

# Researcher-Participant Privilege: Hanging by a Thread

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## TCPS 2 - Chapter 5

### Article 5.1

Researchers shall safeguard information entrusted to them and not misuse or wrongfully disclose it. Institutions shall support their researchers in maintaining promises of confidentiality.

<http://www.pre.ethics.gc.ca/eng/policy-politique/initiatives/tcps2-eptc2/chapter5-chapitre5/>

### Interpretation

Institutions under whose auspices or within whose jurisdiction such research is being conducted should establish a policy that explains how it will fulfill its responsibilities to support its researchers.

<http://www.pre.ethics.gc.ca/eng/policy-politique/interpretations/privacy-priviee/>

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## Parent c. R., 2014 QCCS 132

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<http://www.canlii.org/en/qc/qccs/doc/2014/2014qccs132/2014qccs132.html>

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## Privilege

“It is important to remember that the rationale underlying resort to privilege or privacy rights is diametrically opposed to that underlying most ordinary evidentiary rules of exclusion. Privilege and privacy interests would exclude evidence despite the fact that such evidence might further the truth-seeking process. On the other hand, ordinary rules of exclusion are generally motivated by the desire to further the truth-seeking process, in that they tend to exclude evidence which might be unreliable, which might mislead or prejudice the trier of fact, or which might otherwise prejudice the fairness of the trial.”

(R. v. O'Connor, [1995] 4 S.C.R. 411, para 147)

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## Privilege

- Statutory
- Class, *Prima Facie*, Common Law
- Case-by-case

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## Wigmore Test

1. the communications must originate in a confidence that they will not be disclosed.
2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. the relation must be one which in the opinion of the community ought to be sedulously fostered.
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.

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If research participant confidentiality is to be protected *when it is most in danger*, universities need:

- a **policy**, and
- a **plan**

**Almost no one has either**

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December 19, 2012 – Letter: Rock to Turk

“The University of Ottawa recognizes its role pursuant to the Tri-Council Policy Statement on Research Involving Human Subjects in safeguarding entrusted information. However, the University does not consider that its role extends to the payment of legal costs if researchers decide to challenge the seizure of research records in the context of criminal proceedings. Consequently, the University will not assume responsibility for payment of the ongoing legal costs in this matter.”

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### **Lessons**

- Ensure awareness of issue among researchers
- Supportive REB
- Clear commitment by university administration – including sorting out their differences ahead of time
- Strong working relationship and respect between administration & REB
- Plan (detailed) for what to do:
  - legal team (not in-house university lawyers)
  - financial resources
  - emotional and academic support for researchers

**If you wait till you have a case, it is too late**

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If, after this session, you have questions, want more detail or references, or want to talk about the issues, please let me know.

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