

*IN CAMERA REVIEW AND*  
DISCLOSURE OF DHS  
RECORDS

THROUGH THE EYES OF A CHILD  
CONFERENCE

AUGUST 7, 2017

AN OVERVIEW

# CONFIDENTIALITY OF DHS RECORDS

# DHS RECORDS GENERALLY

- **Multi-person records**
- **Subject to various federal and state confidentiality laws**
- **Consideration of the intersection between those laws**



# CHILD WELFARE RECORDS

- **Generally considered confidential**
  - Required disclosures
  - Best interest disclosures
  - Prohibited re-disclosures



# CHILD ABUSE REPORTS

- **Generally considered confidential**
  - Certain required and permitted disclosures
  - Re-disclosure prohibited



# DHS ADOPTION RECORDS

## **Must be sealed and generally considered confidential except:**

- May disclose pursuant to a court order. ORS 109.319(7)(a).
- May disclose as allowed in ORS 109.319 – for instance, disclosure to an adult adoptee of court adoption records in the possession of DHS except for the adoption home study unless there is a court order.
- May disclose as allowed under the Voluntary Adoption Registry. ORS 109.425 to 109.507; OAR 413-130-0300 to 413-130-0365.
- May disclose for purposes of providing adoption services or the administration of child welfare services. ORS 109.319; OAR 413-010-0035(8).

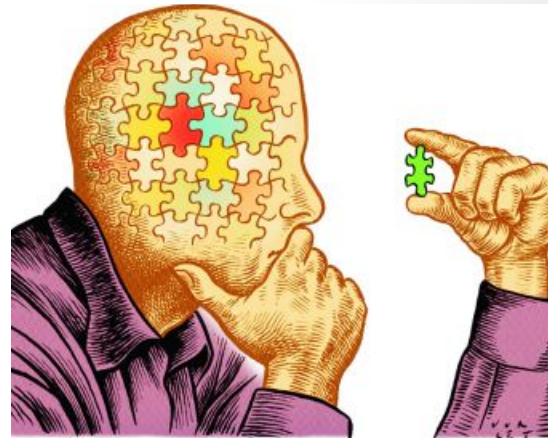
# FOSTER PARENT INFORMATION

- **Name, address and identifying information of person who maintains a foster home is confidential. ORS 418.642(1).**
- **DHS may adopt rules authorizing disclosure if DHS deems it necessary to protect the best interests of a child or necessary for the administration of child welfare laws. ORS 418.642(2). DHS has adopted rules: OAR 413-200-0298.**



# ADDITIONAL CONSIDERATIONS

- **Public Assistance Records**
- **Medical Records**
- **Substance Abuse Treatment Records**
- **Education Records**
- **Criminal History Records and Information**
- **Public Records Law**





A BRIEF HISTORY

*IN CAMERA* REVIEW

# *IN CAMERA REVIEW*



# *IN CAMERA REVIEW*

WHAT IS THE NECESSARY  
SHOWING?



STAYING ON TARGET

# *IN CAMERA REVIEW*

WHAT IS THE NECESSARY  
SHOWING?



STAYING ON TARGET

# *IN CAMERA* REVIEW

## Necessary Showing

Is there more than  
one line of  
precedent?

If so, which one is  
should I use?



# *IN CAMERA* REVIEW

## **The “State with Particularity” Standard**

**The trial court must examine requested materials in camera when proponent states with particularity that the information sought is favorable and material to the issues at bar. Trial court is not obligated to conduct in camera review based on pure conjecture.**

*State v. Wixom*, 275 Or App 824, (2015), *rev den* 359 Or 166 (2016)

# *IN CAMERA* REVIEW

## **The “Might Yield” Standard**

Proponent of *in camera* review must make a showing that would support a reasonable belief that an in camera review *might yield* relevant evidence.

