

## **Ethical Implications of Third-Party Record Release**

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### **Abstract**

In this article, the authors present a critical analysis of the ethical implications related to third-party record release, when a therapist is asked to release a client's counselling record information to an external party. Drawing from the values of the Canadian Psychological Association's (2017) code of ethics, the authors emphasize the need for therapists to balance their duty to protect client confidentiality with their responsibility to promote client self-determination through the informed consent process. Several recommendations are offered to enhance the informed consent process and to reduce the risk of harm to the client in the event the record is released to a third-party. An ethical checklist is provided for therapists to use when responding to a third-party record release request. This article may be of interest to lawyers who seek to understand why releasing counselling record information is a complex process for therapists.

**Key words:** release of information, ethics, consent, confidentiality

It is our intention to explore the ethical implications of third-party record release, otherwise known as release of information, when a therapist releases a client's counselling record information to an external source. A third-party record release can occur either at the request of the client or at

the request of an outside person or agency that is affiliated with the client, such as a family member, legal representative, medical office, or educational institution. Client counselling records can be requested by third parties for a variety of reasons. In Canada, it is commonplace for therapists to receive third-party record release requests for insurance claims and legal proceedings (Mills, 2014).

## **Ethical Issues Related to Third-Party Record Release**

Numerous ethical considerations exist related to third-party record release; however, confidentiality and informed consent are arguably the two most imperative ethical values to be aware of. A therapist's duty to protect the confidentiality of their clients is at the core of ethical practice as it is fundamental to maintaining a strong therapeutic alliance with clients as well as upholding society's trust in the profession of counselling (Robinson et al., 2015a). While it is imperative that therapists uphold their duty to protect client confidentiality, it is also essential that therapists respect their clients' right to self-determination by engaging the client in the informed consent process to determine if the client wants their counselling record to be released to a third-party or not.

Fortunately, Hamberger (2000) developed and tested a three-step response protocol to assist therapists in responding to complete record release requests in an ethical manner. Hamberger's (2000) study revealed that clients were often unaware of the contents of their counselling record and of their right to refuse authorizing the release of their record at the time of making the request, which then inhibited them from making an informed decision that weighed the benefits and risks of releasing their information. Given that 21 years has elapsed since Hamberger's (2000) study was completed, updated information concerning the ethical implications of third party-record release is greatly needed. The information presented below references the *Canadian Code of Ethics for Psychologists* (Canadian Psychological Association [CPA], 2017); however, the information is still highly relevant to therapists who abide by other ethical codes.

## **Informed Consent**

Foremost, it is important to highlight the difference between consent and informed consent. A client's signature on a release of information consent form may demonstrate that a client has given consent; however, it does not imply that the client made an informed decision to consent to the release of their information. Informed consent requires a client's full and active participation in the decision-making process (CPA, 2017, standard I.16). Informed consent is a collaborative process that occurs

between a client and a therapist, not between a client and a consent form.

When obtaining a client's informed consent for third-party record release, it is ethically responsible for therapists to inform their clients of three critical concepts: 1) the risks of releasing their information, 2) alternatives available to the client, and 3) the right to refuse to consent to the release their information. Each of these topics will be addressed next.

### ***Risks of Third-Party Record Release***

One major concern with releasing a client's record is the person receiving the record may not be held to the same ethical standards as the therapist and, therefore, may not have the same responsibility to protect the information being released. For example, when a client's record is released to an insurance company, the information in the record may be accessed by multiple staff members who are each responsible for various tasks, such as logging information, filing, completing audits, and so forth (Pope, 2015). Each time a different employee has access to the client's confidential information, the likelihood that this information will be unethically disclosed increases. Therefore, when engaging clients in the informed consent process, it is important for therapists to highlight that they do not have control over what the third-party does with the client's record information once it is released to them (Koocher & Keith-Spiegel, 2008).

The specific risks associated with the release of information are dependent on who the information is being released to. To assist clients in understanding the risks specific to their situation, therapists can assist clients in developing questions they have for the third-party regarding how their confidential information will be protected, stored, and distributed, as well as questions regarding other potential benefits and risks related to the release of information that the therapist may not be aware of. The practice of guiding the client to question the third-party likely improves the effectiveness of the informed consent process as the client can receive information pertinent to their decision-making process from multiple sources. This approach could also have therapeutic benefits as the client is empowered to develop skills to advocate for their right to confidentiality to be upheld.

### ***Alternatives to Complete Record Release***

It is important to explicitly discuss alternatives to complete record release during the informed consent process. Clients may authorize a third-party record release request because they are unaware that alternative options exist (Koocher & Keith-Spiegel, 2008). The benefits and risks

associated with each alternative should be explored with the client (McBride, 2020). An example of a common alternative to offer to a client is releasing a letter or report summarizing the client's record instead of releasing the complete record (Hamberger, 2000). If the third-party will only accept a complete record release, therapists should remind clients of their right to refuse to discuss any topic in counselling that they do not want the third-party to have knowledge of (McBride, 2020).

