 7, at 1280.

⁹ See Holly A. Ruff, et al., *Declining Blood Lead Levels and Cognitive Changes in Moderately Lead-Poisoned Children*, 269 JAMA 1641, 1643 (1993) (using age, sex, birth order, household size, and socioeconomic status as variables in epidemiological study of relationship between lead and intelligence in children); Claire B. Ernhart, et al., *Subclinical Lead Level and Developmental Deficit: Re-Analyses of Data*, 18 J. LEARNING DISABILITIES 475, 475-77 (1985) (discussing the effect of parental intelligence on children with lead paint exposure); Herbert L. Needleman, et al., *Deficits in Psychologic and Classroom Performance of Children with Elevated Dentine Lead Levels*, 300 New Eng. J. Med. 689, 692-693 (1979) (noting parental non-lead variables significant in assessment of children's intelligence).

¹⁰ Ruff, *supra* note 9, at 1643; Ernhart, *supra* note 9, at 475-477; Needleman, *supra* note 9, at 692-93.

of the elements that may result in learning disabilities, emotional and behavioral problems, and developmental delays¹¹

Armed with opinions from pediatric and neuropsychological experts regarding the influence of family history and environment on a child's development, defense attorneys are increasingly seeking access to DSS records.¹² These records are vital to both defense counsel and their experts in assessing whether or not a child's intellectual and behavioral deficits are solely attributable to lead paint poisoning. However, by successful motions to quash, plaintiffs' counsel frequently thwart the defense's attempts to subpoena these records from the DSS, basing their motions on the assertion of the social worker-client privilege, the Fair Information Practices Act, and the statutory definition of public records along with their subsequent access, which are all discussed below.¹³

Despite frequent contentions by plaintiffs that the DSS and other protected records, such as school and medical records, are not discoverable, courts often allow opposing counsel access to the records, reasoning that the privileges asserted are not absolute.¹⁴ For example, notable exceptions to the social worker privilege statute exist, and where defense counsel makes a

¹¹ Nicholas Zill, et al., *Developmental, Learning, and Emotional Problems: Health of Our Nation's Children*, 1988, 190 VITAL & HEALTH STAT. NAT'L CENTER HEALTH STAT. 6-9 (1990). The study focused on data from the 1988 National Health Interview Survey of Child Health of 17,110 children under age seventeen. The researchers obtained a considerable amount of background information on the family, physical health, behavioral adjustment, emotional adjustment, school performance, and receipt of medical and psychological care. *Id.* at 2.

¹² *MacNeil v. Five G Realty Trust*, Civ. Action No. 89-CV-00398, (Martin, J.) (Worcester Housing Ct.) (March 14, 1994); *McCue v. Kraines*, Civ. Action No. 90-7264E, (Fremont-Smith, J.) (Middlesex Super. Ct.) (Nov. 22, 1993); *Goodrich v. St. Jeans Credit Union*, Civ. Action No. 92-CV-00057 (Kerman, J.) (Northeast Housing Ct.) (March 5, 1993); *Paige v. Gerardi*, Civ. Action No. 92-CV-00031 (Kerman, J.) (Northeast Housing Ct.) (February 18, 1993); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Nov. 9, 1992) (Order on Plaintiffs' Motion to Quash Subpoena of Department of Social Services); *Caminero v. Hertrich*, Civ. Action No. 88-1226, (Brady, J.) (Essex Super. Ct.) (Sept. 27, 1990). Note that because these records are pursued through discovery channels, written opinions are sparse and have thus far only originated at the Massachusetts housing and superior court levels. To date, no opinion has been handed down on this particular issue by the Massachusetts Court of Appeals or the Supreme Judicial Court.

¹³ See MASS. GEN. L. ch. 112, § 135, *et seq.* (West Supp. 1994) (stating that communications between a licensed social worker and a client are privileged); MASS. GEN. L. ch. 66A, § 1 (West 1988) (defining personal data); MASS. GEN. L. ch. 4, § 7, cl. 26 (West 1986) (defining public records).

¹⁴ *Commonwealth v. Stockhammer*, 409 Mass. 867, 883 (1991).

good-faith showing of relevance under one of these sections, the records may be released under judicially controlled circumstances.¹⁵ Several recent decisions from the criminal courts recognize that defendant's right to discover all relevant information in defense of his or her case outweighs a claim of privilege by a social worker.¹⁶ However, the high courts in Massachusetts have yet to rule definitively on this vital discovery issue in the context of lead paint cases, and thus, there are a myriad of conflicting decisions coming out of the housing and superior courts.¹⁷

This article will examine the various privilege statutes defendants invoke when seeking to disclose DSS records. The first section will dissect the social worker privilege statute and discuss cases ruling under both the pre-1989 and post-1989 statute in order to establish the bases for the Massachusetts' courts' rulings on the subject. The article will then analyze a decision handed down by the Northeast Housing Court, as its discussion of the statutory interplay and policy issues is instructive on this type of request. Finally, the article will explore the possibilities for a Supreme Judicial Court or Appeals Court ruling on the issue based on a ruling recently handed down in Massachusetts and an instructive case from the Appeals Court in Maryland.

¹⁵ MASS. GEN. L. ch. 112, § 135B(a)-(h) (West Supp. 1994); *see* *Commonwealth v. Figueroa*, 413 Mass. 193, 203-4 (1992) (allowing judge to review records for significant exculpatory evidence pertaining to defendant); *Commonwealth v. Stockhammer*, 409 Mass. 867, 884 (1991) (concluding counsel for defendant entitled to review DSS records for evidence of bias or motive to lie); *Commonwealth v. Jones*, 404 Mass. 339, 343 (1989) (allowing defendant's counsel to in-camera review of DSS records); *Commonwealth v. O'Brien*, 27 Mass. App. Ct. 184, 187 (1989) (stating defendant was denied access to DSS material which was potentially helpful in his defense); *Commonwealth v. Collett*, 387 Mass. 424, 439 (1982) (holding in-camera hearing the proper procedure to a determination of release of DSS records and remanding to trial court for said determination).

¹⁶ *See Figueroa*, 413 Mass. at 203 (stating that defense counsel must be entitled to review the records for relevant information to impeach the credibility of the witness); *Stockhammer*, 409 Mass. at 883 (holding that in appropriate circumstances, the privilege must yield to the right of defendant to use the privileged communications); *Jones*, 404 Mass. at 344 (stating defendant is entitled to in camera hearing because the government has the obligation to turn over evidence that is both favorable to the accused and material to guilt and punishment).

