

RELEASE OF RECORDS: LEGAL ISSUES FOR PSYCHOLOGISTS

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*** This paper is intended for information purposes only and is not a substitute for legal advice. You should seek the assistance of a lawyer if you have questions about your professional obligations to release records.*

I. INTRODUCTION

1. Registrants of the College of Psychologists of British Columbia have a general duty to keep all information obtained from clients confidential. This is a duty that extends to client records.
2. When, however, a client is involved in a legal proceeding that touches an issue relating to the services which the registrant provided to the client, the registrant may be faced with a request to release the client's records that, on first blush, may seem contrary to the duty of confidentiality.
3. In this paper, we examine some of the legal issues surrounding the release of client records during litigation, and offer practical advice for what registrants should do when they receive such requests.
4. *A note about confidentiality and privilege.* To understand the law relating to disclosure of client records, registrants should understand the difference between "confidentiality" and "privilege". While both concepts can limit disclosure of information, they have distinct legal meanings and obligations attached them, and they should not be confused.
5. *Confidentiality.* "Confidentiality" is, for registrant purposes, the professional duty of a psychologist not to disclose information about a client, including client records, without the client's consent, unless the psychologist is legally compelled. Breach of confidentiality can result in professional and/or legal sanctions against a registrant.
6. In British Columbia, a registrant's duty of confidentiality and the few exceptions to that duty are set out in the *Code of Conduct* in Division 6 (attached at Appendix A).
7. *Privilege.* "Privilege" is a principle of the law of evidence which protects certain kinds of communications (including documents) from being disclosed as evidence in legal proceedings. The justification for privilege is that public policy, and the proper functioning of the justice system, requires that persons in certain kinds of relationships be able to communicate without fear of disclosure, and that compelling disclosure of these communications would cause more harm to the overall administration of justice than the excluding of such evidence. Accordingly, the common law recognizes that communications between persons in certain, very specific relationships are privileged, and may not be used in court or disclosed by a litigant to other parties.

8. The most notable example of privileged communications under the common law is a communication between a lawyer and the lawyer's client. Certain kinds of communications are also granted privilege by statute, for example, some communications related to labour relations. A court may also find other kinds of communications are privileged on a case-by-case basis.
9. Registrants should be aware that except in very limited circumstances (e.g., where the psychologist is acting as an agent of a lawyer, or the psychologist is assisting with negotiations to settle litigation) communications between psychologist and client are generally **not** recognized as privileged. This means that anything disclosed by a client to a psychologist could potentially be disclosed in court.
10. Ultimately, privilege is a legal concept relating to the admissibility of evidence in a legal proceeding and not a professional duty of a psychologist. As such, registrants who think privilege may be an issue regarding disclosure of records should seek legal advice.

II. REQUESTS FROM CLIENTS

A. Client's right to access records

11. Under Canadian common law a client or a client's legal guardian has the right to access all information that a health professional has on file that was used in the provision of services. The Supreme Court of Canada, in *McInerney v. MacDonald*,¹ recognized that, in the absence of regulatory legislation, patients have an interest in information which a health provider has obtained in the course of providing treatment and accordingly are entitled to inspect and copy all information in his or her medical file.
12. For psychologists practising in British Columbia, this right of access is set out in section 6.12 of the Code of Conduct.

6.12 Client access

A registrant must provide access to and permit the reproduction and release of confidential information about a client to that client unless there is a significant likelihood that disclosure of the information would cause

- (a) a substantial adverse effect on the client's physical, mental or emotional health, or
- (b) harm to a third party.

