Guidelines re: Legal Support to Maintain Researcher-Participant Confidentiality

Purpose
University researchers who conduct human participant research have, in some cases, faced legal challenges to their obligations to maintain the confidentiality of the data or other information they have collected. The Tri-Council has mandated that in certain circumstances institutions may be required to fund independent legal counsel for researchers. These guidelines specify, why, when, and how the University of Waterloo will provide such funding.

Whether researchers see the potential for a conflict, are advised of its potential by someone else (for example a research ethics board/committee or funder), or are served with a subpoena or search warrant, they need to be aware of the institutional support that is available and how to access it.

All members of the University who conduct human participant research should become familiar with these guidelines to ensure they are aware what may need to be put in place for both themselves as researchers and for their study participants. A need for independent legal counsel may arise at any point in the life of a research study, including the initial design stages of a project.

- Section A provides an overview of researcher-participant confidentiality in Canada, how it has been challenged, and why researchers might require independent legal advice
- Section B presents the procedures for faculty, staff and students at the University of Waterloo to obtain funding for independent legal advice
- Section C consists of resources for further information.

Section A: Researcher-participant confidentiality and how it has been challenged
Research involving human participants sometimes involves asking people to share information that if disclosed to a third party could cause them serious harm. Researchers have an obligation to safeguard information that is entrusted to them and to use that information only for the purposes agreed to with the participant. The ability to promise confidentiality is crucial as this promise can enable researchers to gather data and information on sensitive or controversial topics and can be particularly important in studies that involve vulnerable or marginalized individuals/populations.

Conflict can sometimes arise for researchers when the ethical obligation to provide assurances of confidentiality is challenged by a legal obligation to disclose data pursuant to a court order. A

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researcher may identify the potential for a challenge to confidentiality when designing or planning the study or there may be an actual demand by third party sources to disclose data during the life of the study, after data is collected, or when disseminating the findings. In either case, legal advice may be needed.

The legal basis for protecting research data
Canadian law protects communications between individuals from forced disclosure in court under particular circumstances, called “privileges.” These are created either by statute or by belonging to a class of relationships that courts have determined merit special protection in the public interest. The best known class protection is lawyer-client privilege, which allows clients to confide in their lawyers for the purpose of obtaining legal advice. For example, communications between a researcher and their lawyer about how to protect the confidentiality of participants would be privileged and no court could force disclosure.

At present, there is no class protection for communications between researchers and their participants. In cases where there is no established privilege, the responsibility rests with the individual who receives a demand to persuade a court that their communications should be privileged under their particular circumstances. Courts make these decisions by applying a set of principles called the Wigmore criteria (see Appendix A).

It is critical that researchers are well informed from the outset about how to arrange their research protocols to make the case for protection of participant’s confidentiality. Appendix B contains some best practices for researchers who will be conducting human participant research. Depending on the nature of the research and the risk to confidentiality, researchers may need to obtain independent legal advice.

Canadian challenges to researcher-participant confidentiality
There have been three Canadian cases that have challenged researcher-participant confidentiality to date. In all cases, the researchers obtained approval from their institution’s research ethics board/committee on the basis the participant’s identity would not be revealed and their data would not be shared beyond the research team.

- The first case began in 1994 when Russel Ogden, an MA student at Simon Fraser University, conducted a study on assisted suicide. Ogden received a subpoena to appear before a coroner’s inquest. Ogden attended and was asked to reveal some of his sources. He was successful in making a claim to the inquest to have researcher-participant privilege recognized.²

- The second case involved professors Colette Parent and Chris Bruckert from the University of Ottawa. They received a search warrant for access to the recording and transcript of an interview they had conducted in 2007 with an individual who was subsequently charged with murder in 2012. The interview material was surrendered to police in a sealed envelope with the promise that it would not be opened until a court

ruled on the matter of researcher-participant privilege. The Superior Court of Quebec ultimately found a qualified privilege. The legal costs involved were substantial.3

- The third case involved a then-doctoral candidate from the Université du Québec à Montréal, Marie-Ève Maillé, who tracked social disruption among residents of two small towns in the Arthabaska region east of Montreal over a proposed large-scale wind farm.4 The student interviewed 93 Quebec residents, all of whom signed university-approved consent forms assuring confidentiality. This provision was a condition of participation in the study for many residents. A Quebec Superior Court judge, who initially demanded that she turn her research materials over to the defense in a court case brought by a group of disgruntled residents who objected to the construction and operation of the wind farm, has now retracted his own decision. In his new ruling, the judge noted that Maillé’s promise of confidentiality met the four criteria of the “Wigmore” test for determining whether a communication is privileged.

Section B: Procedures

How to request independent legal advice

Contact the Vice President, University Research or delegate to initiate a request for University funded independent legal advice

Vice President, University Research or delegate
Contact: Ms. Lorna Kelly
lukelly@uwaterloo.ca
Office of Research
519-888-4567x 33432

A researcher’s request should include a brief description of the situation, the nature of their research and a copy of any documents that they believe will help to determine whether legal advice is needed.

The VPU or delegate will arrange to meet with the researcher to discuss the situation. The researcher will likely be asked to provide additional documentation, such as a description of any assurances that have been or will be provided to participants during the information and consent process.

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In an urgent situation, (e.g., the researcher is facing an immediate demand to turn over research records), and the VPUR or delegate is unavailable, the researcher should attempt to make contact with Bruce Muirhead or the Office of General Counsel.

