

Youth Criminal Justice Act – Confidentiality For SOR-RL Users Serious Occurrence Reporting – Residential Licensing

Learning Objectives

Welcome to the Confidentiality e-learning module.

After completing this module, you will be able to:

- Understand the publication, collection, maintenance, disclosure, and access to records provisions in the Youth Criminal Justice Act (YCJA).
- Identify the policies and procedures of the Youth Justice Division, specific to the identification of a young person and the collection and maintenance of records.
- Better understand the confidentiality provisions in provincial legislation, including FIPPA and Part X of the CYFSA, in relation to the YCJA.
- Understand the Duty to Report, as it relates to confidentiality provisions in the YCJA.

Definitions of Terms (YCJA)

Record

“includes any thing containing information, regardless of its physical form or characteristics... that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act.”

Publication

“the communication of information by making it known or accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means.”

Disclosure

“the communication of information other than by way of publication”.

Youth Criminal Act Declaration of Principle, Section 3 (YCJA)

The Declaration of Principle (Subparagraph 3 (1) (b) (iii)) of the YCJA states that the criminal justice system for young persons must emphasize “enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.”

Youth Criminal Justice Act Part 6 – Publication, Records and Information

Subject to specific provisions of the Youth Criminal Justice Act, no person is to publish the name of a young person, or any information related to a young person, if it would identify the young person as being dealt with under the Youth Criminal Justice Act.

It is important to recognize that an individual's name is not the only information that can be used to identify them. Gender, age and address, are a few examples of information that can be combined to identify an individual. It is important to consider that while you may not be able to identify the individual with that information, others could, given additional knowledge or information they may have.

Please refer to the *Privacy Considerations Training* on the SOR-RL web portal for further privacy and personal information (pg. 10-13).

The Youth Criminal Justice Act also places:

Limitations on the publication of information about witnesses or victims of youth crime who are under the age of 18 years, and

Limitations on the access to, and disclosure of, information and records about young persons.

Publication Under Part 6 of the YCJA

The Act also contains two provisions in which a young person may publish information that would identify them as having been dealt with under the Act:

- After attaining the age of 18, provided they are not in custody pursuant to the Act at the time of publication.
- On application a Judge may permit a young person to publish identifying information about themselves if the court is satisfied it would not be contrary to the young person's best interests or the public interest.

Section 111 of the YCJA prohibits the publication of identifying information about a victim and/or witness under the age of 18.

Information identifying a young victim, or a witness may be published under the following circumstances:

- By the child or young person after attaining the age of 18 years, or before that age with the parent/guardian's consent.
- The parent/guardian of the young victim or witness may publish information about their child if the child is deceased, and

- On application a Judge may permit a young victim or witness to publish identifying information about themselves if the court is satisfied it would not be contrary to the young person's best interests or the public.

Section 110 of the YCJA sets out the overall prohibition on publishing the name or other information related to a young person if it would identify the young person as being dealt with under the YCJA.

Section 110 also sets out the exceptions to the general prohibition.

Exceptions for Prohibited Publication

The YCJA has exceptions from this prohibition under the following circumstances:

- Where information relates to a young person who has received an adult sentence under the YCJA.
- If a youth receives a youth sentence for a violent offence, as defined in the YCJA, the publication may be lifted if the court determines, considering the purpose and principles in sections 3 and 38 (for example, impact on rehabilitation, proportionality and diminished moral blame worthiness) that:
 - the young person poses a significant risk of committing another violent offence
 - the lifting of the ban is necessary to protect the public against that risk
- Where the publication of information is during the administration of justice (for example, in court), if it is not the purpose of the publication to make information known in the community.
- On application by a Peace Officer, a Youth Justice Court Judge can permit publication for a limited time (five days) of information identifying a young person who has committed or allegedly committed an indictable offence if the Judge is satisfied that:
 - there is reason to believe the young person is a danger to others, and the publication is necessary to assist in apprehending the young person.

Unauthorized Publication, Access or Disclosure

It is important for Youth Justice Division (YJD) ministry staff and service providers to understand and comply with the confidentiality provisions of Part 6 of the YCJA. Violating any part of it is a criminal offence under section 138 and carries a maximum sentence of two years in jail.

Section 138 of the YCJA identifies the following provisions in the YCJA and the YOA that, if contravened, would constitute an offence:

- Identity of young person not to be published (YCJA s.110(1))
- Identity of victim or witness not to be published (YCJA s.111(1))
- No access to records unless authorized (YCJA s.118(1))
- Disposal of R.C.M.P. records (YCJA s.128(3))

- No subsequent disclosure (YCJA s.129; YOA s.1.12)
- Identity not to be published (YOA s.38(1))
- No subsequent disclosure by school (YOA s.1.14)
- Information to be kept separate (YOA s.1.15)
- Destruction of records (YOA s.45(2))
- Prohibition against disclosure (YOA s.46(1))

Note that section 163 of the YCJA indicates that sections 114-129 of the YCJA apply to records kept under the YOA.

