

# Client confidentiality and record-keeping



## Responding to a search warrant

A **search warrant** can be used by police officers in the investigation of criminal or other types of offences to **look for and seize records, including counselling records**.

Records can be printed or electronic format. A search warrant is a court order obtained from a type of judge known as a “**justice of the peace**” (sometimes referred to as a “JP”) on the basis of sworn evidence from a peace officer (*Criminal Code* section 487.(1)).

Under the *Criminal Code*, before issuing a search warrant, the justice of the peace must have **reasonable grounds to believe that evidence exists at or within the premises, regarding an offence** that is defined in the *Criminal Code* or another federal statute. In making a decision about whether to grant the police a search warrant, the justice of the peace must balance the privacy interests of the individual in a democratic society against the interest of the state in investigating and prosecuting crimes.

- If the police produce a valid search warrant to search the premises or seize items that may be evidence for a criminal case, every person who is in possession or control of the premises or of the materials covered by the search warrant is legally required to turn over the records (or portions of the records) requested by police under the warrant.
- However, there is no obligation to turn over any more information or materials than covered by the warrant, and protecting client confidentiality should mean turning over as little as is required under the warrant. If police do not have a warrant, there is no obligation to provide them with any records or information. In any case, where police seek to search an organization’s premises for information about a client, whether with or without a warrant, the organization should contact a criminal lawyer as quickly as possible for advice.
- Note that the police are not to review the documents before seizing them or to browse through files to determine what might be relevant.
- Organizations and counsellors will have to decide for themselves how to respond when faced with a search warrant. Some organizations may feel strongly that breaching confidentiality will undermine the trust relationship with the communities they serve and ultimately damage their ability to support people living with HIV — and so may choose to fight a search warrant in court.

- One way to **challenge a search warrant and buy you some time is to assert “privilege.”** The sealing of client records and the assertion of privilege are legal actions that demonstrate that an organization is opposed to the search warrant and may challenge in court the seizure of the records and their use as evidence in a prosecution. **Asserting “privilege” is important because it also gives the client an opportunity to challenge the seizure by police.**

The legal principle of **privilege** is a **common law rule of evidence. Under this rule, for public policy reasons, certain communications cannot be used as evidence in court proceedings.** For example, the information that a client provides to his or her lawyer is protected by a “solicitor–client privilege.” This means that the lawyer cannot be ordered to tell a court any information received from the client. This rule to protect the confidentiality of discussions between lawyers and their clients ensures that people can seek and receive full legal advice and proper legal representation, without worrying that anything they reveal to a lawyer can be used against them.

It is up to a witness or a party in a legal case to assert that privilege applies to the information that somebody else is trying to put forward as evidence. If you assert “privilege,” a court will have to determine whether the confidential information claimed to be privileged (e.g., information given to a counsellor) can or cannot be used as evidence in court. Only communications between a lawyer and his or her client are automatically “privileged.” In all other cases, the court will have to decide on a case-by-case basis.

The Supreme Court of Canada has adopted a four-part test to determine whether, in any given case, there is a privilege that applies to prohibit confidential information from being disclosed and used as evidence in a court proceeding. In order to find that there is such a privilege, a court must be satisfied that:

1. the **client disclosed the information in confidence** that it would not be divulged;
2. the **confidentiality must be essential** to the relationship;
3. the **community believes** that the relationship should be protected and fostered; and
4. **disclosing the information would do more harm** to the relationship than the benefit gained by deciding the legal case correctly based on more information.<sup>1</sup>

**When the police demand a client’s counselling or other records such as HIV test results and medical files under a search warrant, it is recommended to take the following steps:**

- Consult the organization’s policy and guidelines on client confidentiality and record-keeping, if they exist.

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<sup>1</sup> *Slavutych v Baker*, [1976] 1 SCR 254.

- Ask to see the warrant and to receive a copy for your records. Examine the warrant to make sure a justice of the peace has signed it and that it relates to the records the police have asked for. Check the deadline that limits the length of time the police can use the warrant.
- Ask the police exactly what records they want.
- Locate the records (or portions of the records) for the police (which could be paper documents or computer files depending on what the warrant says) and place them in an envelope or box and seal it. Write on the envelope or box:  
**PRIVILEGE ASSERTED — DO NOT OPEN.**
- Tell the police: **I AM ASSERTING THAT THESE RECORDS ARE CONFIDENTIAL AND PRIVILEGED AT LAW.**
- Tell the police the name, address and telephone number of the organization's lawyer, if known.
- Give the records to the police. They will take them away.
- **Call the client immediately.** Advise him or her of the seizure and suggest that he or she seek legal advice providing appropriate referrals. For referrals, see the section, “For more information and legal advice,” also in this Resource Kit.
- **Call a lawyer as soon as possible to get legal advice.** If it’s possible to get this advice before handing over the documents to the police, all the better. If not, then get advice as soon as possible after the police have left with the documents.

This document is part of the on-line resource, *HIV Disclosure and the Law: A Resource Kit for Service Providers*, available at [www.aidslaw.ca/community-kit](http://www.aidslaw.ca/community-kit). It contains general information and does not constitute legal advice. Reproduction is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of the information. For further information, contact the Legal Network at [info@aidslaw.ca](mailto:info@aidslaw.ca). *Ce document est également disponible en français.*

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