13. Note that this provision reflects the common law, in that the right of access is not absolute, but instead subject to the discretion of the registrant to withhold access if there is significant risk of harm to the client or third party (subsections 6.12(a) and (b), in fact,

¹ [1992] 2 S.C.R. 138

precisely mirror the court’s language in *McInerney*). However, also note that *McInerney* had this to say about exercising this discretion:

...[E]ven here, the discretion to withhold information should not be exercised readily. Particularly in situations that do not involve the interests of third parties, the court should demand compelling grounds before confirming a decision to deny access ... Assessing the “best interests of the patient” is a complex task. Non-disclosure can itself affect the patient’s well-being. If access is denied, the patient may speculate as to what is in the records and imagine difficulties greater than those that actually exist. In addition, the physical well-being of the patient must be balanced with the patient’s right to self-determination. Both are worthy of protection. **In short, patients should have access to their medical records in all but a small number of circumstances.** (Emphasis added)

McInerney, Para 36

B. What can a client access?

1. Reproductions not originals

14. As section 6.12 states, registrants must provide clients with “access to and permit the reproduction and release of” that client’s records. Essentially, this means that a client may have reasonable access to examine and copy the records, not that the client may remove the records from the premises. The court in *McInerney* noted that ownership in the tangible records belongs to the physician, institution or clinic that compiled them or ordered them compiled and that

[m]edical records play an important role in helping the physician to remember details about the patient’s medical history. The physician must have continued access to the records to provide proper diagnosis and treatment. Such access will be disrupted if the patient is able to remove the records from the premises. Accordingly, the patient is entitled to reasonable access to examine and copy the records, provided the patient pays a legitimate fee for the preparation and reproduction of the information.

McInerney, Para 38

2. Reports prepared by other psychologists or health care providers

15. The court in *McInerney* specifically held that a patient may access all information in the patient’s file that the physician considered in administering advice or treatment including any reports or materials provided to that physician by other health care providers. However, access is limited to the information the physician obtained in providing treatment and does not extend to information arising outside the doctor-patient relationship.

3. Test Materials and Protocols

16. Often, registrant's may have contractual obligations regarding the confidentiality of test materials and protocols that conflict with the client's right of access. These are discussed in more detail below.

III. REQUESTS FROM THIRD-PARTIES IN COURT PROCEEDINGS

A. Client's legal counsel

17. A client's legal counsel, having declared and confirmed their status as client's counsel, are acting as "agent" of the client and as such have the same access to a client's records as the client would.

B. With Client's consent

18. The right of a client to access practice records may also be exercised by a non-client in a legal action who has a signed consent form from the client (see *Code* section 6.2). Such a circumstance will typically arise where a client owes a duty to other litigants to disclose all relevant documents within the client's possession or control, including any documents to which the client has a right of access.
19. In a situation where a registrant has been presented with a third party request to exercise the client's right of access, the registrant should take steps to ensure that the signed consent form is genuine and has been properly obtained before granting access to a client's records. It is not unusual for clients to unwittingly sign a consent form for the release all of their records, even when only a portion of the record is obviously relevant to the case at hand. If the record contains other sensitive information unrelated to the focus of the request, registrants would be prudent to seek further direction from the client as to what they perceive the consent as covering, with a view to consideration of a more limited consent.

C. Without Client's consent

20. A registrant may receive a "request" for records from a non-client litigant on the basis the records are relevant to a court proceeding. Such a request, in and of itself, is not sufficient basis for the registrant to breach confidentiality. The registrant should contact the client and determine whether the client consents to the records being released. If the client does not then the registrant should refuse access to the records.
21. Note that such requests are typically made to elicit an express refusal by the registrant to disclose records. This refusal then becomes evidence in obtaining a court order for disclosure of the records.

D. Court orders

22. Generally, a non-client litigant will apply to court for an order requiring disclosure of records under Rule 26(11) of the *Supreme Court Rules*, although some statutory tribunals may also be empowered to require a non-party to disclose confidential information.
23. In seeking a court order, the person seeking the records will have to establish at the hearing that the records are likely relevant to an issue in the legal proceeding. Assuming that the client whose records are under discussion is a party to the proceedings, a registrant's involvement in the hearing is quite minimal. Usually, the registrant is not required to attend, take a position or retain separate counsel (although this is always an option).
24. If a valid court order is granted for disclosure of the records then section 6.11 of the *Code* requires a registrant to comply even if it means releasing confidential information that he or she would not normally be permitted to disclose under some other part of the *Code*:

6.11 Court order

Despite any other provision of this *Code*, a registrant must comply with a court order requiring the release of confidential information.