¹⁷ *MacNeil v. Five G Realty Trust*, Civ. Action No. 89-CV-00398, (Martin, J.) (Worcester Housing Ct.) (March 14, 1994); *Goodrich v. St. Jeans Credit Union*, Civ. Action No. 92-CV-00057 (Kerman, J.) (Northeast Housing Ct.) (March 5, 1993); *Paige v. Gerardi*, Civ. Action No. 92-CV-00031 (Kerman, J.) (Northeast Housing Ct.) (February 18, 1993); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Nov. 9, 1992) (Order on Plaintiffs' Motion to Quash Subpoena of Department of Social Services); *Caminero v. Hertrich*, Civ. Action No. 88-1226, (Brady, J.) (Essex Super. Ct.) (Sept. 27, 1990).

II. ANALYSIS OF EARLY LEGAL APPLICATIONS

Lawyers have attempted to discover DSS records since the advent of the comprehensive 1987 lead paint law. Surprisingly, the Massachusetts Court of Appeals and the Supreme Judicial Court have yet to rule on this discovery issue in the lead paint context. With no precedent to bind them, housing court decisions are unpredictable and vary widely in their reasoning.¹⁸ Furthermore, only recently have Massachusetts judges at the housing court level begun to rule on these discovery issues, along with analogous issues of discovery of medical and school records of the minor plaintiffs, their siblings, and their parents, in written memoranda and orders.¹⁹

¹⁸ Compare *Paige v. Gerardi*, Civ. Action No. 92-CV-00031 (Kerman, J.) (Northeast Housing Ct.) (February 18, 1993) (access to records allowed), *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Nov. 9, 1992) (Order on Plaintiffs' Motion to Quash Subpoena of Department of Social Services) (access to records allowed), and *Caminero v. Hertrich*, Civ. Action No. 88-1226, (Brady, J.) (Essex Super. Ct.) (Sept. 27, 1990) (access to records allowed); with *MacNeil v. Five G Realty Trust*, Civ. Action No. 89-CV-00398 (Martin, J.) (Worcester Housing Ct.) (March 14, 1994) (access to records denied), *Goodrich v. St. Jeans Credit Union*, Civ. Action No. 92-CV-00057 (Kerman, J.) (Northeast Housing Ct.) (March 5, 1993) (access to records denied), and *McCue v. Kraines*, Civ. Action No. 90-7264E, (Fremont-Smith, J.) (Middlesex Super. Ct.) (Nov. 22, 1993) (access to records denied).

¹⁹ See generally *Vasquez v. Hezekiah*, No. 94-J-889 (Ma. App. Ct. Feb. 13, 1995) (allowing discovery of school records of minor plaintiff's mother); *MacNeil v. Five G Realty Trust*, Civ. Action No. 89-CV-00398, (Martin, J.) (Worcester Housing Ct.) (March 14, 1994) (denying defendants access to school records of minor plaintiff's siblings and mother); *Vasquez v. Hezekiah*, Civ. Action No. 91-CV-0057 (Kerman, J.) (Northeast Housing Ct.) (Dec. 23, 1993) (holding medical, school, and work records of minor plaintiff's mother not discoverable); *Hughes v. Webster*, Civ. Action No. 90-28584 (Daher, J.) (Boston Housing Ct.) (June 25, 1993) (allowing plaintiff's motion to quash subpoena of mother's school records); *Coren v. Cardoza*, Civ. Action No. 90-CV-29101 (Smith, J.) (Boston Housing Ct.) (May 7, 1993), Order Den. Mot. to Reconsider, (May 29, 1993) (granting access to defendants for school records of minor plaintiff's siblings); *Connor v. Colby*, Civ. Action No. 88-CV-72 (Martin, J.) (Worcester Housing Ct.) (Jan. 26, 1993) (denying defendants discovery of minor plaintiff's parents' medical and school records); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Dec. 3, 1992) (stating in camera review of medical and school records of minor plaintiff's parents allowed). See also *MacNeil v. Five G Realty Trust*, Civ. Action No. 89-CV-00398, (Martin, J.) (Worcester Housing Ct.) (March 14, 1994) (declining to allow discovery of DSS records by defendants); *Paige v. Gerardi*, Civ. Action No. 92-CV-00031 (Kerman, J.) (Northeast Housing Ct.) (February 18, 1993) (allowing defendants access to DSS records in camera); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Nov. 9, 1992) (Order on Plaintiffs' Mot. to Quash Subpoena of Department of Social Services) (ordering plaintiffs to produce DSS records); *Goodrich v. St. Jeans Credit Union*, Civ. Action No. 92-CV-00057 (Kerman, J.) (Northeast Housing Ct.) (March 5, 1993) (holding medical, school and DSS records of minor plaintiff not discoverable); *Caminero v. Hertrich*, Civ. Action No. 88-1226, (Brady, J.) (Essex Super. Ct.) (Sept. 27, 1990)

To illustrate, in *Caminero v. Hertrich*,²⁰ one of the earliest published orders in this area, the Essex Superior Court allowed the defense to review the DSS records in a lead paint poisoning case. The court examined the exceptions to the current social worker privilege statute—chapter 112, section 135B of the Massachusetts General Laws. The court found that the plaintiffs may discover records under an exception to the privilege in subsection (c), where the plaintiff “ha[s] introduced [his] mental or emotional condition as an element of [his] claims,” and it is more important to disclose the communication than to protect the client-social worker relationship.²¹ Since the plaintiff’s mental and emotional development were clearly an element of his claim, the court in *Caminero* allowed the landlord to pursue the defense that the plaintiffs’ unfortunate home environment, as opposed to lead ingestion, may have caused his cognitive deficits.²² The order, however, made no reference to the balancing of interests required by section 135B(c).

Other Massachusetts housing court decisions after *Caminero* allowed discovery of similarly privileged records, yet made no mention in their orders of the various privilege statutes or any other statutory or privacy interests of the plaintiffs as the judge enumerated in *Caminero*.²³ In one such order from the Boston Housing Court, the judge recognized that the plaintiffs’ claims for damages had opened up the door to this type of disclosure, and both parties’ reliance on expert opinions made it critical that a complete and accurate knowledge of the family history be obtained. Thus, the court allowed the release of the records.²⁴

(ordering plaintiffs to produce entire DSS record); *McCue v. Kraines*, Civ. Action No. 90-7264E, (Fremont-Smith, J.) (Middlesex Super. Ct.) (Nov. 22, 1993) (allowing defendants access to DSS records after court’s in camera review).

²⁰ *Caminero v. Hertrich*, Civ. Action No. 88-1226, (Brady, J.) (Essex Super. Ct.) (Sept. 27, 1990).

