

Nova Scotia Board of Examiners in Psychology Statement Regarding the Release of File Materials

Psychologists often receive requests for disclosure of copies of their client's full psychological file record including clinical notes, reports, test results and psychological raw data and test materials. This Statement of the Nova Scotia Board of Examiners in Psychology ("NSBEP") attempts to provide guidance when such requests are made for disclosure of information while considering applicable professional and legal requirements. It does not cover all scenarios and principles; however this document should be read in its entirety. If after reviewing the following information, you remain uncertain about how to respond to a request for disclosure and still require guidance, the NSBEP recommends that you contact a lawyer to assist. Tip: Most psychologists' insurance coverage provides some free legal consultation. Use it when necessary! Also consider obtaining your own lawyer in complicated situations.

Guiding Principles

The NSBEP Standards of Professional Conduct (Principle 7) and the NSBEP Standards for Providers of Psychological Services (Standard 5) require providers of psychological services to establish a system to protect confidentiality of their records. Principle 7 requires a registrant to "make reasonable efforts to ensure that psychological records are complete and accessible and that their records and the records of those they supervise are secure and protected from loss, tampering or unauthorized use or access".

Principle V.1 of the NSBEP Standards for Providers of Psychological Services states that "Psychologists respect client's rights of access to their own records and develop procedures to permit user access and user correction of errors."

Generally this means that when the client requests a copy of his/her file and provides express written consent, then the psychologist should provide a copy of the requested material.

This principle of access is also enshrined in various pieces of legislation across different organizational settings, such as the Personal Health Information Act, Freedom of Information and Protection of Privacy Act, Personal Information Protection and Electronic Documents Act, the Privacy Act, and is affirmed by the Supreme Court of Canada.

However raw data and test materials should not be disclosed to the client unless the psychologist is legally required to do so. In part, this is to ensure that raw data is accessed by individuals who have the skills to interpret it accurately. Principle 7.9 and 7.10 of the NSBEP Standards for Professional Conduct state:

7.9 A registrant takes all reasonable steps to ensure that raw psychological data, if requested with proper authorization, is transferred to a designated registrant for interpretation rather than provided directly to a client or the client's legal representative.

7.10 A registrant does not release copyright or clinically significant information such as test questions, stimuli, manuals and protocols except when ordered by the Court. In such cases the registrant makes all reasonable attempts to ensure the Court is aware of the ramifications of releasing such protected information to the general public.

The non-disclosure of raw data is also supported by test publishers. Publishers of test materials consider such materials as proprietary, copyrighted, and confidential commercial information analogous to trade secrets, and treat and protect them accordingly. Studies confirm that if test items and test protocols were readily available, the integrity of the test and scoring model could be compromised. Test publishers expect psychologists to do all they can to protect material and to protect the items and scoring criteria in response to requests for disclosure. They state that the psychologist should in all circumstances secure a court order when faced with such requests/demands and that this should ideally contain provisions protecting access to the requested materials.

Requests for Disclosure in the Course of Litigation

Within the course of litigation means proceedings brought in the Supreme Court of Nova Scotia including the Family Division of the Supreme Court.

The NSBEP acknowledges that the current Standards of Practice and the expectations of test publishers are not aligned with the current law in Nova Scotia so it provides the following recommendations regarding client file material disclosure requests.

Based on the recent Nova Scotia Supreme Court decision, *Hernandez v. Purcell*, 2013 NSSC 303 a psychologist is required to disclose the entire file including the raw data and test materials when the request is made within the course of litigation.

In litigation the “implied undertaking rule” prevents the use of information disclosed or discovered in a legal proceeding from being used for a purpose outside the proceeding, without the permission of a judge (see *Nova Scotia Civil Procedure Rule* 14.03(1)).

Civil Procedure Rule 14.03(2) specifically provides that the implied undertaking rule applies to “documentation used in administering a test, such as test documents supplied to and completed by a psychologist”, “all notes and other records of an expert” and “anything disclosed or produced for a settlement conference.”

Consequently unless the psychologist can demonstrate that there is a “real risk” of the material being used for an improper or collateral purpose outside the course of litigation then the full file including the raw data and test materials must be disclosed. Circumstances may exist where a psychologist may be able to demonstrate the necessity of additional safeguards for the raw data and test materials even with the protection of the implied undertaking rule. However, based on the current law in Nova Scotia additional protection would be ordered only in exceptional circumstances where a psychologist is able to demonstrate that a “real risk” of improper use exists and such instances would likely be rare. Therefore, if a psychologist is considering

refusing access on the basis of a real risk of the material being used for an improper or collateral purpose outside the course of litigation, he or she should consult a lawyer.

Consequently any associated legal costs to oppose the disclosure of raw data and test material, when requested in the course of litigation, would likely become borne by the psychologist opposing the release. Any legal costs awarded by the judge on an unsuccessful court application would also likely be borne by the psychologist.

