

*Professional Guidelines for Psychologists*

## **Release of Confidential Information:**

### **Special Issues in Client and Third Party Requests**

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## Release of Confidential Information: Special Issues In Client And Third Party Requests

Several concerns arise where release of confidential client information is required in the absence of the client's consent. Even where the client has signed a consent form, the psychologist may have legitimate concerns around the voluntariness of his or her consent and about the extent to which he/she was fully informed about the issues involved.

This guideline is grounded on certain general principles derived from the *Canadian Code of Ethics for Psychologists*, the *Standards of Practice*, international *Fair Information Practices*, and from current legislation and case law bearing on issues of release of confidential information. Psychologists in some settings are governed by the *Health Information Act* and/or the *Freedom of Information and Protection of Privacy Act*. Most psychologists in the private sector are mainly subject to the common law provisions regarding privacy set out in the Supreme Court of Canada's decision in *McInerney v. MacDonald*. However, federal legislation concerning protection of personal health information in the private sector (*Personal Information Protection and Electronic Documents Act*) is scheduled to come into force on January 1, 2004.

In acquiring and maintaining personal information about clients, psychologists should adhere to the fundamental principle of privacy protection: that they collect from clients only that information they need to provide good service to the client. Furthermore, they should only use that information for the original purposes for which the client has agreed to its collection.

In the following sections, we identify the guiding principle first and then offer commentary on it.

### **A Psychologists have a duty to protect the confidentiality of information that clients<sup>1</sup> reveal to them in the context of a professional relationship.**

Clients usually expect that private information they disclose to a professional will be kept in confidence. That is, they expect the professional will not reveal that information to anyone else without their permission. Confidentiality is the client's right, not the professional's. However, professionals are often required to exercise that right on behalf of their clients. Clients rarely understand the many formal and informal exceptions to confidentiality that exist in practice and often expect a more rigorous standard of confidentiality than exists. For this reason, professionals are often required to act as guardians of client information and to ensure that clients fully understand the limits to the confidentiality of information they disclose and the plausible consequences of disclosure of such information.

### **B Psychologists should release confidential information about clients only with the express, specific consent of the client, except where required to do so by law.**

Psychologists have a duty to ensure that clients' consent to release is informed and voluntary. "Informed" consent requires, at minimum, that the client understand *what* information is to be released, *to whom* this information will be released, what the *purpose* of the release is, and *to what purposes* the information may be put. Consent is voluntary when the client is free from coercion around decisions to release or withhold information about him or her. Written consent is useful as documentation that some kind of process of securing consent took place. However, the process of eliciting consent, whether oral or written, is the important element. A competent client is almost always the final arbiter of what information about him or her should

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<sup>1</sup> For issues concerning confidentiality and release of information about minors (that is, persons under 18 years of age), consult the CAP Guideline on "Limits to Confidentiality and Consent for Services: Special Issues in Working With Minors and Dependent Adults"

be released or withheld, including when the client asks that information be released to him or her.

There are clearly circumstances where release or withholding of information may not be in a client's interest and where the psychologist should accept a duty to protect that interest. However, the only circumstances where competent clients' consent to release or withhold information about themselves may be overridden is where release or withholding of such information is required by law, where the file information was compiled pursuant to the direction of a third party payer (e.g. Child and Family Services or an insurance carrier), or where release or withholding of that information may pose a tangible threat to the client or an identified other person. In the latter case, the burden of proving that a threat exists will rest on the professional should his or her decision to release or withhold the information be contested.

Clients should usually be presumed competent to make decisions about releasing or withholding personal information about them unless there is a formal order in place appointing a guardian for them under the *Dependent Adults Act*. Where a guardianship order is in place, the consent of the Guardian is required for release of information about the client.

Where files contain information about several persons obtained in the context of a professional relationship (for example, in couples or family therapy), the psychologist must secure the consent of all such persons before releasing the information. Psychologists may release file information without the consent of the third parties in this circumstance if it is possible to obscure information about third parties identified in the file or sever third party information from the file.

Alternately, at the time of discussing confidentiality and the limits to confidentiality at the beginning of service delivery, psychologists may enter into a written agreement with all parties whereby the parties would agree that information may later be released to one of the parties without the expressed consent of the other parties.

Psychologists may be required to release confidential information about a client without the client's consent in response to a valid Court Order, or under the provisions of a variety of Acts, including, for example, the *Workers Compensation Act*, *Mental Health Act*, *Child, Youth and Family Enhancement Act*, and *Hospitals Act*. Even under these circumstances, psychologists should be careful to release only the information required or demanded.

Psychologists may be asked by "next-of-kin" or others to release the file of a client who is deceased. Such release should not occur unless there is a court order, or the request comes from the client's executor. Only that information required to properly administer the estate should be provided.