## ***Client Rights***

A client's consent must be given voluntarily (Robinson et al., 2015b), meaning the client's consent to release their record "is not given under conditions of coercion, undue pressure, or undue reward" (CPA, 2017, standard I.27). It is essential during the informed consent process that clients are made aware that they do not have to give their permission to release their record information if they do not believe it is in their best interest to do so (Borkosky & Smith, 2015; Hamberger, 2000; Koocher & Keith-Spiegel, 2008). Unfortunately, there are often incentives to consent to the release of information presented by third parties, such as record release being a condition of receiving financial coverage for the cost of counselling (Caustagouy, 2013). Under such circumstances where a client must choose between protecting their privacy and being able to afford mental health support, it is unlikely that a client's consent to release their record information to the third-party truly meets the condition of voluntariness. In such circumstances, the therapist can implement any of the global recommendations listed below to reduce the risk associated with the release of the client's counselling record.

## **Global Recommendations to Reduce Risk of Releasing Records**

### ***Documentation***

**Brief and Focused Session Notes.** To minimize the risk of client harm caused by the release of their counselling record, therapists should be vigilant about limiting personal details documented in the counselling record. The *Canadian Code of Ethics for Psychologists* states that therapists should only record information that is germane to the goals of the service being provided (CPA, 2017, standard I.39). Therefore, maintaining brief session notes that are focused on change (i.e., only documenting stated counselling goals and interventions used to facilitate these goals), reduces the possibility of a client's personal information being misinterpreted or misused by a third-party. Omitting personal details unrelated to counselling goals from the client's record honours a therapist's duty to

document in a manner that protects the client's dignity and respect (CPA, 2017) and ensures sensitive information will not be released to a third-party in the event of a record release request (Bemister & Dobson, 2011; 2012; McBride, 2020).

**Separate Records.** When counselling couples, families, or working in a group setting, therapists are encouraged to keep separate records for each client instead of using a joint record (Knauss, 2006). Alternatively, therapists can use a joint record to document session notes that summarize the service provided to the couple, family, or group, while still having separate records for each client to record any sensitive information specific to the individual (Reamer, 2005). These documentation practices will preserve the privacy of the other clients in the event one client's record is requested to be released to a third-party. Additionally, these practices reduce the workload associated with having to redact other client's information from a joint record prior to the record being released.

**Open Notes.** In addition to limiting the number of personal details in the client record, adopting transparent record-keeping practices can further reduce the likelihood of harm caused to the client due to a third-party record release. Open notes refer to the process of inviting clients to read their session notes with the therapist, and in some instances entails clients having access to a secure portal that contains their counselling record so that they can review their record as needed (Blease et al., 2020; Chimowitz et al., 2020). Critics of open notes state that reading session notes with the client may cause client confusion and harm the therapeutic relationship (Blease et al., 2020; Chimowitz et al., 2020). However, adopting an open notes approach has been found to increase client's recall of what occurred in sessions, strengthen the therapeutic alliance, and had little impact on therapists' workload (Chimowitz et al., 2020).

If a therapist receives a third-party record release request, adopting an open notes approach could save the therapist time and effort since the therapist will not have to review the entire counselling record with the client prior to releasing it. Additionally, because record release to third-party payers is typically continuous wherein insurance companies require updates following a certain number of sessions, an open notes approach increases the client's ability to give informed consent to the ongoing release of their information as the client is continuously informed of the exact information that is being released in their record.

### ***Detailed Release of Information Consent Form***

One method to ensure clients are fully informed before releasing their record information is to present them with a release of information consent form that clearly outlines the following information: the full name of the person the client information is being released to, what client information is being released, the purpose of the intended use, how the information will be released (e.g., fax), the date the form was signed, expiration date of the client giving consent for this information to be released (assuming it is not just a one-time release), risks and limitations of the information being released, the name and signature of the person authorizing the release, the signing person's relationship to the client (if the person authorizing is not the client), and the signature of a witness if the person is signing outside of the practitioner's presence (Koocher & Keith-Spiegal, 2008). These recommendations offered by Koocher and Keith-Spiegal (2008) provide a good starting point when drafting a consent form for third-party record release requests; however, a one-size-fits-all approach to consent forms is inappropriate given that the risks of the record release are highly dependent on the purpose of the release and the party to whom the record is being released to (Borkosky & Smith, 2015). As such, therapists should consider adopting a consent form that provides space to document the specific risks, benefits, and alternatives pertaining to the request, as well as the client's reaction to this information, on the consent form.

### ***Legal Considerations when Releasing Client Information***

Receiving a request to release a client's counselling record for legal proceedings can be a highly distressing experience for therapists as it not only challenges a therapist's duty to protect their client's privacy but can also threaten the therapist's sense of competence as a professional (Jenkins, 2003). Therapists have an ethical duty to prioritize their client's right to privacy and minimize potential harm to the client when responding to said requests (CPA, 2017). Releasing a client's counselling record in the legal context requires therapists to consider the potential for significant risks, such as the client's mental health history being used to undermine the client's credibility in court (Borkosky & Smith, 2015; Jenkins, 2003). Beyond immediate concerns related to the outcome of the court process, therapists also need to consider if releasing the information poses a more general risk of harm to the client, such as increasing the likelihood of the client engaging in negative coping strategies to manage the stress of having their personal information shared in court or causing irreparable damage to the therapeutic alliance due to breaches in trust.