*Frease v. Glazer*, 330 Or 364 (2000)

## *IN CAMERA* REVIEW

***Frease v. Glazer*, 330 Or 364 (2000)**

- **Mandamus proceeding (from tort actions alleging misrepresentation by attorney in custody case)**
- **Complex factual background**



# *IN CAMERA* REVIEW

**“On this record, we conclude that plaintiff failed to produce sufficient evidence to support a reasonable belief that *in camera* review might yield evidence that the crime fraud exception applies to defendant’s files concerning his representation of Torabi. Accordingly, the trial court erred in ordering defendant to turn over those files for *in camera* review.” (emphasis added)**

*Frease v. Glazer*, 330 Or 364 (2000)

# *IN CAMERA* REVIEW

**“Reasonable belief that something might be subject to disclosure”**

**“To satisfy a ‘might yield’ standard, defendant needed to provide the court with the evidence that would support a reasonable belief that something in the records might be subject to disclosure.”**

**Regarding review of a victim’s counseling records, the Court of Appeals held that the Defendant is entitled to an *in camera* review on demonstration that there is a reasonable basis to think those records could contain any exculpatory evidence related to the abuse.**

**Held: trial court erred in finding the showing for in camera review was inadequate.**

***State v. Lammi*, 278 Or App 690, clarified on reconsideration, 281 Or App 96, rev den 360 Or 697 (2016)**

# *IN CAMERA* REVIEW

**“Reasonable belief that something might be subject to disclosure”**

**On reconsideration, the Court of Appeals added that “...once a party has made a threshold showing sufficient to permit an in camera review, whether to conduct the review is a separate discretionary decision” using the factors listed in *State v. Bray*, 281 Or App 584 (2016).**

***State v. Lammi*, 278 Or App 690, clarified on reconsideration, 281 Or App 96, rev den 360 Or 697 (2016)**

# *IN CAMERA* REVIEW Privileged or Otherwise Protected Material

## **State v. Bray, 281 Or App 584 (2016)**

- Facts and circumstances of the particular case;
- The volume of the materials to review;
- The relative importance to the case of the alleged privileged information; and
- The likelihood that an exception to privilege will apply.



# *IN CAMERA* REVIEW Privileged or Otherwise Protected Material

**Kahn v. Pony  
Express Courier  
Corp., 173 Or App  
127 (2001)**

Defendant to wrongful  
death action sought  
child protective  
services (then SCF)  
records.



# *IN CAMERA* REVIEW Privileged or Otherwise Protected Material

**Kahn v. Pony  
Express Courier  
Corp., 173 Or App  
127 (2001)**

HELD: “History and prognosis records” are privileged. Other materials in the file are confidential.



# *IN CAMERA* REVIEW

## Privileged Material

1. **OEC 503-511:** Is there an exception to the privilege?
2. **Criminal case:** Will the right of compulsory process defeat the privilege?
3. **ORS 419B.040:** Certain privileges are not grounds for exclusion in child abuse cases; or
4. ***State v. Bray* factors:** What is the likelihood that an exception will apply?



# *IN CAMERA* REVIEW Privileged Material

## **The Criminal Defendant's Right of Compulsory Process**

Article 1, Sec. 11,  
Oregon Const.; 6<sup>th</sup>  
Amendment to the  
U.S. Constitution

Will defeat claim of  
privilege when the  
defendant  
demonstrates...





# IN CAMERA REVIEW

## Privileged Material

### The Criminal Defendant's Right of Compulsory Process

1. The information sought is favorable to the defendant;
2. The information sought is material to the issues in the case; and
3. The defendant has identified an interest in the evidence that outweighs the legitimate interest in the privilege asserted.

