



College of Psychologists
of New Brunswick
Collège des psychologues
du Nouveau-Brunswick

College of Psychologists of New Brunswick (“CPNB”) Guidance Regarding the Release of File Materials

Psychologists often receive requests for disclosure of copies of a client’s full psychological file record including clinical notes, reports, psychological raw data, test materials and results.

This document attempts to provide guidance to our members on how to address such requests in light of applicable professional and legal requirements. It does not cover all scenarios and principles. If after reviewing the following information, you remain uncertain about how to respond to a request for disclosure and require further guidance, CPNB recommends that you contact a lawyer to assist.

This guidance contained in this document is not a substitute for legal advice. Most psychologists’ insurance coverage includes some free legal consultation. You may also want to consider obtaining your own lawyer in complicated situations.

Guiding Principles

The Code of Conduct for CPNB (see e.g. Sections III.2.1, III.2.6, III.2.7, III.2.12, III.3.7(3), III.4.1 and III.4.2) and the Canadian Code of Ethics for Psychologists (see Principle I, Standards I.37-I.45) require providers of psychological services to protect the confidentiality of their records.

Section III.2.1 of the Code of Conduct states that “[t]he psychologist shall safeguard confidential information obtained in the course of practice, teaching, research, or other professional services”.

Section III.2.6 states that “[t]he psychologist shall limit access to client records to preserve their confidentiality”.

Section III.2.7 states that “[t]he psychologist may release confidential information upon court order [...] or to conform to appropriate federal or provincial law or regulation”.

Section III.2.12 states “[t]he psychologist shall continue to treat information regarding a client as confidential after the professional relationship between the psychologist and the client has ceased”.

Section III.3.7(3) states “[t]he psychologist shall store and dispose of written, electronic and other records in such a manner as to insure their confidentiality [and] maintain the confidentiality of all psychological records in the psychologist's possession or under the psychologist's control except as otherwise provided by law or pursuant to written or signed authorization of a client specifically requesting or authorizing release or disclosure of the client's psychological records”.

Standard I.40 of the Code of Ethics states that a psychologist must “[r]espect the moral right of primary clients and contract examinees whose identifiable information is collected and recorded to access that information in the record (including obtaining copies) and to request corrections with regard to the accuracy or completeness of the information, except as otherwise required or justified by law...”

Standard I.41 of the Code of Ethics states that a psychologist must “[c]ollect, record, store, handle, and transfer all private information, whether written or unwritten (e.g., paper or electronic records, e-mail or fax communications, computer files, recordings), in a way that attends to the needs for privacy, confidentiality, and security. This would include protection from loss or unauthorized access...”

Standard I.45 of the Code of Ethics states that a psychologist must “[s]hare confidential information with others only to the extent reasonably needed for the purpose of sharing, and only with the informed consent of those involved, or in a manner that the individuals and groups (e.g., couples, families, organizations, communities, peoples) involved cannot be identified, except as required or justified by law, or in circumstances of possible imminent serious bodily harm.”

Taken together, these guiding principles indicate that when a client requests a copy of his/her own file and provides express written consent, then the psychologist should provide a copy of the requested material. Similarly, in the case of a minor or incapacitated client, a copy can be released with the express consent of the legal guardian.

This principle of access to one’s own personal information is also enshrined in various pieces of legislation across different organizational settings, such as the *Personal Health Information Privacy and Access Act*, the *Right to Information and Protection of Privacy Act*, the *Personal Information Protection and Electronic Documents Act*, the *Privacy Act*, and is affirmed by the Supreme Court of Canada.

Raw Data and Test Materials

Requests for access to raw data and psychological test materials within a client file present a particular challenge. Although raw test data is considered to be client data, psychologists have consistently taken the position that it 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.

On this point, Sections III.4.1 and III.4.2 of the Code of Conduct state:

III.4.1. The psychologist shall protect the security of tests. To this end, members must distinguish between test data and test materials. According to the Personal Health Information Privacy and Access Act (PHIPA), client health information, which includes raw data from standardized psychological tests, must be released to clients and others with proper authorization upon request (refer to PHIPA for requirements and exceptions). When possible, raw data should be presented in summary form, rather than presented on testing material or protocols, and efforts should be made to transfer the requested information to a qualified professional.

III.4.2 Testing material is protected by copyright laws. Because federal or provincial legislation may require psychologists to release the content of files to clients or others with proper authorization, testing material (such as test questions, manuals, and protocols) should be excluded as much as possible from the client files. Testing materials contained within the client file should be released to clients with proper authorization when ordered by a court or as may be required under application federal or provincial legislation.

The non-disclosure of raw data and test material except when legally required 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 have confirmed that if test items and test protocols are readily available, the integrity of the test and scoring model may 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.

CPNB acknowledges that the Code of Conduct and the expectations of test publishers are not aligned with the current law in New Brunswick. Therefore, the following is recommended regarding client file material disclosure requests, keeping in mind the client's right to access their health records, the psychologist's need to safeguard test materials, the psychologist's requirement to adhere to the Code of Conduct and the Code of Ethics, and the legal obligations of all parties.

Requests for Disclosure in Civil Proceedings

A request for access to a client file may come in the context of civil court proceedings, including proceedings in the Court of King's Bench of New Brunswick Trial Division or Family Division.

