# Client confidentiality and record-keeping

## Responding to a subpoena

Under the *Criminal Code*, a **court can issue a subpoena** to any person who is likely to have material **evidence about a criminal case** (*Criminal Code*, sections 697 to 708). A subpoena is a court order requiring a person to attend court to give evidence at a time and place stated in the subpoena. The subpoena can also require the person to bring anything in his or her possession or control that is relevant to the proceedings. This could **include a client's counselling records**. A person who fails, without lawful excuse, to attend these proceedings is guilty of **contempt of court**, and the court can issue an arrest warrant for that person.

- When served with a subpoena, organizations and counsellors must consider whether or not they are going to claim that the client's records and other information not be introduced as evidence by asserting **"privilege."** The sealing of client records and the assertion of privilege are legal actions that demonstrate that an organization is opposed to the introduction of the client's record and other information as evidence.

- Some organizations may feel strongly that breaching confidentiality will undermine the trust relationship with the community they serve and ultimately damage their ability to support people living with HIV.

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.[1]

**When served with a subpoena, it is recommended to take the following steps:**

- Consult the organization's policy and guidelines on client confidentiality and record-keeping, if they exist.
- Next, contact the client and advise him or her of the subpoena. Suggest to the client that he or she seek legal advice. Provide appropriate referrals, e.g., a criminal lawyer, lawyer referral service, legal aid office, legal clinic, or legal advice service. For referrals, see the section, "For more information and legal advice," also in this Resource Kit.
- Call a lawyer to get legal advice.
- Identify what exact information and documents are required by the court. A lawyer can help the organization to do this.
- Locate the records (or portions of the records) and place them in an envelope or box and seal it. Write on the envelope or box: **PRIVILEGE ASSERTED — DO NOT OPEN.**
- Work with the organization's lawyer to prepare the defence of the assertion of privilege in court.

**N.B.:** The Ontario Court of Appeal has indicated that shredding records is "manifestly inappropriate."[2] **People who destroy records after being served with a subpoena may be cited for contempt of court and, upon conviction, subject to a fine or imprisonment.**



[1] *Slavutych v Baker*, [1976] 1 SCR 254.
[2] *R v Carosella* (1995), 102 CCC (3d) 28 (Ont CA).