²¹ *Caminero v. Hertrich*, Civ. Action No. 88-1226, slip op. at 2 (Brady, J.) (Essex Super. Ct.) (Sept. 27, 1990).

²² *Id.*

²³ See *Vasquez v. Hezekiah*, Civ. Action No. 91-CV-0057 (Kerman, J.) (Northeast Housing Ct.) (Dec. 23, 1993); *Hughes v. Webster*, Civ. Action No. 90-28584 (Daher, J.) (Boston Housing Ct.) (June 25, 1993); *Coren v. Cardoza*, Civ. Action No. 90-CV-29101 (Smith, J.) (Boston Housing Ct.) (May 7, 1993), Order Den. Mo. to Reconsider, (May 29, 1993); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Dec. 3, 1992) (Order); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Nov. 9, 1992) (Order on Plaintiffs’ Mot. to Quash Subpoena of Department of Social Services).

²⁴ *Coren v. Cardoza*, Civ. Action No. 90-CV-29101 slip op. at 1 (Smith, J.) (Boston Housing Ct.), Order Den. Mot. to Reconsider, (May 29, 1993).

Courts after *Caminero*, however, continuously denied requests for the release of records. In *MacNeil v. Five G. Realty Trust*,²⁵ the defendants discovered through a reference in medical records that there were possible allegations of abuse to the minor child and thus they subpoenaed the DSS records. The court denied the defendants access to the records, stating as its reasons the social worker privilege statute and its protection of client-social worker communications and their lack of relevance.²⁶ Similarly, the court in the same case denied the defendants access to the medical and school records of the minor plaintiff's siblings and mother stating that these records, too, were irrelevant.²⁷

Other judicial orders dealing with discovery requests for privileged records do not address the need for or the relevance of the records. These orders simply set forth specific guidelines as to how the judge and counsel should examine the confidential records and make no reference whatsoever to the statutory privileges.²⁸ It was not until the decision in *Paige v. Gerardi*,²⁹ discussed below, that a court provided a concrete guideline to for granting or denying access to privileged DSS records.

Without binding precedent on this issue, the numerous Massachusetts housing and superior courts are struggling to create a standard for ruling on various discovery motions. These courts look to other types of cases dealing with the social worker privilege statute, and other instructive privacy statutes relating to medical and school records, to determine when and if records are privileged. The task of interpreting the privilege, however, is especially difficult because the social worker privilege statute was markedly different and was construed broadly by the courts prior to its revisions in

²⁵ *MacNeil v. Five G Realty Trust*, Civ. Action No. 89-CV-00398, (Martin, J.) (Worcester Housing Ct.) (March 14, 1994).

²⁶ *Id.* at 2.

²⁷ *Id.* at 1.

²⁸ See *Coren v. Cardoza*, Civ. Action No. 90-CV-29101 (Smith, J.) (Boston Housing Ct.), Order Den. Mot. to Reconsider, (May 29, 1993) (limiting disclosure of DSS record to defendant's attorney, support staff, and expert witnesses); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Dec. 3, 1992) (Order) (limiting disclosure of records to four specific areas of inquiry); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Nov. 9, 1992) (Order on Plaintiffs' Mot. to Quash Subpoena of Department of Social Services) (limiting counsel for defendant to review the record in the courthouse making no photocopies of said record).

²⁹ *Paige v. Gerardi*, Civ. Action No. 92-CV-00031 (Kerman, J.) (Northeast Housing Ct.) (February 18, 1993).

1989.³⁰ To understand the early legal applications of the social worker privilege statute in the context of the discovery and release of DSS records in lead cases, it is necessary to examine the use and interpretation of the pre-1989 statute in the case law.

A. The Pre-1989 Social Worker Privilege Statute, the Fair Information Practices Act, and Their Early Applications

The early social worker privilege statute³¹ (pre-revision statute), like the current statute, did not create an absolute privilege against disclosing information obtained by a social worker, nor did its terms provide for unlimited access by court order under a showing of relevancy by the defense.³² The pre-revision statute enumerated limited exceptions or circumstances under which disclosure was proper.³³ The overriding purpose of the statute was to protect the well-being of children and maintain the confidentiality of the client-social worker relationship, thus fostering successful social work intervention.³⁴ Courts have broadly construed the privilege by extending it beyond actual client communications to conversations between a social worker and those persons consulting the social worker in his or her professional capacity.³⁵ The term "consulting" in the interpretation of the pre-revision statute did not imply that it protected every conversation a person may have had with a social worker, but judges tended to construe the term liberally.³⁶ This judicial interpretation led to a "blanket of confidentiality" covering nearly all communications between clients and social workers.³⁷

³⁰ MASS. GEN. L. ch. 112, § 135A (West 1994) (amending ch. 112, § 135 (West 1981)).

³¹ MASS. GEN. L. ch. 112, § 135 previously read, in pertinent part: "No social worker in any licensed category, including those in private practice, and no social worker employed in a state, county, or municipal governmental agency, shall disclose any information he may have acquired from a person consulting him in his professional capacity or whom he has served in his professional capacity. . . ."

³² *Commonwealth v. Jones*, 404 Mass. 339, 342-343 (1989).

³³ MASS. GEN. L. ch. 112, § 135 provided exceptions (a)-(g), none of which are germane to the discussion below.

³⁴ *Jones*, 404 Mass. at 342.

³⁵ *Commonwealth v. Collett*, 387 Mass. 424, 430 (1982); *see also* *Allen v. Holyoke Hosp.*, 398 Mass. 372, 378 (1986) (limiting discovery of DSS records to social worker's personal observations while denying access to remaining records).

³⁶ *Allen v. Holyoke Hosp.*, 398 Mass. 372, 386 (1986) (Liacos, J., dissenting).

³⁷ *Id.*

Under the pre-revision statute, unlike the current statute, a social worker's personal observations of a plaintiff's home were not privileged.³⁸ The courts construed the statute very narrowly with regard to observations, because its language clearly stated that a social worker may not disclose information or communications he may have acquired from a *person* consulting him in his professional capacity.³⁹ Despite the fact that a social worker's personal observations did not fall within the privilege, the "consulting" provision of the statute broadly protected clients' privacy interests.

