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The letter below was sent by e-mail to ethics@sshrc.ca, therese.degroot@sshrc.ca, sectr@nserc.ca, office@ncehr-cnerh.org, and cbeauvais@ncehr-cnerh.org on 6 February 2000.

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**To:** The Tri-Council and NCEHR

**From:** Ted Palys, Ph.D., and John Lowman, Ph.D., Simon Fraser University School of Criminology

**Subject:** Issues Regarding the Ethics and Law of Confidentiality

**Date:** 6 February 2000

We recently visited the Tri-Council "FAQ" page regarding the *Policy Statement* and noticed the following:

**Q:** I wish to study street gangs, and with the approval of my local REB, plan to promise participants that their response to my questionnaire will be rigorously anonymous. Only I would have the key that could put names to the questionnaires. If I am subpoenaed by the local crown prosecutor who is demanding the personal response of each interviewee, should the university or REB defend me?

**A:** Something to consider from the outset of your research is whether it is possible for you to construct a questionnaire in which neither you nor anybody else can retrieve the answers of particular individuals.

Failing this, a first step in conducting your study would be to inquire about the policy of your own institution regarding legal assistance and the payment of fees for such assistance, in case individual response records are subpoenaed. If your REB has approved your proposal, the university should normally defend you, although the question of costs may have to be negotiated if there is no clear university policy. Failure to do so could seriously undermine the credibility of the REB. Since you may win or lose your case, even if your university does provide legal counsel to argue that the subpoena is inappropriate, you should ensure that the gang members know in advance that the records may be subpoenaed and ultimately handed over to a third party.

We find the second paragraph of this response highly problematic both in what it assumes about law and in the "ethics" it appears to advocate.

With respect to law, the proper response to this question would be that the scenario the questioner outlines — the Crown using a subpoena — is difficult to envisage. Any prosecutor familiar with the Canadian law of privilege would surely not bother to subpoena the researcher, as they would know that no judge would order disclosure of the information for a "fishing expedition." The scenario envisaged did happen in the US because of their grand jury system. But we do not have grand juries here. In Canada, the Supreme Court has indicated it will not tolerate "fishing expeditions" when a claim of privilege — which we assume the researcher would invoke — is at stake.

With respect to ethics, the second paragraph of the response appears to suggest that the Tri-Council *Policy Statement* subjugates ethics to law, and that the researcher is expected to hand the information over to a court if ordered. We cannot believe this is the intention. For one thing, it would place the Tri-Council *Policy Statement* in direct opposition to many disciplinary ethics

codes that encourage a primary allegiance to ethics, not law, in those rare instance when the two conflict. Several social science ethics codes explicitly recognize the ethical right of researchers to make that choice (see Appendix 1).

These issues are new to Canada. After searching for two years, we know of only one case of a researcher ever being subpoenaed to provide confidential research information and threatened with contempt of court if he did not. He successfully invoked a claim of "privilege" using the Wigmore criteria. We cannot find an instance of any Canadian researcher being "required" by a court to provide confidential research information that violated subject anonymity. Is the Tri-Council suggesting that our allegiance to research participants and commitment to academic freedom should be discarded because of a theoretical risk that has never materialized?

In the US, in contrast, these issues have been addressed over the last thirty years. There was a time, particularly during the Nixon years, when zealous prosecutors used grand jury subpoenas in an effort to conscript researchers as agents of the state, but US academics would have none of it. A few even went to jail to ensure promises of confidentiality would be maintained, because they realized that a promise that might or might not be kept was no promise at all, and that many research participants and key segments of the research enterprise would be lost if confidentiality were to be limited.

They also correctly saw these as core academic freedom issues. The integrity of the research enterprise requires that researchers maintain independence from the state, particularly (but not exclusively) in a discipline such as criminology, where analysis of law and justice issues require independence from the system to study it effectively. As the Tri-Council *Policy Statement* says, the research enterprise enriches our understanding of all aspects of society, and contributes to the development of effective social policy. It would be ethically inappropriate to do research on sensitive topics (not only crime, but also sexual behaviour, financial records, medical conditions, other "private" topics) without an unqualified guarantee of confidentiality, as this would involve knowingly exposing to harm individuals who voluntarily provide knowledge.

The US government agreed with these views, and the development of "confidentiality certificates" and "privacy certificates" was the result. In those cases that have been raised in US courts (a 1996 special volume of *Law and Contemporary Problems* on court-ordered disclosure identified about twenty such cases) the courts have always protected the identity of research subjects. We cannot find as much as ONE example of a research participant ever being harmed by a court-ordered violation of confidentiality, and would appreciate the Tri-Council informing us if it knows of such a case. US courts have refused to order the names of research participants be disclosed.

We cannot believe that the Tri-Council would subjugate ethics to law, thereby making the Policy Statement one of the biggest threats to academic freedom this country has seen.

We have engaged in research on the ethics and law of confidentiality and privilege for two years and recently completed a paper outlining our ethical position (Palys and Lowman, "Ethical and Legal Strategies for Protecting Confidential Research Information" at <http://www.sfu.ca/~palys/Strategies.pdf>; a copy is attached). You will see that our interpretation of the Tri-Council *Policy Statement* is that it does not subjugate ethics to law. The paper is actually a penultimate draft of an article we intend to submit to the *Canadian Journal of Law and Society*. We invite you to read it and welcome your comments. If we have interpreted the Tri-Council incorrectly, please advise us as soon as possible, as we would need to change the focus of the paper to publicize the threat to academic freedom posed by the Tri-Council.

As FAQs are listed anonymously, we do not know who posed the question or answered it. We request those responsible for the FAQ page to forward our observations to those parties and for the Tri-Council to reconsider its response.

Sincerely,  
Ted Palys and John Lowman  
SFU School of Criminology

# Appendix 1

## Social Science Ethics Codes Regarding Conflicts Between Ethics and Law

### **Tri-Council Policy Statement (Sections F and 3).**

"Information that is disclosed in the context of a professional or research relationship must be held confidential. Thus, when a research subject confides personal information to a researcher, the researcher has a duty not to share the information with others without the subject's free and informed consent" (Section 3)... "Legal and ethical approaches may lead to different conclusions" (Section F).

### **Canadian Psychological Association Code of Ethics (Sections iv.15-16)**

"Abide by the laws of the society in which they work. If those laws seriously conflict with the ethical principles contained herein, psychologists would do whatever they could to uphold the ethical principles. If upholding the ethical principles could result in serious personal consequences (e.g., jail or physical harm), decision for final action would be considered a matter of personal conscience.

Consult with colleagues, if faced with an apparent conflict between keeping a law and following an ethical principle, unless in an emergency, and seek consensus as to the most ethical course of action and the most responsible, knowledgeable, effective, and respectful way to carry it out."

### **American Political Science Association Code of Ethics (Section 6.2)**

"[S]cholars also have a professional duty not to divulge the identity of confidential sources of information or data developed in the course of research, whether to governmental or non-governmental officials or bodies, even though in the present state of American law they run the risk of suffering an applicable penalty."

### **American Sociological Association Code of Ethics (Section 11)**

"Confidential information provided by research participants must be treated as such by sociologists, even when this information enjoys no legal protection or privilege."

### **American Anthropological Association Statements on Ethics (Section 1(c))**

"Informants have a right to remain anonymous. This right should be respected both where it has been promised explicitly and where no clear understanding to the contrary has been reached."

### **American Society of Criminology Draft Code (Section 19)**

"Confidential information provided by research participants must be treated as such by criminologists, even when this information enjoys no legal protection or privilege and legal force is applied."