Records Under the Youth Criminal Justice Act

When we discuss records, we must consider four aspects:

- Collection of records and information.
- Maintenance of records.
- Access to a young person's records.
- Disclosure of information in a record.

The Youth Justice Services Manual (YJSM) provides policies, standards and procedures for YJD ministry staff and service providers regarding confidentiality requirements. These are located in the following sections of the YJSM: Contents Applicable to All Service Providers, Probation and Direct Operated Custody / Detention Policy and Procedures.

Collection and Maintenance of Records & Information

Section 116 sets out the authority for the ministry and service providers to keep youth records. Specifically, subsection 116 (1) of the YCJA states “a department or an agency of any government in Canada, may keep records containing information obtained by the department or agency

- (b) for use in proceedings against a young person under the Act;
- (c) for the purpose of administering a youth sentence or an order of the youth justice court;
- (d) for the purpose of considering whether to use extrajudicial measures against the young person
- (e) as a result of the use of extrajudicial measures to deal with a young person.

Subsection 116 (2) of the YCJA states “a person or organization may keep records containing information obtained by the person or organization

- (a) as a result of the use of extrajudicial measures to deal with a young person;
- (b) for the purpose of administering or participating in the administration of a youth sentence.

Access to Records

- All YJD ministry staff and service providers are required to comply with the provisions of the YCJA regarding a young person's information and records.
- No access or disclosure unless it is authorized under the Act.
- No subsequent disclosure of disclosed information or records unless authorized under the Act.
- Sections 118-129 of the YCJA do not apply to records kept when an adult sentence under the YCJA has been imposed on a young person.
- Sections 118-129 of the Youth Criminal Justice Act sets out the rules as to who may have access to different records.
- Subsection 119(1) of the YCJA states that, subject to exceptions for some records, a person listed may be given access to records that are kept under section 116 by the government or an organization.

Access to Record by Young Person

Paragraph 119(1)(a) of the YCJA permits a young person to have access to their own records. In addition, section 124 of the YCJA indicates that a young person may have access to their own records at any time.

If the person requesting the record is the young person, there are specific policies and procedures to follow.

A decision respecting whether to release the young person's Youth Criminal Justice Act (YCJA) record(s) shall be considered on a case by case basis and shall meet the relevant requirements of the YCJA.

Access to Young Person's Record by Others

YJD ministry staff and service providers shall only provide access to a young person's record or disclose information in that record in circumstances where access or disclosure is authorized under the relevant provisions of the Youth Criminal Justice Act (YCJA). Each decision is considered on an individual basis and must minimally meet the relevant requirements of the YCJA.

Additional Disclosure of Information

Subsection 125(6) of the YCJA states the provincial director, a youth worker, the Attorney General, a peace officer or any other person engaged in the provision of services to young persons may disclose to any professional or other person engaged in the supervision or care of a young person – including a representative of any school board or school or any other educational or training institution – any information contained in a record kept under sections 114 – 116 if the disclosure is necessary to

- Ensure compliance by the young person with an authorization under section 91 (reintegration leave) of the YCJA or an order of the Youth Justice Court;
- Ensure the safety of staff, students or other persons; or
- Facilitate the rehabilitation of the young person.

A person to whom information is disclosed under this section must keep the information separate and confidential and destroy the information when it is no longer required. [see subsection 125(7)]

Other Provincial Privacy Legislation

Part X of the Child, Youth and Family Services Act, 2017 (CYFSA)

Part X of the Child, Youth and Family Services Act, 2017 is scheduled to come into force on January 1, 2020 and will provide new privacy rights for children and youth to access their personal information from CYFSA service providers

- Part X will also set rules for how CYFSA service providers can collect, use and disclose personal information of individuals (e.g. with limited exceptions, service providers must obtain consent to collect, use or disclose personal information). Service providers must also take steps to safeguard personal information.
- Clarifies authority for MCCSS to collect, use and disclose individual personal information to improve service system planning and better understand outcomes for children and their families.
- Establishes an oversight role for the Information and Privacy Commissioner over children and youth service providers (e.g. responding to individual privacy complaints and conducting reviews of service provider information practices).