*State v. Bassine*, 188 Or App 228, 234-235 (2003), *adh'd to on recons*, 189 Or App 228 (2003), *rev den*, 337 Or 182 (2004)



# IN CAMERA REVIEW

**Trial court's analysis of the sufficiency of the proponent's showing is reviewed for legal error:**

- Support a reasonable belief that an in camera review might yield relevant unprivileged evidence (*Frease v. Glazer*); and
- “Might yield” is a reasonable belief that something in the records might be subject to disclosure (*State v. Lammi*)

**Once sufficient showing is made, the court must then apply *State v. Bray* discretionary factors before deciding to conduct review:**

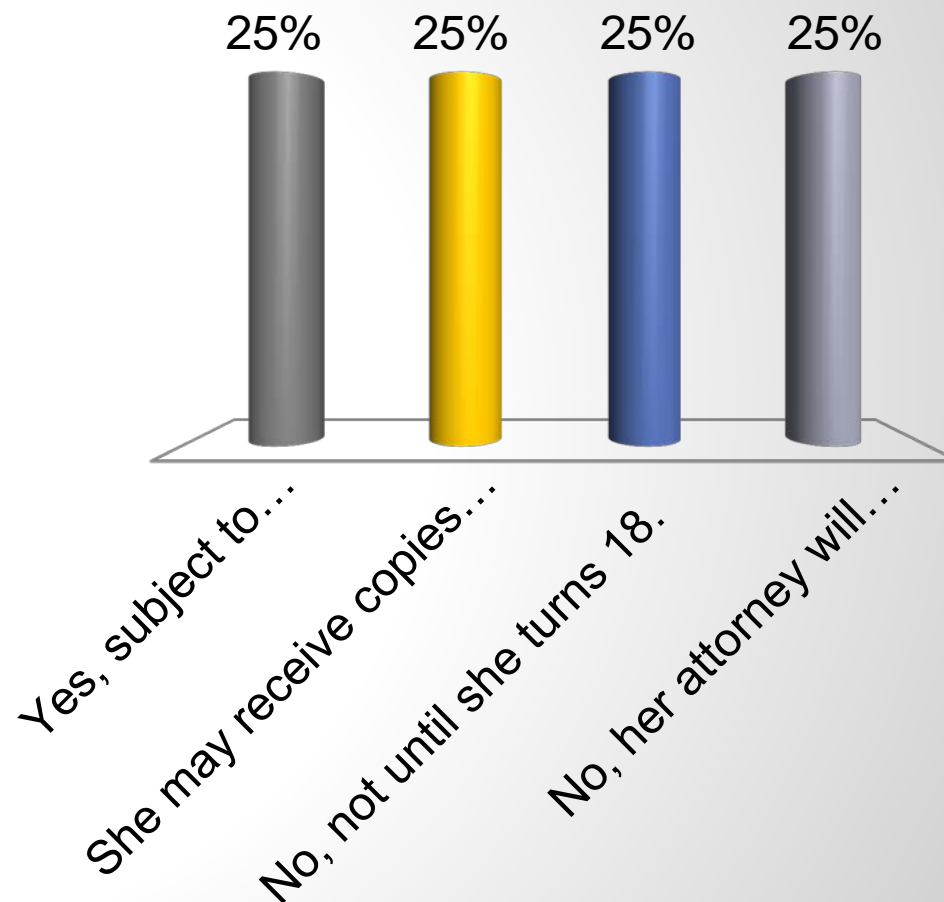
- Facts and circumstances of the particular case;
- The volume of the materials to review;
- The relative importance to the case of the alleged privileged information; and
- The likelihood that an exception to privilege will apply.

APPLICATION

**A 16 year-old ward in DHS custody requests copies of her entire DHS case file. She has been in foster care for the past 3 years. Her parents' rights were terminated for purposes of her adoption but her adoption disrupted prior to finalization and she has remained in foster care. She is an intelligent, developmentally on-track teen but suffers from PTSD and a Generalized Anxiety Disorder due to the abuse she suffered while in the care of her parents. DHS has been granted legal custody and guardianship of the ward.**