The Supreme Judicial Court in *Commonwealth v. Collett*,⁴⁰ working under the pre-revision statute, recognized a plaintiff's and society's privacy concerns over disclosure of confidential information.⁴¹ The court noted that disclosure harms more than just the social worker and the client involved.⁴² Privacy concerns often extend to individuals in need of help who may not, in fact, be the specific "client" protected by the statute.⁴³ Therefore, the court interpreted the statute to protect anyone consulting the social worker in his or her professional capacity, including non-parties to the underlying action.⁴⁴ Without this guaranteed protection of confidential information, the court recognized that individuals' concerns about personal privacy may deter them from seeking the advice of a social worker.

As a result of the broad protections afforded plaintiffs' DSS records under the pre-revision statute, those seeking the records continually tried to circumvent the statute and gain access to the records through an exception to the protection of "personal data" as stated in the Fair Information Practices Act (FIPA).⁴⁵ FIPA restricts all holders of personal information from disclosing that information, unless it falls within the definition of a "public record."⁴⁶ "Public records" are generally documents received by any public

³⁸ *Allen*, 398 Mass. at 378.

³⁹ MASS. GEN. L. ch. 112, § 135 (1981).

⁴⁰ *Commonwealth v. Collett*, 387 Mass. 424 (1982).

⁴¹ *Id.*

⁴² *Id.* at 428.

⁴³ *Collett*, 387 Mass. at 429.

⁴⁴ *Id.* at 430.

⁴⁵ MASS. GEN. L. ch. 66A, § 1 (West 1988). The definition of "personal data" reads, in pertinent part: "[a]ny information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual; provided, however, that such information is not contained in a public record, as defined in clause Twenty-sixth of section seven of chapter four. . . ." *Id.*

⁴⁶ MASS. GEN. L. ch. 4, § 7, cl. 26 (West 1988).

agency, and therefore accessible by the public, unless the "materials or data relat[e] to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy."⁴⁷

In determining whether certain actions constituted an "unwarranted invasion" of personal privacy, courts would balance the public's right to know with the individual's right to personal privacy.⁴⁸ The courts recognized that the dominant purpose of the public records statute was to allow the public broad access. Parties seeking these records rely upon this policy.⁴⁹ Although public access is important, this purpose should be restricted in some circumstances. Where the facts in question are intimate details which an individual of normal sensibilities would consider an invasion of privacy, then the courts should recognize their highly personal nature and prevent disclosure.⁵⁰

The Massachusetts courts recognized such FIPA and privacy concerns when deciding whether or not to release other types of records similar to DSS records; that is, records with a less than absolute privilege. The courts routinely prevented disclosure of such records, including medical, school, psychotherapist, motor vehicle, and special education records, under the privilege statutes and FIPA.⁵¹ In *Allen v. Holyoke Hospital*,⁵² the court, in a civil context, discussed the statutory provisions prohibiting disclosure of DSS records. In *Allen*, the parents of a minor child in foster care brought a wrongful death action against Holyoke Hospital and various treating physicians. The defense sought to discover DSS records which documented a history of parental neglect in an attempt to disprove legal causation of the child's death and to mitigate damages.⁵³ Additionally, the court held that communications between the department's social workers and the decedent's

⁴⁷ MASS. GEN. L. ch. 4, § 7, cl. 26(c).

⁴⁸ *Torres v. Attorney Gen.*, 391 Mass. 1, 9 (1984).

⁴⁹ *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 436 (1983).

⁵⁰ *Doe v. Registrar of Motor Vehicles*, 26 Mass. App. Ct. 415, 424 (1988).

⁵¹ See *Allen v. Holyoke Hosp.*, 398 Mass. 372 (1986) (limiting discovery of DSS records to social worker's personal observations while denying access to remaining records); *Alberts v. Devine*, 395 Mass. 59 (1985) (holding physician-patient privilege prevented disclosure of medical records); *Torres v. Attorney Gen.*, 391 Mass. 1 (1984) (determining DSS records protected under FIPA); *Globe Newspaper*, 388 Mass. 427 (1983) (stating public's right of access should be restricted when seeking documents from Retirement Board); *Doe*, 26 Mass. App. Ct. 415 (1988) (determining data such as social security number, height, and date of birth are not public records); *Commonwealth v. LeCain*, 19 Mass. App. Ct. 1034 (1985) (holding DSS records privileged under statute).

⁵² 398 Mass. 372 (1986).

⁵³ *Id.* at 376.

grandparents and foster parents while consulting the social worker fell within the privilege.⁵⁴ The Supreme Judicial Court further concluded that the trial court must determine whether the collective public interest in disclosure of the social worker's personal observations warranted an invasion of the subject's personal privacy under the balancing test of FIPA.⁵⁵

Cases in line with *Allen* delineated how the protective pre-amendment statute denied defendants' access to potentially relevant information.⁵⁶ The judicial system is founded on the fundamental and comprehensive need to develop all relevant facts.⁵⁷ In contrast, relevant evidence such as that contained in the DSS files was continuously protected under the pre-amendment statute, and it continues to be protected today. But as this discovery issue becomes more prevalent in lead paint cases, judges must turn their attention to the new provisions of the social worker privilege statute.⁵⁸ Under proper construction of that statute and related privacy statutes,⁵⁹ courts hearing these matters should be able to apply the law in a more consistent and rational manner.

B. The Revised 1989 Social Worker Privilege Statute, the Fair Information Practices Act and Their Applications

The changes in 1989 to the social worker privilege statute,⁶⁰ specifically, chapter 112, sections 135A and 135B, addressed numerous privacy

⁵⁴ *Id.* at 378.

⁵⁵ *Id.* at 381.

⁵⁶ See *Commonwealth v. Merola*, 405 Mass. 529 (1989) (holding DSS records were properly excluded from trial based on their irrelevancy); *Allen*, 398 Mass. 372 (1986) (limiting discovery of DSS records to social worker's personal observations while denying access to remaining records); *Torres v. Attorney Gen.*, 391 Mass. 1 (1984) (determining DSS records protected under FIPA); *Collett*, 387 Mass. 424 (1982) (holding in-camera hearing the proper procedure to a determination of release of DSS records and remanding to trial court for said determination); *Commonwealth v. LeCain*, 19 Mass. App. Ct. 1034 (1985) (holding DSS records privileged under statute). But see *Commonwealth v. Jones*, 404 Mass. 339 (1989) (allowing defendant's counsel to in-camera review of DSS records); *Commonwealth v. Hawkesworth*, 405 Mass. 664 (1989) (deciding defendant was not prejudiced by judge's admission of DSS record in criminal trial); *Commonwealth v. O'Brien*, 27 Mass. App. Ct. 184 (1989) (stating defendant was denied access to DSS material which was potentially helpful in his defense).

⁵⁷ *U.S. v. Nixon*, 418 U.S. 683, 709 (1974).