25. As a pragmatic matter, a registrant receiving a valid court order should review it carefully and release only the information required or demanded.
26. Registrants who have doubts about the validity of an order or who feel they may have legitimate reservations about complying with an order should always seek appropriate legal advice to inform their decisions.

IV. OTHER LEGAL OBLIGATIONS

27. In addition to the professional duties owed toward the client and any legal obligations imposed by a court, a registrant may have other obligations, imposed by statutes or contractual relationships, which impact confidentiality and the disclosure of client records. These obligations may not be relevant in every case, but registrants should at least be aware of them.

A. Subpoenas and summons

28. Registrants may receive a subpoena or summons requiring that they attend before a court or a tribunal to be a witness, and to bring documents relevant to the proceeding.
29. For example, Rule 40(39) authorizes a party before the British Columbia Supreme Court to require any person, by way of subpoena, to bring to a trial "any document in the person's possession or control relating to the matters in question, without the necessity of identifying the document..." A subpoena is an order of the court that a witness appear at a particular time and place to testify or produce documents within the witness's control.

30. As a further example, the BC *Inquiry Act* authorizes a commissioner conducting an inquiry to summon a person to attend as a witness, and to “bring and produce before the commission or commissioners all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry” (section 5(1)(b)).
31. Relevant documents will be subject to production under a subpoena or statutory summons unless it is privileged against production. A court may, however, take measures to protect the confidentiality of documents, e.g., by sealing a court file, or allowing sensitive information to be redacted from copies of documents.

C. Exceptions under Particular Statutes

32. Confidentiality may be compromised by the operation of various statutes. Here are some statutes of which registrants should be aware. This listing is not comprehensive. For example, search warrants under the *Criminal Code* are not discussed.

1. The Health Professions Act

33. The confidentiality which registrants owe to their clients is subject to the right and power of any College inspector under section 28 of the *Health Professions Act* to inspect, examine and copy the records of any registrant during regular business hours.
34. Bylaw 56 of the College of Psychologists of British Columbia further clarifies that a registrant may not refuse to provide access to practice records that are the subject of an inspection on the basis that the records are confidential.
35. Section 29 of the *Health Professions Act* also entitles any College under the statute to seek a court order authorizing a person to require the production of any record, property, asset or thing to be inspected, examined and analyzed.
36. These provisions may be invoked by the College where, for example, a complaint has been made against a registrant, and the complaint is being investigated by the Inquiry Committee.

2. Personal Information Protection Act

37. British Columbia's *Personal Information Protection Act* (AKA “*PIPA*”), which came into force on January 1, 2004, sets out the baseline standard for how private sector and not-for-profit organizations (the definition of “organizations” under *PIPA* includes individual “persons”) collect, use, store and disclose personal information about clients, customers, employees and volunteers. Personal information is defined under *PIPA* as being “information about an identifiable individual” and includes identifying, contact and medical information.
38. Although many of the requirements in *PIPA* are directly analogous to the professional duties regarding confidentiality and disclosure of client information set out in the *Code*, it

is a good idea for registrants to read *PIPA* and familiarize themselves with their additional responsibilities.

39. Part 7 of *PIPA* requires every organization to provide, on an individual's request, that individual's personal information under the organization's control, under section 23(1) or (2). *PIPA* also provides in section 23(4), however, that personal information must *not* be disclosed where disclosure could reasonably be expected to "cause immediate or grave harm to the safety or to the physical or mental health of the individual who made the request", or to "threaten the safety or physical or mental health of an individual other than the individual who made the request," or reveal personal information about another individual".