# CAN DHS RELEASE CHILD WELFARE RECORDS TO THE CHILD?

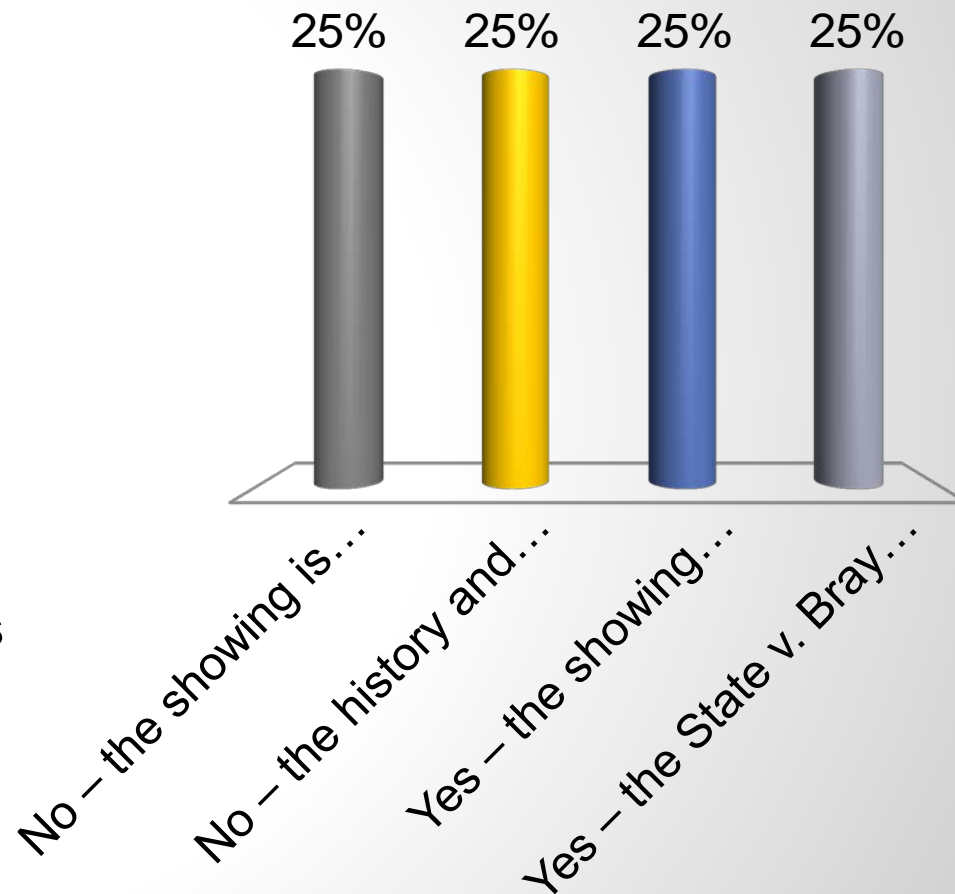
- A. Yes, subject to redaction of information about other people.**
- B. She may receive copies of some records if her purpose is related to the administration of child welfare laws.**
- C. No, not until she turns 18.**
- D. No, her attorney will receive the records as part of discovery and can show them to her.**



**A criminal defendant subpoenas victim's DHS caseworker to testify at a pre-trial evidentiary hearing in his criminal case. The defendant also issues a subpoena duces tecum requesting early production of the victim's entire DHS case file and in camera review by the court. The defendant's attorney prepared an affidavit in support of the request stating that he is aware that this victim previously accused another individual of molesting him and that the case was ultimately dismissed. He believes that the victim recanted the abuse and that review of the file will demonstrate this victim has falsely accused another individual.**