⁵⁸ MASS. GEN. L. ch. 112, §§ 135A-135B (West Supp. 1994).

⁵⁹ Mass. Gen. Laws Ann. ch. 66A (West 1988); Mass Gen. Laws Ann. ch. 4, § 7, cl. 26 (West 1986).

⁶⁰ MASS. GEN. L. ch. 112, § 135B.

issues and allowed access to records only under limited exceptions. The current statute narrows the protections of the privilege to communications between the social worker and the "client," who is defined as a "person with whom a social worker has established a social worker-client relationship."⁶¹ Previously, the statute covered any "person consulting [the social worker] in his professional capacity or whom he has served in his professional capacity."⁶²

The change in the statute with regard to whom it protects is significant in light of the Supreme Judicial Court's holdings under the pre-revision statute in both *Allen* and *Collett*. In *Collett*, the court first concluded that the social worker privilege extended beyond the victim and the victim's family to anyone consulting the social worker in his or her professional capacity.⁶³ The court then reiterated its assertion in *Allen* that extending the privilege to the victim's grandparents is in accord with legislative intent.⁶⁴

Undoubtedly, under the new statute, the courts would decide these cases differently, based on the fact that neither subject of the privilege was a "client" of the social worker in the statutory sense. Perhaps the 1989 legislature agreed with Judge Liacos in his dissent of *Allen* when he said, "The court here unquestioningly accepts the strained interpretation of 'consult' given in *Collett*—which appears to say that, by his very status, the social worker 'consults' with others and, hence, casts a blanket of confidentiality and 'privilege' wherever he goes."⁶⁵ Under the pre-revision statute, courts deciding lead paint cases were not required to perform the strict balancing under the new statute, where a DSS record contains communications from *other* members of a child's family or friends who are not considered clients. Although these people have a notable privacy interest, it is clear from the change in the statute that the privilege protects the child, who is the actual client, from unwarranted disclosure.

The revised statute changed significantly the type of protected information so as to consider fully the data subject's privacy interests. Before its revision, the statute did not protect a social worker's personal observations of the subject's home in the performance of his or her duties.⁶⁶ This lan-

⁶¹ MASS. GEN. L. ch. 112, §§ 135-135A.

⁶² See *supra* note 31, at § 135.

⁶³ Commonwealth v. Collett, 387 Mass. 424, 429 (1982).

⁶⁴ Allen v. Holyoke Hosp., 398 Mass. 372, 378 (1986).

⁶⁵ *Id.* at 386 (Liacos, J., dissenting).

⁶⁶ *Id.* at 378. The court states that the language of § 135 protects communications "from a person" and does not include observations of the social worker.

guage led to the *Allen* decision allowing the disclosure of the social worker's notes, investigation and observations. However, these communications would be privileged by the new statute, which protects "any information acquired or revealed in the course of or in connection with the performance of the social worker's professional services."⁶⁷ The legislature may have realized that private, protectable information could be gathered through the "myriad of investigative and administrative tasks above and beyond counseling," and that the client had a right to have this type of information protected as well.⁶⁸

With the enactment of the 1989 social worker privilege statute, the legislature established a privilege for a specific class of people—those who seek help from the DSS. Also, the new statute extended the web of coverage of the privilege to include a social worker's personal observations of the client and the client's environment. Yet the legislature recognized in the new statute that this privilege should not be absolute. Thus, they created exceptions to confidential communications, which, under certain circumstances, would warrant disclosure.⁶⁹ Until the Massachusetts Appeals Court or Supreme Judicial Court applies the exceptions under section 135B⁷⁰ in the context of a lead paint case, however, the trial courts will continue to produce inconsistent discovery orders like those orders discussed above.

III. BALANCING PUBLIC AND PRIVATE CONCERNS UNDER THE SOCIAL WORKER PRIVILEGE STATUTE AND THE FAIR INFORMATION PRACTICES ACT: *PAIGE v. GERARDI*

The current social worker privilege statute did not bar discovery of DSS records in a recent decision from the Northeast Housing Court, *Paige v. Gerardi*.⁷¹ The *Paige* court allowed the defendant landlord to discover

⁶⁷ MASS. GEN. L. ch. 112, § 135A.

⁶⁸ *Paige v. Gerardi*, Civ. Action No. 92-CV-00031, slip op. at 3 (Kerman, J.) (Northeast Housing Ct.) (February 18, 1993).

⁶⁹ See MASS. GEN. L. ch. 112, § 135A(a)-(i) and § 135B(a)-(h).

⁷⁰ See MASS. GEN. L. ch. 112, § 135B(c) (stating that where a client puts his emotional state at issue, and a balancing of interests tips in favor of justice to the defendant, then the records will be disclosed).

⁷¹ *Paige v. Gerardi*, Civ. Action No. 92-CV-00031 (Kerman, J.) (Northeast Housing Ct.) (February 18, 1993). I use the word "recent" notwithstanding the fact that the decision was handed down in February of 1993, because as stated earlier, there are very few written decisions on this issue and even fewer that are written with reasons for granting or denying the motions. This case is frequently cited by defense attorneys in this field as

the records of the plaintiff's family in a lead paint case. Through an examination of the various relevant statutes, the court concluded that the records were accessible through a proper showing under exception (c) to section 135B of the social worker privilege statute.⁷² The court also examined whether or not the FIPA barred the claims, and after balancing both the public and the private interests in discovering these records, concluded that discovery would not be an unwarranted invasion of personal privacy.⁷³

The defendant's success on the discovery request in *Paige* rests on the court's examination of the new social worker privilege statute and its relationship to protections under FIPA. The plaintiffs unsuccessfully asserted that FIPA was a total bar to disclosure of DSS records, through judicial controls or otherwise.⁷⁴ Based on the definition of "personal data" as set forth in chapter 66A, section 1 of FIPA, plaintiffs claimed that because it includes "any information concerning an individual," its protections are broader than those included in the definition of "communications" which may be disclosed under chapter 112, section 135B(c) when the client introduces his mental or emotional condition as an element of the claim or defense, and the interests of justice require the communication's disclosure.⁷⁵ Thus, plaintiffs in *Paige* contended that simply because the species of data contained in the definition of communications, unprivileged under section 135B(c) because the client has introduced his mental or emotional state, does not mean they waive their rights to protection of this data. FIPA con-

supporting evidence for their motions to compel records through subpoena of the Department of Social Services.

⁷² MASS. GEN. L. ch. 112, § 135B(C) states that the privilege does not apply, "[i]n any proceeding . . . in which the client introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between the client and the social worker be protected."