Freedom of Information and Protection of Privacy Act (FIPPA)

FIPPA provides individuals with a right of access to certain records and personal information under the custody or control of Ontario government ministries and government agencies. There are two main purposes of the FIPPA:

- To provide a right of access to information.
 - The principles are:
 - information should be available to the public
 - necessary exemptions from the right of access should be limited and specific, and
 - decisions on the disclosure of information should be reviewed independently of ministries and government agencies.
- To protect the privacy of individuals with respect to personal information.

The confidentiality provisions of the YCJA take precedence over any provincial legislation, including FIPPA or Part X of the CYFSA, when the information or records are subject to the YCJA.

Consent Forms

There are no provisions in the Youth Criminal Justice Act that permit a young person to give consent for disclosure of their YCJA related information. If the YCJA does not permit access to a young person's records or disclosure of information in those records, then a young person cannot consent to the access to or disclosure of those records or information.

Timelines and Time Limits

Timelines for Access

After having determined that a person is authorized under subsection 119(1) (a-s) of the YCJA to have access to a record, it needs to be determined whether the disclosure of a record is within the access period.

Section 128 of the YCJA prohibits the use of a record after the time for access to that record has expired and no access to the record can be given without a court order under section 123 of the YCJA.

Time Limits for Access & Disclosure

Subsection 119(2) of the Youth Criminal Justice Act sets out the time limits within which access and disclosure are permitted. The time periods for access to the records differ according to the way the young person was dealt with by the court and by the type of offence.

Please review the access chart by clicking [this link](#). This chart outlines the various access periods outlined in the Youth Criminal Justice Act.

Extensions to Access Periods

Subsection 119 (2) of the YCJA outlines the period of access for youth sentences. If a youth commits a subsequent offence during the access period, the access period extends for as long as the subsequent record is accessible.

Where, before the expiration of the time periods above relating to summary conviction or indictable offences, the young person is convicted of a subsequent offence committed when they are an adult, the records may be used or disclosed as would any adult record according to subsection 119(9).

Exceptions to Timelines

- A young person and their counsel may have access to the record at any time.
- A Youth Justice Court Judge may, on application by a person, after the end of the applicable access period, order that the person be given access to all or part of a record under section 123.
- If the youth record for summary or indictable offence is still accessible under s. 119(2) of the YCJA and the young person is convicted of an offence committed when they are an adult, YCJA provisions no longer apply to that record. The youth record becomes part of the adult record.

“Need to Know” Basis

If access to or disclosure is authorized and within the period of access, YJD ministry staff and service providers exercise professional discretion on a case-by-case decision as to how much information should be disclosed. “Need to Know” includes a consideration of the reason(s), scope and nature of the request for information (e.g. to administer a sentence, provide a service/program, carry out a specific duty, assist in rehabilitation, fulfil responsibilities to victims).

Child Protection

When a YJD ministry staff or service provider have reasonable grounds to suspect a child may be in need of protection, as set out at subsection 125(1) of the Child, Youth and Family Services Act, 2017, they must report their suspicion to a children’s aid society even if the information would normally be considered confidential or privileged.

- Under the Youth Criminal Justice Act, subparagraph 119 (1)(n)(ii), YJD ministry staff or service provider may provide youth records or information to a person engaged in a child welfare investigation.

Test Your Knowledge

When YJD ministry staff and service providers receive a request to disclose a young person's records or information, staff shall: (Consider all that may apply)

- A) Review the relevant YCJA section (eg: 119 (1), 125(6)) to determine if disclosure is authorized.
- B) If disclosure is authorized, determine if the youth record is within the access period as outlined in the YCJA subsection 119 (2).
- C) If disclosure is authorized, apply “Need to Know” Basis using professional discretion on how much information to disclose.
- D) Review the Youth Justice Services Manual policies, standards and procedures applicable to the disclosure of a young person’s record.

The correct answer is all the above options.

Summary & Conclusion

Congratulations - this concludes the confidentiality module.

In this course we covered:

- The Declaration of Principle with respect to the enhanced procedural protection for young persons, including their right to privacy
- Definitions of record, disclosure and publication
- Purpose of Part 6 of the Youth Criminal Justice Act
- Prohibition on publication of a young person's information
- Offence information for unauthorized disclosure
- Confidentiality provisions in provincial legislation, including FIPPA and Part X of the CYFSA
- Policy in the Youth Justice Services Manual on collection, maintenance, publication, disclosure and access to youth information
- The Access to Records provisions of the Youth Criminal Justice Act.
- The timelines for access to information

Appendix (Tools and Resources)

- [SOR-RL Training Web Portal](#)
- Youth Justice Services Manual
- [Youth Criminal Justice Act](#)
- [Child, Youth and Family Services Act, 2017](#)
- [Freedom of Information and Protection of Privacy Act](#)