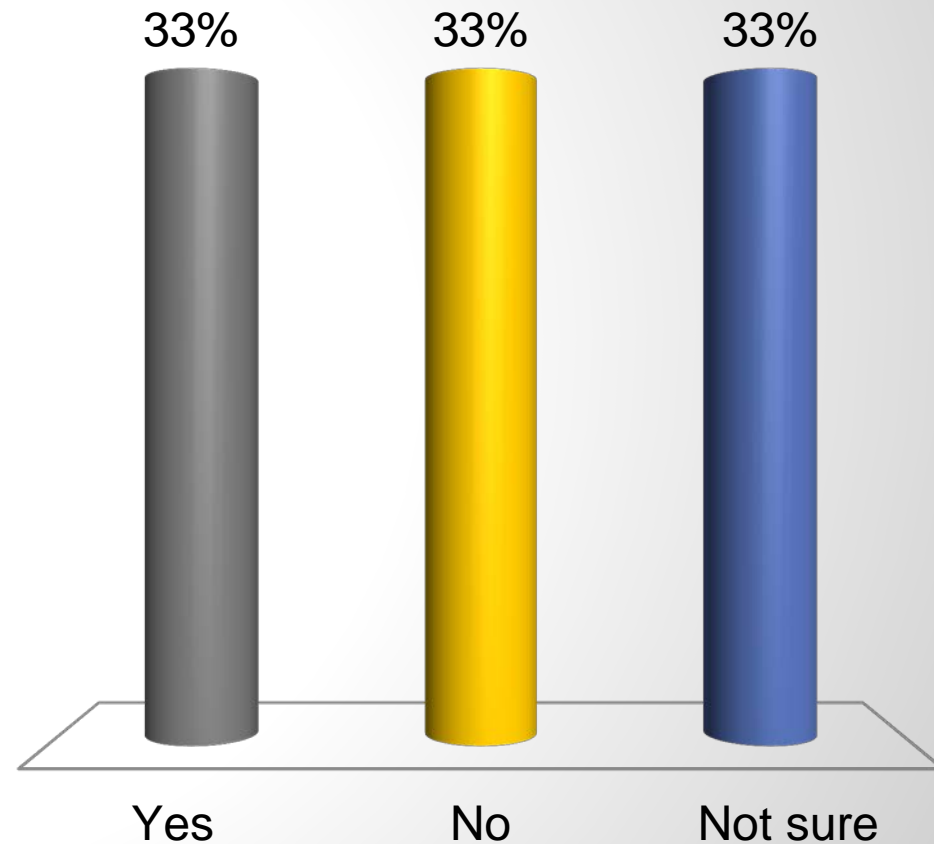
# SHOULD THE COURT AUTHORIZE EARLY PRODUCTION OF THE RECORDS AND CONDUCT AN IN CAMERA REVIEW? (MULTIPLE ANSWERS ALLOWED)

- A. No – the showing is speculative and does not demonstrate that the material is favorable to the defendant.
- B. No – the history and prognosis records are privileged.
- C. Yes – the showing demonstrates a reasonable belief that something might be subject to disclosure.
- D. Yes – the *State v. Bray* factors and defendant's right of compulsory process are exceptions to privilege.