⁷³ *Paige v. Gerardi*, Civ. Action No. 92-CV-00031, slip op. at 6-7 (Kerman, J.) (Northeast Housing Ct.) (February 18, 1993).

⁷⁴ *Id.* at 1.

⁷⁵ *Id.* at 2. MASS. GEN. L. ch. 66A, § 1 states that access to personal data is prohibited for "any information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual; provided, however, that such information is not contained in a public record as defined by [MASS. GEN. L. ch. 4, § 7, cl. 26]. . . ." Alternatively, "communications" under the social worker privilege statute, MASS. GEN. L. ch. 112, § 135, include "conversations, correspondence, actions and occurrences regardless of the client's awareness of such conversations, correspondence, actions and occurrences and any records, memoranda or notes of the foregoing."

tains broader protections in its definition of personal data, which protects this information from disclosure.⁷⁶

In one respect, the *Paige* court agreed with the plaintiffs in their assessment of the new species of personal data, but the court continued its analysis by turning to the second portion of the definition of "personal data" under FIPA: that is, whether or not the documents at issue are exempted from FIPA as "public records."⁷⁷ "Public records" under the statute contain identifying information about an individual, the disclosure of which would constitute an unwarranted invasion of privacy.⁷⁸ To determine if a disclosure is "unwarranted" under the statute, the court must perform a balancing test based on public and private interests demonstrated in the case law on the issue.

While a constitutional right to privacy in the case of confidential records of the DSS exists, as this case did not concern a fundamental right such as marriage or procreation, the court in *Paige* recognized that plaintiffs do have an undeniable privacy interest in nondisclosure.⁷⁹ Expectations of the "data subject" play an important role, as it is likely that the subject of the DSS records does not contemplate that a future, unknown defendant may seek to use the records in defense of personal injury litigation.⁸⁰ The court noted DSS prepares the records for the social purpose of protecting children from abuse and neglect, and not because they might be "coincidentally relevant" to the defense of personal injury litigation.⁸¹ Based on this recognition, the court reasoned that disclosure of private information could adversely affect the purposes of social worker-client relationships and undermine a client's trust.⁸²

In contrast, the public has a strong interest in ensuring private litigants obtain relevant information.⁸³ The court, however, concluded the merits of the information-seeker's needs do not enhance his or her rights to access the

⁷⁶ *Paige*, Civ. Action No. 92-CV-00031 at 3.

⁷⁷ MASS. GEN. L. ch. 4, § 7, cl. 26.

⁷⁸ *Id.*

⁷⁹ *Paige*, Civ. Action No. 92-CV-00031, slip op. at 4 n.2 (citing Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 157 n.5 (1979)).

⁸⁰ *Id.* at 5.

⁸¹ *Id.*

⁸² See *Commonwealth v. Bishop*, 416 Mass. 169, 176 (1993) (concluding routine disclosure of DSS records could discourage people from seeking help from a social worker).

⁸³ *Paige*, Civ. Action No. 92-CV-00031, slip op. at 6.

records.⁸⁴ Rather, the public should be treated collectively, and they must show an aggregate public interest in disclosure warranting an invasion of a data subject's personal privacy.⁸⁵

When balanced with the "enormous collective interest" of the public, the *Paige* court determined the statutory interest of the plaintiffs in maintaining secrecy of DSS records must yield through judicially controlled discovery.⁸⁶ This type of discovery protects the data subject's privacy while allowing the defense access to relevant information. Access to the DSS records in this way should occur in any lead paint poisoning case where the plaintiff's mental state is at issue and the judge determines that the balance under the social worker privilege statute weighs in favor of the defense.⁸⁷ Accordingly, in *Paige*, the court hoped to avoid potentially anomalous results in future cases whereby a "communication" would be disclosed under section 135B(c), but "information" acquired or revealed by the client, in the course of or in connection with the performance of the social worker's professional services, would be protected under FIPA.⁸⁸

In light of the fact that the *Paige* court found it necessary to consider the various privacy interests of the data subject when determining the release of DSS records, they turned next to assessing the appropriate procedure for reviewing the records so as to maintain as much privacy as possible. The court rejected the idea of an in camera review solely by the judge, outside the presence of counsel.⁸⁹ The court reasoned that chapter 66A, section 2 of FIPA, makes it an administrative, not judicial, function to limit the volume and types of information collected, and to collect no more personal data than is reasonably necessary.⁹⁰

⁸⁴ *Id.* at 7; see *Allen v. Holyoke Hosp.*, 398 Mass. 372, 381 (1986); *Torres v. Attorney Gen.*, 391 Mass. 1, 9-10 (1984).

⁸⁵ *Paige*, Civ. Action No. 92-CV-00031, slip op. at 7; see *Doe v. Registrar of Motor Vehicles*, 26 Mass. App. Ct. 415, 427-428 (1988); *Allen*, 398 Mass. at 381; *Torres*, 391 Mass. at 10-11.

⁸⁶ *Paige*, Civ. Action No. 92-CV-00031, slip op. at 6.

⁸⁷ MASS. GEN. L. ch. 112, § 135B(c) (West Supp. 1994). The court noted that it is applying the same factual and legal standard in the balancing test under both FIPA and the social worker privilege statute. *Paige* at 6.

⁸⁸ *Paige*, Civ. Action No. 92-CV-00031, slip op. at 6.

⁸⁹ *Id.* at 8. The court requested argument from DSS as to what procedure they felt was adequate for the review of their records, and relying on *Commonwealth v. Collett*, 387 Mass. 424 (1982), and *Commonwealth v. Jones*, 404 Mass. 339 (1989), the DSS proposed that it should provide an unredacted copy of the records to the court, and the judge should decide which portions should be redacted. *Id.*

⁹⁰ *Id.*

Furthermore, the court pointed out that an in camera review by the judge alone was rejected by the Supreme Judicial Court in *Commonwealth v. Stockhammer*.⁹¹ The *Stockhammer* court reasoned there were other ways to protect the confidentiality of the DSS records without trial judges assuming the role of advocates when examining such records.⁹² Stating a judge's role becomes uncomfortable when he or she becomes an advocate, the court in *Stockhammer* concluded that it is simply "enough for a judge to judge."⁹³ Consequently, under the *Stockhammer* reasoning, the *Paige* court ordered the entire, unredacted file to be produced to the defendants,⁹⁴ subject to the DSS or the plaintiff's request for an in camera review of the records to protect their interests.⁹⁵

IV. OUTLOOK

The court's decision in *Paige v. Gerardi*, in the context of a lead paint poisoning case, struck a balance between public and private concerns, and allowed for disclosure where it is in the interests of justice and where a client places his or her mental or emotional condition at issue.⁹⁶ The defendant must show the elements of the exception in chapter 112, section 135B(c) are satisfied, and that the information sought is likely to be relevant and reasonably calculated to lead to the discovery of admissible evidence.⁹⁷ The possibility exists that plaintiffs' alleged damages in a lead paint case result from factors completely unrelated to lead paint. Therefore, it is vital the defense receive all relevant evidence. By using the *Paige* court's analysis of the social worker privilege statute, it appears that subsequent courts deciding this issue will be able to satisfy both public and private concerns.