What happens after a request for independent legal advice is made

- The researcher’s request for funding to obtain independent legal advice will be reviewed by the Vice President, University Research.

- If approved, the researcher will be provided with a list of lawyers with known expertise in this field. The researcher may select which lawyer to approach from the list. If the researcher wishes to approach a lawyer of their own choosing, they will be asked to provide evidence that the lawyer has sufficient expertise to provide advice in this area of law.

- Legal costs can rapidly get out of control. Lawyers are always willing to respond to emails and phone calls but will bill for every communication. For this reason, the researcher will be required to submit regular statements of costs and at some stage may review the need for continued legal support.

- If the researcher chooses not to seek independent legal advice after their request has been approved, they will be asked to sign an acknowledgement to this effect so that the University can verify its compliance with Tri-Council policy. At a later stage, the researcher may change their mind and approach the VPUR or delegate again to request independent legal advice.

- Once the researcher has obtained legal advice, they will be asked to provide to the VPUR or delegate verification from the lawyer in the form of a Certificate of Independent Legal Advice.

- If the researcher’s request for funding to obtain independent legal advice is denied, they may challenge the decision of the Vice President, University Research through the appropriate grievance process. The process for doing so can be found in the Memorandum of Agreement – UW/FAUW, Article 9.

Why the University can’t provide this legal advice

The lawyers in the Office of General Counsel provide advice to the University as an institution. The position of the Tri-Council is that researchers require access to legal advice that is at arm’s length from the institution and institutional concerns.

However, the University may provide basic information in order to help the researcher explore the implications of issues with their lawyer. Contact will still proceed through the VPUR or
delegate and care will be taken to ensure that any information provided is not construed as a legal interpretation or legal advice.

The researcher’s receipt of information from the Office of General Counsel does not compromise their ability to access funding for independent legal advice.

Section C: Resources

Whom researchers should speak with for more information

Vice President, University Research or delegate
Contact: Ms. Lorna Kelly
lukelly@uwaterloo.ca
Office of Research
519-888-4567x 33432

The researcher’s representative association at the University can also help to confidentially discuss options, particularly if the researcher needs to access a grievance process (e.g., Faculty Association, Staff Association, Federation of Students, Graduate Students Association).

Other resources

The Canadian Association of University Teachers, of which the Faculty Association is an active member, maintains information about Canadian cases in this area and has published a book on Protecting Research Confidentiality as part of its academic freedom series.

Ted Palys, of the Department of Criminology at Simon Fraser University, and his collaborators have written extensively on the topics of research ethics regulation and research confidentiality in Canada.

Chapter 5 of the TCPS 2 (2014), the Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans obliges universities to make independent legal advice available to researchers.
Appendix A: The Wigmore criteria

The Wigmore criteria⁵ are applied by Canadian courts to determine whether to grant privilege (i.e. a legal right that protects an individual from being compelled to disclose information to the court⁶) on a case-by-case basis. The criteria require that:

1. The communications must originate in a confidence that they will not be disclosed;
   - E.g., do the research participants believe that their information will be kept confidential, and is their participation dependent upon this belief?

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
   - E.g., would the research project have been able to proceed without the promise of confidentiality, and would future participation in research studies be jeopardized if this promise was broken?

3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and
   - E.g., should the relationship between researcher and participants be fostered and protected in the public interest?

4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
   - E.g., do the benefits of allowing the information to be used in the interest of public safety, outweigh the protection of the researcher/participant relationship?⁷

Appendix B: Things researchers need to consider to protect the confidentiality of participant data

What follows are some best practices for researchers who conduct research involving human participants. These cannot guarantee protection from forced disclosure, but they will ensure that the researcher is in the best possible position to make this argument:

- Researchers should consider the nature of their research at the outset and design protocols accordingly. Research that may result in demands for disclosure include, for example:
  - research dealing with controversial political topics;
  - research that might directly or indirectly uncover information about illegal acts; and
  - research dealing with vulnerable or marginalized participants.

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- The easiest way to safeguard participants is by collecting anonymous data wherever possible and ensuring that information cannot be re-identified with participants. Where this is not possible, the ethical duty of confidentiality is critically important.

- Researchers should design their research from its inception to embed the Wigmore Criteria and include a discussion in their research ethics application as to why confidentiality is essential to undertaking the research project. Although not a guarantee a court would uphold the case, demonstrating confidentiality is part of a well-considered research plan places the researcher in a better position to have researcher-participant privilege recognized.8

- Researchers should reinforce the Wigmore Criteria at every stage of research and in every contact they have with participants. Their relationship with participants should begin with a clear expectation of confidentiality and researcher behaviour should be consistent with that in every respect.9 Ask prospective participants if they would participate in the research if they could be identified and, if practicable, record their responses.10

- Researchers should expect all aspects of their research procedures and practices might be scrutinized by a court as evidence of the importance of confidentiality. This includes the researcher’s research ethics application, funding proposals to granting agencies, participant recruitment materials, interview and transcription processes, data storage practices, disseminating their findings and more.

- Ensure everyone involved in the research team, including collaborators, research assistants and student volunteers is familiar with these Guidelines and the importance of confidentiality of the data and information collected for the research project.

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8 Supra note 5.
9 Supra note 3.
10 Supra note 5.