*DISCOVERY SCENARIO: DO YOU DISMISS THE PETITION FOR FAILURE OF THE STATE TO PROVIDE DISCOVERY WITHIN 30 DAYS?*

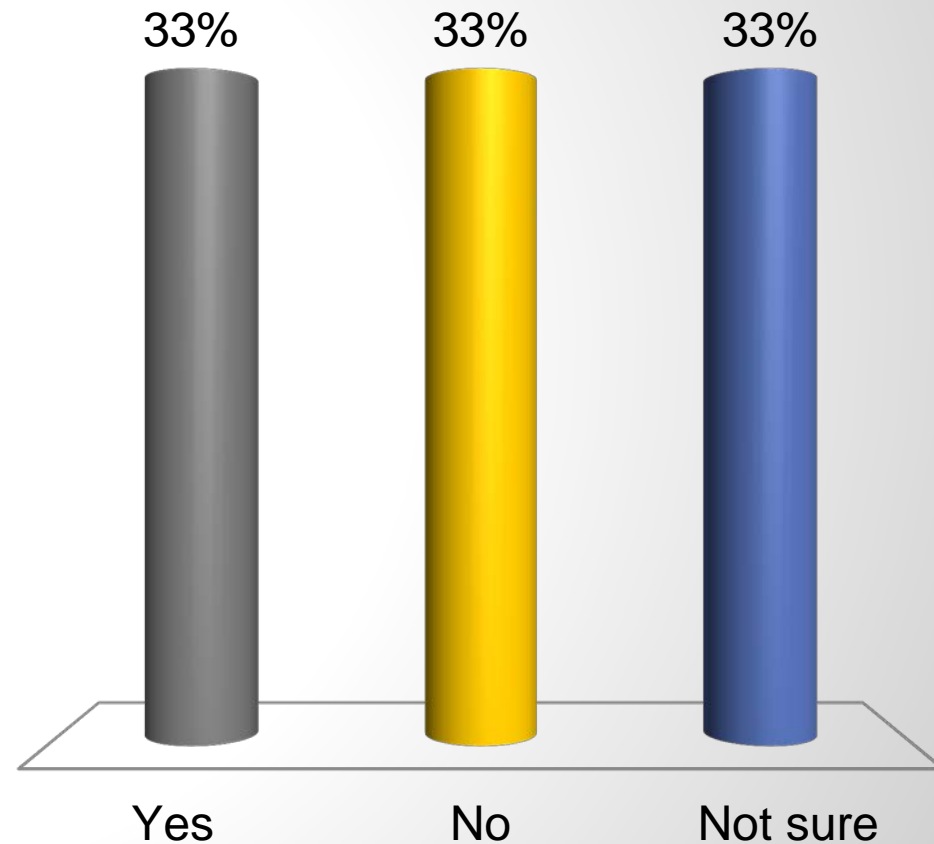
- A. Yes**
- B. No**
- C. Not sure**





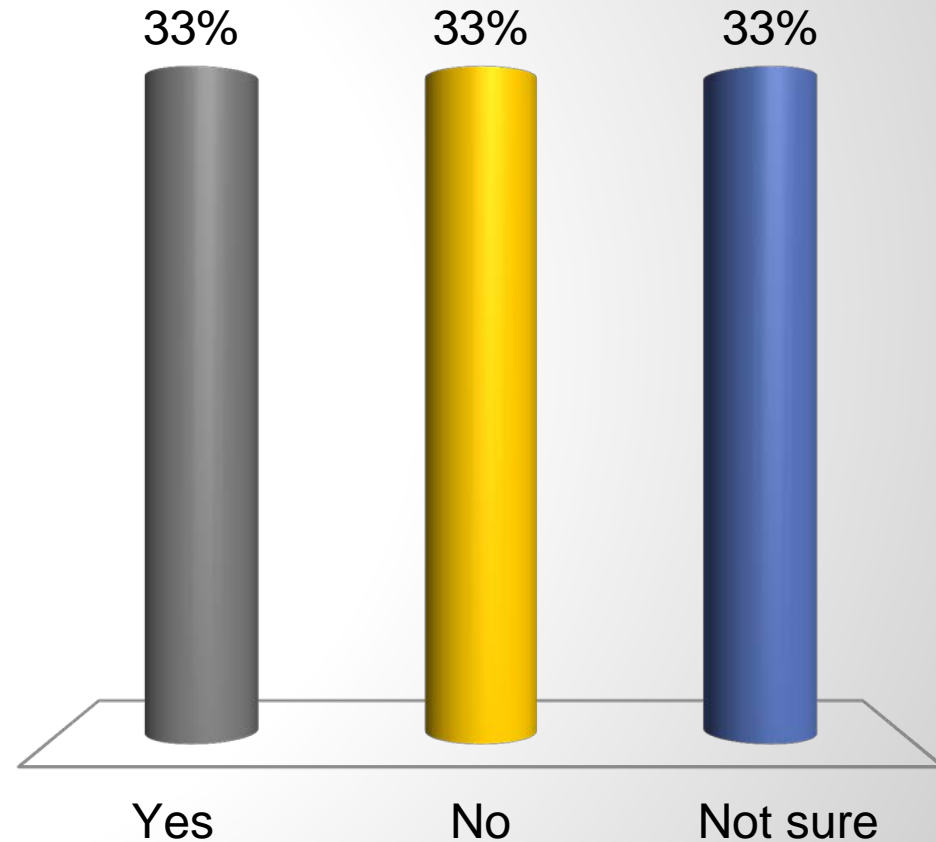
*DISCOVERY SCENARIO:* DO YOU COMPEL THE STATE TO PROVIDE DISCOVERY WITHOUT ANY PROTECTIVE ORDER?