Yet in lead paint and in similar cases seeking privileged records, the housing and superior courts have continuously denied access to these rec-

⁹¹ 409 Mass. 867 (1991).

⁹² *Id.* at 882.

⁹³ *Id.*

⁹⁴ *Paige*, Civ. Action No. 92-CV-00031 at 10. The court ordered counsel not to file the records with the court and not to disclose their contents to anyone other than defendant's counsel or defendant's consultative expert. *Id.*

⁹⁵ *Id.* The court stated that a motion for in camera review should contain the identity of the particular records involved and the specific need for review. *Id.*

⁹⁶ *Paige v. Gerardi*, Civ. Action No. 92-CV-00031 (Kerman, J.) (Northeast Housing Ct.) (February 18, 1993).

⁹⁷ MASS. R. CIV. P. 26.

ords.⁹⁸ The Middlesex Superior Court in *McCue v. Kraines*⁹⁹ refused to disclose DSS records because the plaintiffs' claims for "loss of consortium" and "severe emotional distress" were not enough to introduce their mental or emotional condition as an element to the claim. In *Connor v. Colby*,¹⁰⁰ the Worcester Housing Court denied access to the school and medical records of the minor's parents, who were parties to the action, on the basis that the defense did not show the relevance of the records.

Recently, however, the Appeals Court of Massachusetts granted the discovery of school records of the minor plaintiff's mother in the case of *Vasquez v. Hezekiah*¹⁰¹ on the sufficiency of defendant's prima facie showing of relevance. Cases like *Vasquez* involving privacy issues relating to school records are instructive to the issue of DSS record discovery, as both situations involve records with a less-than-absolute privilege. The court in *Vasquez* first assessed defendants' request for school records on the threshold question of relevance. After reviewing evidence from experts regarding the link from maternal intelligence to child intelligence, the court held that defendants were entitled to proceed under the judicial guidelines for discovery of privileged records set out in the criminal case, *Commonwealth v. Bishop*.¹⁰² The court noted the claims against the defendants were serious, and litigation inevitably compromises the privacy of the party initiating it,

⁹⁸ *MacNeil v. Five G Realty Trust*, Civ. Action No. 89-CV-00398 (Martin, J.) (Worcester Housing Ct.) (March 14, 1994); *Goodrich v. St. Jeans Credit Union*, Civ. Action No. 92-CV-00057 (Kerman, J.) (Northeast Housing Ct.) (March 5, 1993); *McCue v. Kraines*, Civ. Action No. 90-7264E, (Fremont-Smith, J.) (Middlesex Super. Ct.) (Nov. 22, 1993); *Coren v. Cardoza*, Civ. Action No. 90-CV-29101 (Smith, J.) (Boston Housing Ct.), Order Den. Mot. to Reconsider, (May 29, 1993); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Dec. 3, 1992) (Order); *Bolduc v. Peterson*, Civ. Action No. 91-3622, (Grabau, J.) (Worcester Super. Ct.) (Nov. 9, 1992) (Order on Plaintiffs' Mot. to Quash Subpoena of Department of Social Services).

⁹⁹ *McCue v. Kraines*, Civ. Action No. 90-7264E, slip op. at 4 (Fremont-Smith, J.) (Middlesex Super. Ct.) (Nov. 22, 1993).

¹⁰⁰ *Connor v. Colby*, Civ. Action No. 88-CV-72 (Martin, J.) (Worcester Housing Ct.) (Jan. 26, 1993).

¹⁰¹ *Vasquez v. Hezekiah*, No. 94-J-889 (Mass. App. Ct. February 13, 1995).

¹⁰² *Id.* at 5; *Commonwealth v. Bishop*, 416 Mass. 169, 181-183 (1993). The *Bishop* court set out a five stage inquiry. First, the judge must determine if the records are privileged. Second, the judge must determine if the records are relevant based on a proffer by the defendant and a review by the judge in camera. Third, both parties have access to the materials to determine the necessity of disclosure for a fair trial. Fourth, defendant must show that disclosure of the material to the jury is essential to a fair trial. Fifth, the judge must determine whether the records will be received into evidence. *Id.*

and therefore the defendants were entitled to discover probative evidence in their defense.¹⁰³

The *Vasquez* decision is highly instructive to judges in determining when to release DSS records to the defense. However, the Massachusetts trial courts in lead paint litigation should look to the example set by the Maryland Appeals Court in deciding this very same issue in *Department of Social Services v. Stein*.¹⁰⁴ The court in *Stein*, presiding without the benefit of a detailed privilege statute,¹⁰⁵ balanced the defendant's need to inspect the DSS records against the privacy interests involved and determined that defendant's showing of potential relevance outweighed the subject's privacy interests.¹⁰⁶ The Massachusetts courts could adopt the reasoning from *Stein* without compromising the integrity of the carefully-drafted provisions of the Massachusetts social worker privilege statute. Such an adoption would ensure adequate consideration of both privacy concerns and the public's right to know.

In *Stein*, the minor plaintiff and his parents sued the defendant for physical, mental, and emotional injury allegedly caused by exposure to lead paint. The defendant subpoenaed the DSS records, and the trial court granted the request notwithstanding a motion by the plaintiffs for a protective order.¹⁰⁷ On review, the Appeals Court affirmed the decision as to this issue based on the defendant's legitimate need to inspect the records.¹⁰⁸

The *Stein* court recognized, as did the *Vasquez* court in Massachusetts, that although this was a civil case, the defendant had a considerable amount to lose. The civil equivalent of "charges," or "causes of action" faced the defendant, and the plaintiff was seeking millions of dollars in damages.¹⁰⁹ Because the plaintiff claimed serious developmental and behavioral injuries, the defendant demonstrated a "potential and plausible relationship between the records and the causes of action," using the records to rebut the allega-

¹⁰³*Vasquez v. Hezekiah*, No. 94-J-889, slip op. at 6-7 (Mass. App. Ct. February 13, 1995).