A party to litigation means an individual or entity involved in a civil dispute, commonly referred to as a plaintiff or defendant. You may receive a request directly from your client, from your client's lawyer, or from the lawyer for another party.

Court Order to Psychologist

The court can order a psychologist to produce raw test records, clinical notes and testing documentation through Rule 31.11 of the of the New Brunswick *Rules of Court*, NB Reg 82-73 (the "*Rules of Court*").

31.11 Documents in the Possession of a Person Not a Party

(1) Where a document is in the possession or control of a person not a party to the action, any party may apply to the court, on notice to such person and to every other party, for an order for the production for inspection of such document if it is not privileged.

[...]

(3) No order shall be made under this subrule for the production for inspection of a document unless the court is satisfied that the document relates to a material issue in the action and that it would be inequitable to require the applicant to proceed to trial without having discovery of that document.

The party seeking the order must satisfy the court that the documentation sought relates to a material issue in the action, and it would be inequitable to allow the litigation to proceed to trial without the disclosure of the documentation. If these requirements are met, the court can issue a direct order against the psychologist demanding the disclosure of raw test records, clinical notes and testing documentation, which the psychologist must adhere to in compliance with law.

Court Order to Client

Alternatively, the client may be ordered by the court to provide a psychologist's raw data scores, clinical notes and testing documentation for litigation purposes. Based on Rule 31.04(4) of the *Rules of Court*, a court may make a discretionary production order against a party of the litigation at any time if the documents are in the possession or control of the party and there is no claim of privilege over the documents. In *Paul v Reilly*, 2006 NBCA 84, a document was found to be in a party's control if they have an enforceable right to its production for inspection. In *Stone v Sharp*, 2008 NBCA 55 ("*Stone v Sharp*"), the New Brunswick Court of Appeal determined that clients of psychologists have "control" over information in their files, including raw test records, clinical notes and testing documentation.

Therefore, it is possible for the court to order the production of such records through a court order against a client. However, an order against a client is not enforceable directly against a psychologist. In these circumstances, the psychologist may have concerns about disclosing the raw data and testing documentation directly to the client. An alternative may be to make arrangements to provide the material directly to another psychologist involved in the matter (e.g. if the material is being requested in order to inform another psychologist who is assessing the patient or testifying in the case).

When the Psychologist is an Expert Witness

Based on *Stone v Sharp*, a psychologist may be required to provide their entire client file including the raw data records, clinical notes and testing documentation when the request is made in the course of litigation and the psychologist is an expert witness that will be called at trial. Therefore, if the psychologist has received confirmation that they will be acting as an expert witness who will be called at trial, they should be prepared to provide raw data scores, clinical notes and testing documentation if ordered to do so by the Court.

Implied Undertaking Rule

Once provided in the course of litigation, the raw test records, clinical notes and testing documentation will be protected by the "implied undertaking rule". This is a universal rule in litigation established by the Supreme Court of Canada in *Juman v Doucette*, 2008 SCC 8, which prevents the use of information disclosed or discovered in a legal proceeding from being used for a purpose outside the proceeding.

If the psychologist is considering opposing the disclosure of raw data and test material when requested in the course of litigation, including under any of the circumstances noted above, they should consult a lawyer to ensure they are not in violation of a legal obligation. Any associated legal costs would likely have to be 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.

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 SCR 138 at para 36 ("*McInerney v MacDonald*"). 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.”

This has also been codified under the *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 (see section 14, “Reasons for refusing request”). Therefore, if the psychologist is considering refusing access on the basis of a risk to the health or safety of the client or a third party, they should consult a lawyer.

Summary

In the course of litigation, the psychologist should disclose raw test records, clinical notes and testing documentation in the following situations:

- When the psychologist is presented with a subpoena or court order for production of the complete file material.
- When the psychologist is acting as an expert witness in a legal proceeding and has been ordered to disclose all documents.

If court ordered, the psychologist should:

- Request proof of litigation – a copy of the legal action or court file reference.
- Unless there are exceptional circumstances where harm may arise to the client or a third party, 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 not considered in this statement, such as when ordered by the court in a criminal proceeding, or by an arbitrator in an arbitration proceeding, 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, such materials must be provided by the psychologist. This list of circumstances is not exhaustive, and if in any doubt, please consult a lawyer to assist.

Additional Resources

This document is based on guidance provided from the [Nova Scotia Board of Examiners in Psychology](#).

Given that clients have a right of access to their records, the following relevant resources are offered. These resources are 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.

Case Law Links

[Paul v Reilly](#), 2006 NBCA 84.

[Stone v Sharp](#), 2008 NBCA 55.

[Juman v Doucette](#), 2008 SCC 8.

[McInerney v MacDonald](#), 1992 CanLII 57 (SCC).

Statute Links

[Rules of Court](#), NB Reg 82-73.

[Personal Health Information Privacy and Access Act](#), SNB 2009, c P-7.05.

[Right to Information and Protection of Privacy Act](#), SNB 2009, c R-10.6.

[Personal Information Protection and Electronic Documents Act](#), SC 2000, c 5.

[Privacy Act](#), RSC 1985, c P-21.

Note: by clicking the case law and statute names above, you should be able to access the documents if this statement is viewed electronically. However, the cases can also be accessed by completing a search on the following URL: <https://www.canlii.org/en/>. The statutes can also be accessed by completing a search on the following URL: <https://www.google.com/>.