- A. Yes
- B. No
- C. Not sure



*DISCOVERY SCENARIO: DO YOU STRIKE ANY PORTIONS OF THE PROTECTIVE ORDER REQUESTED BY THE STATE AND OBJECTED TO BY MOTHER'S ATTORNEY?*

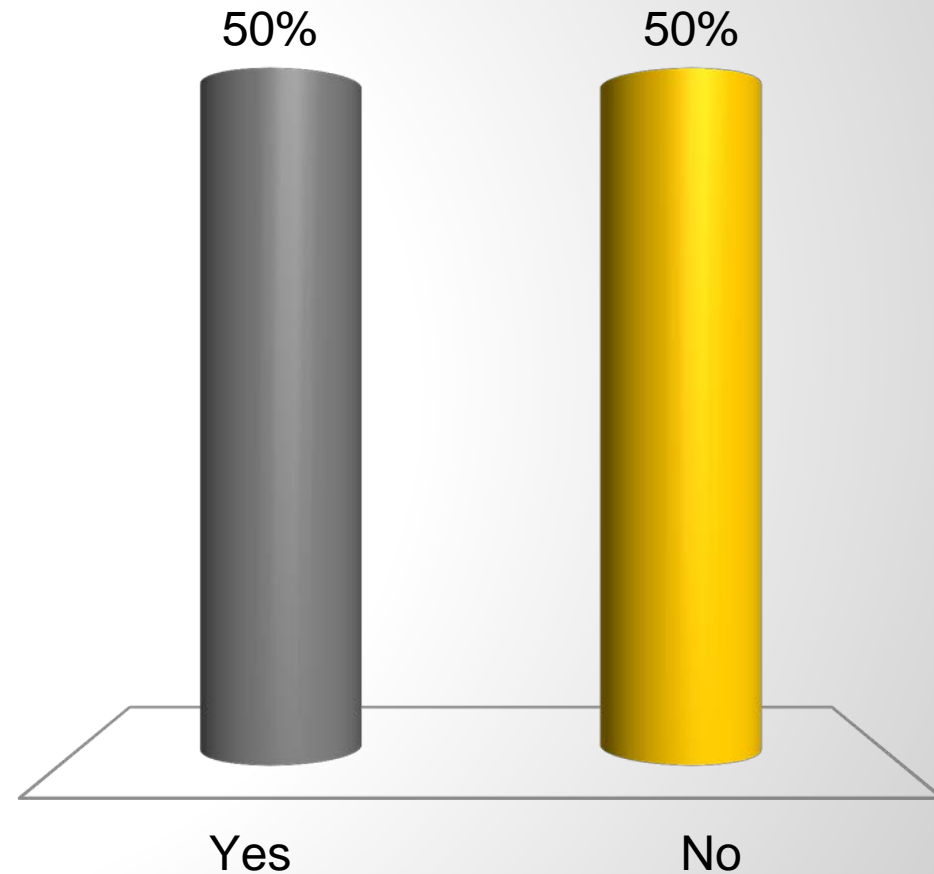
- A. Yes**
- B. No**
- C. Not sure**



*DISCOVERY SCENARIO:* DOES YOUR ANSWER TO ANY PROPOSED RESTRICTION CHANGE IF THE STATE FILES A DEPENDENCY PETITION INVOLVING THE TWO YEAR HOLD CHILD AND THEREBY MAKING THE STEP-FATHER A PARTY IN THIS CASE?