3. Child, Family and Community Service Act

40. If registrants are dealing with cases that have a bearing on the safety of children, they need to be aware that the *Child, Family and Community Service Act* (the "Child Act") imposes legal duties that actually **supersede** the duties of confidentiality in the *Code*.
41. Registrants should be aware that if they have any child safety concerns, the registrant may have a duty to report these concerns to governmental authorities pursuant to sections 13 and 14 of the *Child Act*.
42. Section 14(1) and (2) of the *Child Act* create a positive duty for a person to report to government authorities when that person has reason to believe a child "needs protection" (as defined under s. 13(1)), even where the information on which the belief is based is privileged (except where protected by solicitor-client privilege) or confidential and its disclosure is prohibited by another statute. A failure to report is an offence punishable by fine, imprisonment or both. Accordingly a registrant who is unsure whether the *Child Act* obligates a breach of confidentiality through reporting may wish to seek legal advice about the matter.
43. Registrants should also refer to sections 6.7 and 6.8 of the *Code* which address disclosure of information necessary to protect against a clear and substantial risk of imminent serious harm being inflicted by a client. As a general practice, any safety concerns or report of a safety concern should be documented in the records.

D. Contract-related exceptions

1. Interested third parties

44. In certain situations, a registrant may provide services to a client which is paid for by another party, such as in the context of employee assistance programs. The terms of such services may be such that the third party has an interest in the psychological services, and accordingly an interest in the records. Such terms may place a limit the confidentiality of the client's information.
45. In such circumstances, a registrant's duties are set out in section 6.4 of the *Code*:

6.4 Interested third party

In a situation involving a third party, such as an employee assistance program or an insurance company, in which more than one party has an interest in the psychological services rendered by a registrant to a client, the registrant must, to the extent possible, before performing the services clarify the dimensions of confidentiality and professional responsibility that apply to the rendering of the services.

46. If the interested third party requests a client's information, the registrant should make every reasonable attempt to inform the client of the request and obtain consent to release the information. In a situation, where the interested third party asserts his or her legal right to obtain the information without the client's consent, a registrant may wish to obtain legal advice before proceeding.

2. Test data and protocols

47. It is important for registrants who purchase and conduct standardized psychological tests to be aware of any contractual limitations relating to the disclosure of test results and protocols.
48. The reasons for such limitations are twofold. First, the validity and utility of such a test can depend on keeping its contents and protocols secret from the general public. Second, test publishers often consider the test materials and results to be proprietary confidential information and trade secrets. Accordingly, qualified test purchasers, including psychologists, are often contractually bound by the publishers' non-disclosure policy to protect the integrity of the assessment as well as the publishers' intellectual property rights.
49. This can create issues when test results are sought by clients or others in litigation settings. In theory, the raw data or responses could be released without releasing the test protocols, but without the answers will be of little utility without the questions.
50. This issue is not dealt with in the *Code* and has not yet been settled by the case law. It is worth noting that the College of Alberta Psychologists released a practice bulletin in January 2005 advising their registrants that psychological test protocols were exempt from release to clients or their agents under the confidential commercial information exception of the Alberta version of *PIPA*. The Alberta act reads

24 (2) An organization may refuse to provide access to personal information under subsection (1) if

...

(b) the disclosure of the information would reveal confidential information that is of a commercial nature and it is not unreasonable to withhold that information;

51. This is slightly different from the BC *PIPA*, which reads:

23(3) An organization is not required to disclose personal information and other information under subsection (1) or (2) in the following circumstances:

...

(b) the disclosure of the information would reveal confidential commercial information that if disclosed, **could, in the opinion of a reasonable person, harm the competitive position of the organization**; (emphasis added)

52. An argument could be made that the BC's act creates the same exemption as the Alberta act; however, on first blush, it appears that the registrant would have demonstrate a reasonable apprehension of harm to the competitive interests of the registrant, rather than to the publisher of the test.
53. Until the issue is settled, it is best to proceed with caution if faced with a request to disclose test protocols as part of client records. In many situations, a thorough explanation of the underlying issues as to why there may be difficulties in releasing the test protocols may be sufficient. If the test protocols are being sought in a legal proceeding, it may be necessary to advocate further steps to protect the integrity of the materials. One possibility might be an arrangement where test material is given to another registrant hired by the party requesting the information. Another might be to refer the party making the request directly to the test publishers. If in doubt, registrants should seek legal advice on this issue.
54. Where a court ultimately orders a registrant to produce records, including testing materials, a registrant must comply. A contractual obligation undertaken by a registrant cannot supersede a court order.