Consequently, in the course of litigation, when the psychologist is either provided with the express written consent of the client authorizing the disclosure of the complete file material, or is presented with a subpoena or court order for production of the complete file material, the psychologist should:

- Request proof of litigation – request a copy of the legal action or court file reference.
- Unless there are exceptional circumstances where a real risk that the information may be improperly used or inappropriately disclosed, release the documentation but note:
 - The information is confidential and is being released because the psychologist understands they are legally required to do so with the expectation that the implied undertaking rule will be strictly followed; and
 - The ramifications of releasing such protected information to the general public, indicating that the information is being provided with the stipulation that it will not be used for any other purpose other than the matter at issue in the legal proceeding.

Other Instances Requiring the Release of the Raw Data and Test Materials

If legally required in other instances, such as when ordered by the court or required by legislation to release all materials including raw data and test materials (with or without consent of the client), psychologists are not expected to refuse legal compliance, meaning that if materials are legally required, legally such materials must be provided by the psychologist.

McInerney v. MacDonald, [1992] 2 S.C.R. 138 re Limitations to Disclosure

In rare instances, the psychologist may be justified in refusing a request to access if there is “a significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party” (*McInerney v. MacDonald*, [1992] 2 S.C.R. 138 at para. 36). However considering the decision of *McInerney v. MacDonald* such instances would likely be rare:

“... In the ordinary case, these records should be disclosed upon the patient's request unless there is a significant likelihood of a substantial adverse effect on her physical, mental or emotional health or harm to a third party.”

Therefore, if a psychologist is considering refusing access on the basis of a significant likelihood of a substantial adverse effect on the physical, mental or emotional health or harm to the client or a third party, he or she should consult a lawyer.

Resources

Given that clients have a right of access to their records, the following relevant resources are offered below. The following list is meant to be of assistance but should not be considered to be completely exhaustive. It should be noted that the internet address of legislation may change from time to time.

Some Relevant Citations relating to the cited NS Court Decisions (Hernandez v. Purcell)

Civil Procedure Rules Nova Scotia

<http://www.courts.ns.ca/rules/toc.htm>

Nova Scotia Court Case - Concerning Production of Full File

(Hernandez v. Purcell, 2013 NSSC 303)

<http://decisions.courts.ns.ca/nsc/nssc/en/item/63002/index.do?r=AAAAAQAJSGVybmFuZGV6AAAAAAE>

Nova Scotia Court Case – Subsequent Decision Concerning Costs

(Hernandez v. Purcell, 2013 NSSC 397)

<http://decisions.courts.ns.ca/nsc/nssc/en/item/65818/index.do?r=AAAAAQAJSGVybmFuZGV6AAAAAAE>

Note: you should be able to click on the above URLs if this document is viewed electronically; however, the decisions can also be accessed by completing a search on the following URL:
<http://decisions.courts.ns.ca/nsc/en/nav.do>

Some Statutes Pertaining to Access to Information in Various Contexts

Freedom of Information and Protection of Privacy Act

<http://www.gov.ns.ca/legislature/legc/statutes/freedom.htm>

Provides the right of access to documents of public bodies in Nova Scotia and a right of privacy with respect to personal information held by public bodies in Nova Scotia.

Personal Health Information Act

<http://novascotia.ca/dhw/phia/>

An Act to govern the collection, use, and disclosure of personal health information.

Personal Information Protection and Electronic Documents Act (PIPEDA)

http://www.priv.gc.ca/leg_c/leg_c_p_e.cfm

An Act governing the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information the organization collects, uses or discloses in the course of commercial activities, or about an employee of the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.

Privacy Act

<http://laws.justice.gc.ca/en/showtdm/cs/P-21>

An Act to protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information. Applies to any department or ministry of state of the Government of Canada, or any body or office, listed in the schedule, and any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act.

Workers' Compensation Act

<http://www.gov.ns.ca/legislature/legc/statutes/workers.htm>

Act respecting the compensation for workers:

109 (1) Every physician, surgeon, hospital official or other health-care professional consulted regarding any worker claiming compensation pursuant to this Part shall

(a) provide to the Board any information requested by the Board; and

(b) provide all reasonable and necessary information or other assistance to any worker to enable the worker to establish a claim for compensation

Supreme Court of Canada Decision

(McInerney v. MacDonald, [1992] 2 S.C.R. 138)

This decision states that a patient is entitled, upon request, to have access to information about him/her in the custody of a healthcare provider. The healthcare provider owns the records, but the patient has a right to examine and copy the records and the healthcare provider must allow it as part of fiduciary duty to patient.

Decisions of the Supreme Court of Canada the decisions can also be accessed by completing a search on the following URL:

<http://scc-csc.lexum.com/scc-csc/en/nav.do>

Issued by the Nova Scotia Board of Examiners in Psychology in June 2008

(Originally titled "Position on the release of raw psychological data")

Revised: September 2014