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Third-Party Records in Sexual Offence Cases

Fact Sheet 1: The Victim's Role in Applications for Third-Party Records

This fact sheet talks about

- how a person accused of a sexual offence applies for a third-party record
- how the judge decides whether the accused person will get the record, and
- the role of the victim.

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 victim of the alleged offence is called the **complainant**.
- The person who has a record about the complainant is called the **record-holder** or the **third party**.

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WHAT IS A THIRD-PARTY RECORD?

A third-party record is a document or other record that someone else has made about you that contains personal information about you or another witness. It could be a note, a file, or any other type of document, even something like a text message. It's something that you could reasonably expect to be kept private. This means that it's something that you never thought would be seen by other people.

Some examples of third-party records are

- notes that your counsellor, therapist, psychologist or doctor has made about you
- your hospital records
- your records from a child welfare or social service agency
- records from your employer or your school
- your personal journals.

ARE THERE DOCUMENTS WITH PERSONAL INFORMATION THAT ARE NOT CONSIDERED THIRD-PARTY RECORDS?

Yes. A document made by the police or the Crown prosecutor is not a third-party record.

For example, if a police officer takes notes during an interview with you about the incident, the Crown prosecutor does not have to ask you or the court for permission to give copies to the accused.

In fact, the law says that the Crown prosecutor must give these kinds of documents to the accused.

WHO USES A THIRD-PARTY RECORD?

The accused's lawyer or the Crown prosecutor can use a third-party record at the trial.

The accused's lawyer can use it to try to defend the accused. For example, if you told a counsellor about the sexual assault, the accused's lawyer might ask you about the counsellor's notes to try to show that you've changed your story and shouldn't be believed.

The accused's lawyer cannot use information in a third-party record about your past sexual activity to argue that you should not be believed or were likely to have consented.

The Crown prosecutor can use a third-party record during the trial to support the case. For example, hospital records that describe your injuries from the incident are important to the Crown's case. In this situation, the Crown prosecutor would ask you to waive the application process. For more information on waiving an application, please see *Can I give the accused a third-party record?*

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

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

- the Crown prosecutor
- you
- the record-holder.

The accused will not personally give you the application. They will have someone else deliver it.

The record-holder is the person who has the third-party record. For example, the record-holder could be your counsellor or doctor. For more information about record-holders, see F*act Sheet 3: The Record-Holder's Role in Applications for Third-Party Records.*

DOES THE JUDGE HAVE TO GIVE THE THIRD-PARTY RECORD TO THE ACCUSED?

No. The judge could decide that the accused can't have a copy of the record.

HOW DOES THE JUDGE DECIDE IF THE ACCUSED CAN HAVE THE THIRD-PARTY RECORD?

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

There are two steps that the judge can take to decide if the accused can have the record. First, the judge must decide if the record likely contains information that the accused needs for a fair defence. If the judge thinks the record does likely contain information the accused needs for a fair defence, then the judge will look at the record and decide if it's important to the case.

Step One

In the first step, the accused will tell the judge why they want the record. Then the Crown prosecutor, you, and the record-holder can tell the judge what you think.

The judge will 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 listening to everyone, the judge can decide

- that the accused won't get the record, or
- that the judge will look at the record before deciding.

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

But if the judge thinks the accused has a good reason to think the record can help them defend themselves, then the judge would probably want to see the record. For example, if the accused has a text message from you that gives a different version from what you told the police, then the accused could show that to the judge and the judge might want to see the record.

Step Two

After the judge has looked at the record, they can

- hold 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 the record holder must remove parts of the record before they 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

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

WHAT CAN I DO IF I DON'T WANT THE ACCUSED TO GET THE THIRD-PARTY RECORD?

If you don't want the accused to get the record, you can

- tell the Crown prosecutor that you don't want the accused to get the record, and
- go to the hearings and make *submissions*. This means telling the judge why you don't want the accused to get the record.

You can hire a lawyer to make your submissions for you if you don't want to go to the hearings alone. For more information, see *Fact Sheet 2: Hiring a Lawyer for Third-Party Records Hearings*.

CAN I JUST GIVE THE ACCUSED A THIRD-PARTY RECORD?

If the Crown prosecutor has a third-party record, then you can decide to *waive* the application process. This means that you let the Crown prosecutor give it to the accused without a hearing. For example, if the Crown prosecutor has a copy of your journal, then you could decide there's no need for a hearing and let them give it to the accused.

You can waive the application if

- you understand that the purpose of the application process is to help protect your right to privacy, and
- you tell the Crown prosecutor, by words or actions, that they can give the record to the accused and there is no need for a hearing.

If you agree to give a third-party record to the police or the Crown prosecutor but don't want the accused to get it, *then you should say so*. If you don't tell the Crown prosecutor that you don't want the accused to get the record, then the Crown prosecutor might think your actions mean you are waiving the application.

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