Psychologists will sometimes provide services to a client that are "brokered" by a third party, such as an agency, insurance carrier, employee assistance program, or lawyer. In such cases, it is important to establish *before providing the service* who the client is and who has access to and control of the information. Some insurance carriers take the position that reports prepared by psychologists on their policyholders are the company's property and may not be released without the company's permission. Provided that all parties (that is, company, client, psychologist) are aware of this circumstance and agree to it in advance, there is nothing intrinsically wrong with the arrangement. A more difficult circumstance arises where an agency or program asserts this claim *after* services have been provided and requires release of confidential information about a client without the client's consent. In this situation, the psychologist will inform the client of this request and will release the information if the client consents, or if the psychologist can establish that the third party has the legal right to the information.

Publicly funded agencies (e.g. Child and Family Services) usually take the position that they own and have control of the file materials of psychologists who provide services paid for by the agency (whether these psychologists are employees of the agency or in private practice).

Therefore, requests for information in these cases must be directed to the funding agency and are subject to the Freedom of Information and Protection of Privacy Act or the Health Information Act. Even those parts of a psychologist's file that were not produced to the funding agency (e.g. raw test data) are under the control of the funding agency and must not be released by the psychologist.

Employee assistance programs represent a special case of "brokered" services. Most reputable programs play the role of putting the client and provider in contact but not intruding significantly into the clinical matters at stake. Programs have a legitimate right to information about referrals necessary for quality control and audits to prevent fraud. However, those programs will also state clearly in their policies their position with regard to access to clinical information about persons referred to contract providers. Again, prudent psychologists should inform themselves in advance of working with particular employee assistance programs about the policies in place around these matters. Psychologists should also clarify what the company's policies are upon termination of the contract with the psychologist. For example, does the company claim ownership rights over files or file information about referred clients? How does the company assert its rights? Does the company allow direct transfer of files to another designated professional?

**C Even in instances where release of otherwise confidential client information is required by law, psychologists still have a duty to ensure that only the required information is released, that information is released only to persons authorized to receive it, and that clients are fully informed of the release and the reasons for it.**

Psychologists may best meet their obligations to their several clients by ensuring that all parties are fully informed about what the psychologist's duties, responsibilities, and actions will be. The *Code of Ethics* requires psychologists to be careful to provide information only to persons with the knowledge and skills to use and interpret it properly. Although praiseworthy in intent, this standard sometimes places psychologists in the position of having to make judgments about the competence of another professional or lay person without the necessary information to inform those judgments. Psychologists may best exercise their obligations in this regard by ensuring that clients understand the risks and benefits of allowing release of confidential psychological information about them. The client is then in a position to make a reasonable judgment about who should be able to have that information and to use it in a way that will benefit them. At the same time, psychologists have a collateral obligation to ensure that *their* opinions and judgments are intelligible to the people who need them.

**D Although psychologists are sometimes compelled to release psychological test information, such as client responses to particular test items, copies of test protocols, and raw or transformed scores of psychological tests, they should endeavour to release such materials only to other psychologists.**

Psychologists frequently use standardized psychological test instruments in their practices. These instruments are typically copyrighted by the test publisher. Their utility is dependent on maintaining the confidentiality of test content. Although clients have ultimate right of access to all of their file information, psychologists should make every effort to protect the utility of the measures they use by the care they exercise in distribution of tests and test information. As well, the interpretation of psychological test information often requires special knowledge and skills that are part of the training of psychologists but that may not be represented in the preparation of other professionals or lay persons. For these reasons, whenever possible, psychologists should release only interpreted information about psychological test findings to insure that those findings are understood and used appropriately. The principal way in which psychologists will exercise this duty is to release psychological test data and protocols only to other psychologists.

Psychologists working in publicly-funded institutions in Alberta are explicitly authorized to refuse to release psychological test protocols to clients or third parties even where a client has requested their release. (*FOIPP* Section 25, *HIA* Section 11(1)). These sections do not, however, apply to the results of psychological tests.

Often in the context of various criminal and civil proceedings, psychologists are requested to provide copies of "entire files" bearing on the work they may have done with a particular client. Although there is little question that notes, correspondence, reports, and other records regarding the client may be produced in these circumstances, the issue of release of psychological test data is more problematic. In this situation, psychologists should suggest to the requesting party that raw psychological test data released only to other psychologists, invite the requesting party to designate a psychologist to receive that material, and then forward it to the designated psychologist, assuming the psychologist has the client's consent. Alternatively, an offer to meet with the requesting party to review the psychological test data may satisfy the person requesting the information.

However, if a client insists on production of psychological test data, the psychologist must comply with that request unless, in accordance with the Standards of Practice 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.

If a psychologist is served with a valid Court Order requiring production of psychological test data or test protocols, the psychologist must comply with that order. Furthermore, if the psychologist is served with a Subpoena or Notice to Attend as a witness in a court proceeding that directs him or her to bring files in his or her possession, the psychologist must also comply or face legal sanctions. Psychologists who have doubts about the validity of an Order, Subpoena or Notice to Attend or who feel they may have particular legitimate reservations around complying with such directives should seek appropriate legal counsel to inform their decisions. In all such circumstances, legal requirements for particular kinds of responses do not absolve psychologists of their ethical duty to work toward finding solutions to such dilemmas that promote the welfare of all parties affected by the psychologist's actions.