Given the seriousness of potential risks, therapists have an ethical duty to ensure proper informed consent is obtained from the client prior to any information being released. Time constraints have been identified as a key barrier to obtaining informed consent as therapists may feel they lack the time necessary to obtain proper informed consent when faced with external pressure to respond to the release of information request in a timely manner (Borkosky & Smith, 2015). An example of when therapists may experience pressure to respond without first obtaining informed consent from the client is when the client's lawyer submits a release of information request already signed by the client to the therapist to expedite the release process (Borkosky & Smith, 2015). However, irrespective of the client signing the release of information request form, the therapist is under an ethical obligation to obtain informed consent directly from the client before releasing any verbal or written information to the lawyer (CPA, 2017). After obtaining informed consent from the client, therapists are encouraged to negotiate with the requesting lawyer to determine what information will be released that maximizes benefit and minimizes harm to the client.

In the event the release of the client's record is court ordered, therapists should be aware of Wigmore criteria and be prepared to advocate that the client's record meets these criteria to fulfill their ethical duty of protecting client confidentiality (Robinson et al., 2015a). Essentially, Wigmore criteria enables a therapist to make a case that the counselling record contains highly sensitive information that deserves to be protected through *ad hoc* privilege (Robinson et al., 2015a).

## Conclusion

Based on the information presented in this article, a checklist of questions for therapists to consider when responding to a third-party record release request has been created and is listed below (Table 1). The purpose of the checklist is to ensure that the client is empowered to make an informed decision regarding the release of their private information. The checklist aligns with the aspirational values of the *Canadian Code of Ethics for Psychologists* (CPA, 2017), which encourages therapists to go beyond meeting the mandatory minimum standards outlined in standards of practice and strive to offer the highest degree of ethical care when responding to third-party record release requests.

**Table 1:**

*Checklist of Questions to Consider when Responding to a Third-Party Record Release Request*

Task	Questions to Consider
1. Receive the third-party record release request.	<ul style="list-style-type: none"> <li>a) Was the third-party record release request submitted directly by the client? If not, did I contact the client to verify the client is aware of the third-party record release request?</li> <li>b) Does the form the client signed seem to accurately represent informed consent (e.g., the risks and alternatives are clearly outlined?) If not, I need to address these gaps.</li> </ul>
2. Obtain informed consent from the client.	<ul style="list-style-type: none"> <li>a) Have I reviewed with the client the benefits, risks, and alternatives associated with their decision?                             <ul style="list-style-type: none"> <li>i. Did I offer to write a summary report or letter instead of releasing the entire record?</li> </ul> </li> <li>b) Did I ask the client what else they need to know about releasing their private information before they offer their permission or decline the request?</li> <li>c) Did I check the client's recall as an indicator of if the client comprehended the information presented to them?</li> <li>d) Did I inform the client of their right to read the information I will share and/or what is recorded in their record prior to consenting to the release?                             <ul style="list-style-type: none"> <li>i. If the client agreed to read their record, did I offer possible interpretations of how this information could be misinterpreted by the third-party?</li> </ul> </li> </ul>
3. Document the informed consent process.	<ul style="list-style-type: none"> <li>a) Have I documented the informed consent process either in the client's record or obtained a signed consent form?</li> <li>b) If I used a consent form, did the form include the following information:                             <ul style="list-style-type: none"> <li>i. name of person or agency the record is being released to</li> <li>ii. what specific record information is being released</li> <li>iii. the purpose of the intended use of the information</li> <li>iv. the date the form was signed</li> <li>v. the expiration date of consent (if it is an ongoing release request)</li> <li>vi. limitations of the information being released</li> </ul> </li> </ul>



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	<ul style="list-style-type: none"> <li>vii. the name and signature of the person authorizing the release (or the person's signing relationship to the client if the person authorizing is not the client)</li> <li>viii. signature of a witness if the person is signing outside of my presence</li> <li>ix. the specific benefits and risks to the release that we discussed during the informed consent process</li> <li>x. any questions the client asked and my response</li> </ul> <p>c) Is the information on my consent form presented in a manner that can be understood by the client based on their ability to process information?</p>
<p>4. Collaborate with the third-party</p>	<ul style="list-style-type: none"> <li>a) Did I receive the client's consent to speak to the requesting third-party?</li> <li>b) If so, have I consulted with the third-party to determine the purpose of their request and what specific information they require?             <ul style="list-style-type: none"> <li>i. Did I offer to write a summary report including the specific information they require instead of releasing the entire record?</li> </ul> </li> <li>c) Have I encouraged the client to speak to the third-party themselves about any specific questions they might have?</li> </ul>
<p>5. Action</p>	<ul style="list-style-type: none"> <li>a) Am I prepared to take responsibility for the outcome of this release, particularly if the client experiences a negative outcome?</li> <li>b) Have I learned anything from this experience that can improve my future response to third-party record release requests?</li> </ul>

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Acknowledgements: none

Competing Interests: none

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Publication Date: March 21, 2022