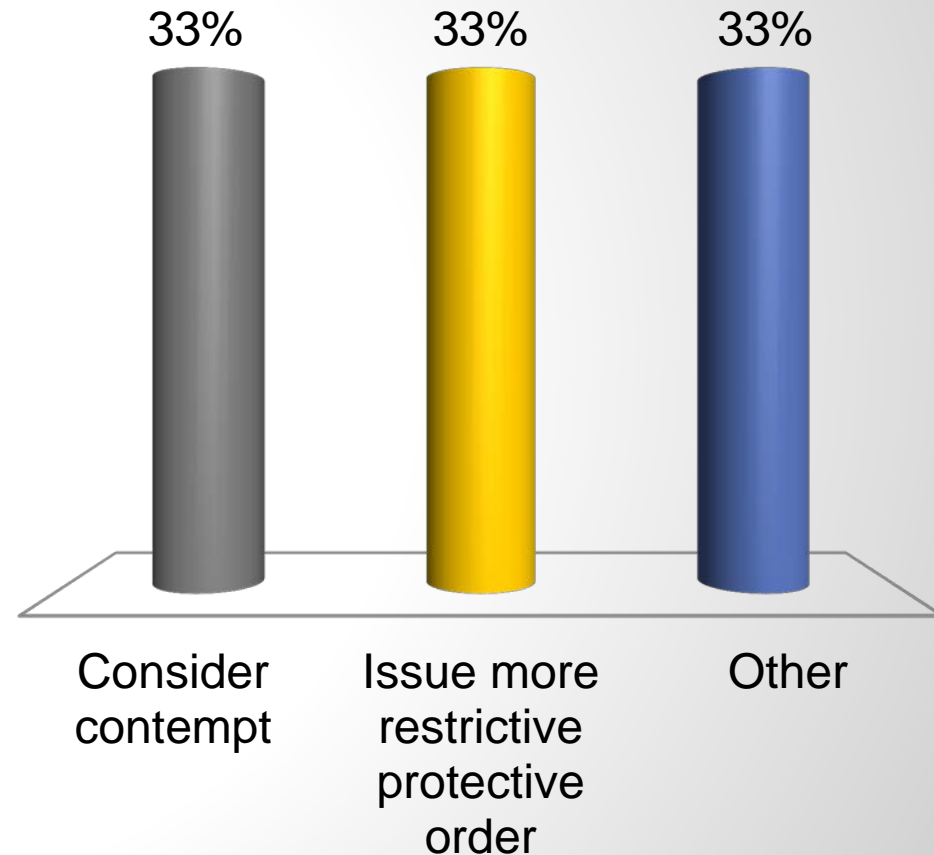
**A. Yes**

**B. No**



*DISCOVERY SCENARIO:* ASSUME YOU HAVE RESOLVED THE PROVISIONS OF THE PROTECTIVE ORDER, BUT THE CHILD ABUSE ASSESSMENT CENTER REFUSES TO PROVIDE THE INFORMATION IN ITS POSSESSION BECAUSE IT BELIEVES THE PROTECTIVE ORDER ISN'T RESTRICTIVE ENOUGH. WHAT IS YOUR RESPONSE?

- A. Consider contempt**
- B. Issue more restrictive protective order**
- C. Other**



A MOTHER WHOSE PARENTAL RIGHTS WERE TERMINATED TO HER CHILD 5 YEARS AGO, AND THE CHILD WAS LEGALLY ADOPTED, NOW REQUESTS COPIES OF HER OWN AND HER CHILD'S DHS RECORDS. THE CHILD IS NOW 10 YEARS OLD. CAN DHS RELEASE THE RECORDS?

- A. No**
- B. Yes, but only records prior to termination**
- C. Yes, subject to redaction of records and information about other people, including the child**
- D. I don't know**