APPENDIX A
DIVISION 6 OF THE CODE OF CONDUCT

6.1 Limits of confidentiality

A registrant must inform clients at the commencement of the professional relationship of the limits of confidentiality to be maintained by the registrant and any other person engaged in the provision of psychological services to them.

6.2 No disclosure without consent

Except as otherwise permitted in this Code, a registrant may only disclose confidential information about a client to a third party if the client has given written consent.

6.3 Multiple clients

When psychological services are rendered to more than one client during a joint session, a registrant must at the beginning of the professional relationship

- (a) clarify for all clients the manner in which confidentiality will be handled, and
- (b) provide all clients with the opportunity to discuss and accept whatever limitations to confidentiality apply.

6.4 Interested third party

In a situation involving a third party, such as an employee assistance program or an insurance company, in which more than one party has an interest in the psychological services rendered by a registrant to a client, the registrant must, to the extent possible, before performing the services clarify the dimensions of confidentiality and professional responsibility that apply to the rendering of the services.

6.5 Limited access

A registrant must limit access to client records to preserve their confidentiality and must ensure that all persons working under their authority comply with these confidentiality requirements.

6.6 Disguising confidential information

When case reports or other confidential information are used as the basis of teaching, research, or other published reports, a registrant must exercise care to ensure that the reported information is appropriately disguised to prevent client identification.

6.7 Disclosure where risk of harm

A registrant may disclose confidential information without the informed written consent of the client if the registrant determines that disclosure is necessary to protect against a clear and substantial risk of imminent serious harm being inflicted by the client on the client or on another individual.

6.8 Limits on 6.7

Where a registrant makes a disclosure in the circumstances described in clause 6.7, the registrant must conduct themselves as follows:

- (a) the registrant must limit disclosure of the information only to those persons and to that content which would be consistent with this Code of Conduct.
- (b) if the client is an organization, the registrant must make the disclosure only after the registrant has made a reasonable and unsuccessful attempt to have the problems leading to the need for a disclosure corrected within the organization.

6.9 Clients without legal capacity

At the beginning of a professional relationship with a client who is a minor or who is under a legal disability, a registrant must inform the client of the limits that the law imposes on the client's right of confidentiality respecting communications with the registrant.

6.10 Exception to 6.9

Despite clause 6.9, if the legal guardian of a minor or person under legal disability agrees before psychological services are rendered that certain issues are not to be disclosed to the guardian, a registrant must not provide any information relating to those issues to the guardian.

6.11 Court order

Despite any other provision of this Code, a registrant must comply with a court order requiring the release of confidential information.

6.12 Client access

A registrant must provide access to and permit the reproduction and release of confidential information about a client to that client unless there is a significant likelihood that disclosure of the information would cause

- (a) a substantial adverse effect on the client's physical, mental or emotional health, or
- (b) harm to a third party.

6.13 Sharing with professionals

When rendering psychological services as part of a professional team or when interacting with other professionals concerning the welfare of a client, a registrant may share confidential information about the client if

- (a) the registrant takes steps to ensure that all persons receiving the information are informed about the confidential nature of the information in accordance with this Code of Conduct.
- (b) the registrant informs the client in advance that the client's confidential information will be shared with other members of the professional team.

6.14 Writings and lectures

A registrant must not disclose in their writings, lectures, or other public media any confidential, personally identifiable information concerning their individual clients or organizational clients, students, research participants, or other recipients of their psychological services that they obtained during the course of their work or performance of those services, unless the individual or organization has consented in writing.

6.15 Disguised information

In the scientific and professional presentations referred to in clause 6.14, a registrant must disguise confidential information concerning the individuals or organizations to prevent those individuals or organizations from being identified by others and to prevent the presentations from causing harm to those individuals or organizations who may be able to identify themselves.

6.16 Ongoing confidentiality

A registrant must continue to treat as confidential all information regarding a client after the professional relationship between the registrant and the client has ended.

