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Third-Party Records in Sexual Offence Cases

Fact Sheet 3: The Record-Holder's Role in Applications for Third-Party Records

This fact sheet talks about

- how an accused applies for a third-party record in a sexual offence case
- how the judge decides whether the accused will get the record, and
- the role of the record-holder.

The law outlines many steps to applying for a third-party record. These steps help protect both the victim's right to privacy and the accused's right to defend themselves.

SOME TERMS TO KNOW

- A **sexual offence** is any kind of sexual assault or another criminal offence that is sexual in nature.
- The person charged with the offence is called the **accused**.
- The alleged victim of the offence is called the **complainant**.
- A **third-party record** is a document with personal information for which there is a reasonable expectation of privacy.
- The person who has a record about the **complainant** is called the **record-holder** or the **third party**.





WHAT IS A THIRD-PARTY RECORD?

A third-party record is a document or other record that has personal information about the victim or another witness. It's something that the victim could reasonably expect to be kept private. This means that it's something the victim never thought would be seen by other people.

Some examples of third-party records are

- notes taken by a counsellor, therapist, psychologist or doctor
- hospital records
- records from a child welfare or social service agency
- records from an employer or school, and
- the victim's personal journals.

HOW DOES THE ACCUSED APPLY FOR A THIRD-PARTY RECORD?

The accused can ask for the record by giving the judge a written application. The application must say

- what the third-party record is, and
- why the accused thinks it's important to their defence.

The accused must make sure that all of these people get a copy of the application

- the Crown prosecutor
- the victim, and
- you, the record-holder.

The accused must also make sure that you get a copy of the application and a *subpoena*. A subpoena is an order to attend court. If you get a subpoena, you must be ready to go to court and answer questions about the record.

HOW DOES THE JUDGE DECIDE WHETHER THE ACCUSED WILL GET THE THIRD-PARTY RECORD?

After the accused has given out copies of the application, the judge will hold a hearing in the courtroom. The judge holds the hearing *in camera*. This means that the public and the media are not allowed in the courtroom.

The accused will tell the judge why they want the record. Then you, the Crown prosecutor and the victim can tell the judge what you think.

The judge will listen to everyone's reasons and decide if the accused has a good reason to think the record has something to do with the case. Just because the record exists is not enough reason for the accused to get the record. The accused must say why they think it's important to their defence.

After the hearing, the judge can decide:

- that you don't have to give the record to the accused, or
- that you must give the record to the judge to look at before the judge decides.

If the judge doesn't believe the accused has a good reason to think the record will help their defence, then the judge probably won't ask to see the record.

But if the judge does believe the accused has a good reason to think the record will help their defence, the judge will probably want to see the record. For example, if the accused had evidence, such as a text message, showing they told you a different version than what they told the police, then the accused could show that to the judge and the judge might want to see the record.



WHAT HAPPENS IF THE JUDGE DECIDES TO LOOK AT THE THIRD-PARTY RECORD?

If the judge decides to look at the third-party record, the judge can then

- have another hearing before making a decision
- decide that the accused will not get the third-party record
- decide that the accused will get the third-party record, or
- decide that the accused will get the third-party record on certain conditions. For example, the judge could say that you must remove parts of the record before you give it to the accused.

The judge must think about many things when deciding if the accused will get the third-party record or if they will apply conditions. The judge must consider

- the victim's right to privacy
- the accused's right to defend themselves, and
- society's interest in having victims report sexual offences.

WHAT SHOULD I DO IF I RECEIVE A SUBPOENA AND AN APPLICATION?

If you receive a subpoena and an application, you must follow the directions in the subpoena about attending court. This doesn't mean that you have to give the third-party record to anyone yet, including the accused or his or her lawyer. You only need to provide the record if the judge orders you to do so.

You can bring the third-party record to the first hearing, but you don't have to. After the first hearing, the judge will decide if you need to give the record to the judge.

You're allowed to make *submissions* at the hearings. This means telling the judge why you do or don't think you should give the record to the accused.

CAN I HAVE A LAWYER?

Yes. You can ask a lawyer represent you. You would have to pay for the lawyer yourself. The lawyer would give you advice on third-party records. The lawyer would also tell the judge why you do or don't think you should give the record to the accused.

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