¹⁰⁴612 A.2d 880 (Md. 1992).

¹⁰⁵MD. ANN. CODE, art. 88A, § 6 (Michie Co. Supp. 1994) limits by its terms, disclosure of "any information concerning any applicant for or recipient of" certain social services programs or benefits and of "records and reports concerning child abuse or neglect." *Id.*

¹⁰⁶*Stein*, 612 A.2d at 894-895.

¹⁰⁷*Id.* at 881-882.

¹⁰⁸*Id.* at 895.

¹⁰⁹*Id.* at 894.

tions.¹¹⁰ The court noted there was a reasonable possibility that the DSS records contained usable evidence.¹¹¹

The court in *Stein* concerned itself little with the defendant's non-specific proffer of relevancy for the DSS records. The court stated, "That is to be expected, however, since the [defendant] has not seen the records and cannot possibly know what is in them."¹¹² Rather than deny defendant's request outright because of absence of concrete proof of relevancy, the court instead found disclosure in judicially controlled circumstances proper, provided counsel conduct the review.¹¹³

The decision in *Stein* is not irreconcilable with the Massachusetts social worker privilege statute. DSS records in Massachusetts are subject to privilege until the client puts his mental or emotional condition at issue.¹¹⁴ As often happens in a lead paint case, the minor child alleges various behavioral, emotional, mental, and physical problems as a result of lead paint poisoning. Therefore, under the statutory analysis outlined above, the court must then determine whether it is more important to the interests of justice that the records be disclosed than the privilege maintained. As a basis for this determination, the court should follow the reasoning of both the Maryland Appeals Court in *Stein* and the Massachusetts Appeals Court in a similar privilege discussion in *Vasquez*. Therefore, on some showing of relevancy, the defendant would be allowed to review the records under the watchful eye of the court, who would be present to protect the plaintiff's privacy interests.

If the Massachusetts courts are unwilling to be as liberal as Maryland courts in deciding the defendant's request for DSS records, the courts may reach the same results by authorization under FIPA. Often, as illustrated above, the plaintiff will claim that his or her privacy interests are protected not just by the social worker privilege statute, but also by FIPA. FIPA pertains to the safekeeping of "personal data" by agencies or individuals that can be readily associated with an individual, excluding public rec-

¹¹⁰ *Stein*, 612 A.2d at 894. Maryland's lead paint statute is similar to Massachusetts' statute, MASS. GEN. L. ch. 111, § 190 *et seq.* It requires that plaintiff show defendant is responsible for the child's lead paint poisoning, that the defendant's acts or omissions proximately caused the child's injuries, and that the child was damaged in some way. *Id.*

¹¹¹ *Stein*, 612 A.2d at 894.

¹¹² *Id.*

¹¹³ *Id.* at 893. The controls imposed in this expanded in camera review are based on the Massachusetts decision of *Commonwealth v. Stockhammer*, 409 Mass. 867 (1991).

¹¹⁴ MASS. GEN. L. ch. 112, § 135B.

ords.¹¹⁵ Any agency or department of the Commonwealth holds public records, which remain privileged if their disclosure constitutes an unwarranted invasion of personal privacy.¹¹⁶ Courts assessing record requests under FIPA will often find themselves balancing the same public and private considerations as under the social worker privilege statute, with the same anomalous results.

If the Massachusetts Appeals Court or Supreme Judicial Court analyzed the duties of "holders" of personal data under section 2 of FIPA, they could provide defendants with the records while maintaining the subject's privacy. The DSS clearly represents a "holder" under the statute.¹¹⁷ Therefore, section 2 of FIPA instructs these holders that they shall "not allow any other agency or individual not employed by the holder to have access to personal data *unless such access is authorized by statute or regulations which are consistent with the purposes of this chapter...*" (emphasis added).¹¹⁸

Arguably, the current social worker privilege statute, specifically under chapter 112, section 135B(c), provides such authorization for the release of the data. Furthermore, section 135B appears consistent with the purpose of FIPA; that is, to maintain confidentiality of personal information. Therefore, if the courts declare section 135B an appropriate authorization of such release of personal data under FIPA, and if, upon release, the courts maintain the procedural protections of judicially controlled discovery to protect individual privacy under *Stockhammer* and *Bishop*, they might finally achieve a balance between public and private interests while accomplishing a more uniform result in granting or denying discovery requests.

V. CONCLUSION

The strict liability nature of the lead paint statute allows little in the way of defenses for a defendant landlord. Thus, defense counsel must seek out all relevant information which could undermine the factual and legal causes of the minor child's damages. Damages, which include neuropsychological, behavioral, emotional and physical effects, are not germane to lead poisoning alone. In fact, experts in the scientific and medical communities have found that environmental and social factors play a significant role in a child's development. For a defense expert to make a diagnosis of a

¹¹⁵ MASS. GEN. L. ch. 66A, § 1.

¹¹⁶ MASS. GEN. L. ch. 4, § 7, cl. 26(c).

¹¹⁷ A "holder" is defined in MASS. GEN. L., ch. 66A, § 1 as "an agency which collects, uses, maintains or disseminates personal data . . . as a result of performing a governmental or public function or purpose."

¹¹⁸ MASS. GEN. L. ch. 66A, § 2(c).

child exhibiting one of the above-mentioned damages, the expert needs to examine any objective information of abuse or neglect in the family environment. The Department of Social Services records may provide such information.

As stated above, the courts have denied such requests routinely in the civil context, citing the privileged nature of the records under the social worker privilege statute and the significant privacy interests at stake. Furthermore, they have denied the requests absent a significant showing of relevancy. However, as the Maryland court points out in *Stein*, relevancy of the records may not be determined with any specificity until they are viewed.¹¹⁹ Under judicially controlled conditions for viewing the records, protection of both the minor plaintiff and the adversarial system is maintained.

It is imperative that the Massachusetts Appeals Court or the Supreme Judicial Court specifically address discovery requests for DSS records by lead paint litigants if there is to be any consistency in rulings on the lower court level. If the courts take into consideration the careful interplay of the statutory law as discussed in *Paige* and apply the reasoning set forth in *Stein* and *Vasquez*, then all litigants will receive an opportunity to view any potentially relevant evidence, whether good or bad for either side. The courts could achieve this result without sacrificing the plaintiff's expectation of privacy by adhering to strict guidelines for judicially supervised review. In the end, the concerns surrounding personal privacy, the integrity of the judicial system, and the interests of justice will be served.

Lisa Neal Healy

¹¹⁹Department of Social Services v. Stein, 612 A.2d 880, 893 (Md. 1992).