6.17 Provision of records to College

A registrant is not in breach of the confidentiality obligation to their clients if the registrant provides their clinical records or other documents related to their practice to authorized persons in response to a request from the College in the course of an investigation of a complaint or a registration matter.

APPENDIX B

Litigation Disclosure Considerations

When a registrant receives a letter demanding disclosure of documents, the registrant should carefully consider the following:

1. Who is making the demand, e.g., a client, a lawyer or someone else?
 - If client, then confirm with client it is his or her request
 - If client's lawyer, then confirm with client that the lawyer is acting for him or her
 - If someone else, then inform client about the request (if client has lawyer then advise lawyer)
 - If you don't know who this person is then ask them
2. What documents are included with the demand?
 - Client consent form?
 - If so, confirm with client he or she signed this form
 - If not should a consent form be obtained?
 - If request is from client then a consent form should be obtained
 - Order?
 - If so, is it signed by counsel? Is it entered into the Court registry?
 - If not, verify the order by contacting counsel and/or the Court registry
 - Court application materials?
 - Do you have a Notice of Motion?
 - Do you have an affidavit?
 - If you are missing either, contact the person making the demand and ask for a copy
 - Just a letter making a demand
 - Does the letter refer to any documents such as consent forms, order, or court application materials which are relevant to disclosure?

- Request a copy

3. What exactly is being demanded?

○ Client consent form

- What is being requested to be disclosed?
- Does disclosure involve a significant likelihood of a substantial adverse effect on the client's physical, mental or emotional health, or harm to a third party?
- Is disclosure limited by legislation
- Is disclosure limited by contract
- Talk to client to confirm the request
 - Talk to client to confirm which part of the practice record is relevant to the request
 - If disclosure may be adverse or harmful then offer a summary
 - If disclosure should be limited because of legislation or contract then offer a summary or redacted documents
 - If client insists on full disclosure then refuse where illegal and where law allows for non-disclosure
 - Deliver disclosure with letter explaining refusal or non-disclosure

○ Court Application

- What is being sought to be disclosed?
- Is the disclosure sought overbroad?
- Does the disclosure sought involve a significant likelihood of a substantial adverse effect on the client's physical, mental or emotional health, or harm to a third party?
 - Consider obtaining legal advice
 - Discuss with requester summary or redactions or putting under seal (in general)

- Does the ordered disclosure contravene legislation?
 - Consider obtaining legal advice
 - Discuss with requester summary or redactions or putting under seal (in general)
- Does the ordered disclosure contravene contractual obligations?
 - Consider obtaining legal advice
 - Discuss with requester in attempt to obtain agreement
- Consider other appropriate terms including return or destruction of documents
- Advise client and if client has lawyer then advise lawyer
 - Will client provide consent form so hearing of application is not necessary?
- What is the requested method of disclosure?
 - Originals?
 - Originals belong to you, consider offering copies
 - Copies?
 - Access?
- Order
 - What is being ordered to be disclosed?
 - Does the ordered disclosure involve a significant likelihood of a substantial adverse effect on the client's physical, mental or emotional health, or harm to a third party?
 - Consider legal advice as to whether appearance before judge who gave order is appropriate
 - Does the ordered disclosure contravene legislation?
 - Consider legal advice as to whether appearance before judge who gave order is appropriate

- Does the ordered disclosure contravene contractual obligations?
 - Consider legal advice as to whether appearance before judge who gave order is appropriate
 - Should there be other terms?
 - Consider legal advice as to whether appearance before judge who gave order is appropriate
 - Advise client and client's lawyer before disclosure
4. What is the deadline for the demand?
- Is there a deadline to respond?
 - If the deadline is not met, what will happen?
5. What is the entitlement to the demand?
- Consent by client?
 - Order?
 - Made pursuant to a particular enactment?
 - If it looks suspicious or you don't understand it then contact a lawyer
6. Responding to Notice of Motion
- Court forms online
 - Response
 - Affidavit
 - Outline
 - No position
 - Objection to production
 - Limitations or terms to production