

## Researcher and Data Confidentiality

The researcher is bound by the promise of confidentiality and anonymity even if they learn about criminal activity. The primary role of research ethics is to ensure that subjects are not harmed by their participation in research. When subjects divulge information about crime, it is the researcher's ethical responsibility to ensure that the information cannot be used against them. Researchers of human subjects are ethically obligated to maintain participant confidentiality, and this requirement is often explicitly stated in profession-specific ethics codes and in the federal regulations. However, courts generally have not recognized researchers as having a researcher-participant privilege, which might offer similar protection as the doctor-patient privilege. Thus, the legal interests of others can threaten researchers' promises of confidentiality if they seek access to the data through subpoena.

Thus, there might be a potential conflict between the law and the ethical requirements of confidentiality in the following circumstances:

1. When researchers learn about certain crimes and are statutorily obliged to report them (i.e., mandatory reporting laws that do not exempt researchers; these vary by jurisdiction, but may include, for example, elder abuse, child abuse, and/or spousal assault).
2. When researchers learn about potential future crime and may be held liable for harm to third parties they could have prevented.
3. When non-governmental third parties subpoena researchers to testify about issues arising in high stakes litigation.
4. When prosecutors, grand juries, congressional committees and various public bodies subpoena researchers to testify about crimes and/or other offenses research participants may have revealed to the researcher. Coroners also can subpoena researchers who they think might have information relevant to an inquest.

The first two are situations where the researcher's violation of confidentiality would be a matter of their own initiative, independent of compulsion. In contrast, subpoenas create the threat of compelled revelation after the fact.

THUS,

- I. If the research is NOT about collecting data about criminal activity, the researcher should:
  1. Be careful about obtaining information that is not directly necessary for the research project
  2. Be careful about recording information which is not relevant to the research project (in particular, it is desirable that any recordings be destroyed at the end of the study)
  3. Protect the confidentiality of participants by ensuring identities are not ascertainable whenever possible.
  
- II. If the research is about collecting data about criminal activity, the consent form should include the following paragraph:

We will also ask you about [insert type of activity, e.g. crime, your use of drugs]. We will not share that information without your consent, unless we are required by law. For example, we may have to share your information if we are called as a witness in court.

[Include if applicable] Please don't tell us any details about events or activities such as [insert appropriate example/s—e.g. crimes that you have not been charged with or you have not been to court about]. Please don't tell us things like names, specific dates or specific places of illegal activities.

There are some additional steps you should take in order to protect the confidentiality of research participants and their data.

For example,

1. Whenever possible, collect data on sensitive information, such as substance abuse, other criminal activity, or sexual behaviors, through anonymous surveys, thus ensuring that the information cannot be linked back to an individual.
2. If data needs to be linked, researchers may code the data so that it is not immediately identifiable. In such cases, the researchers typically limit access to the key of the coding system and take steps to secure the data through physical means (e.g., locked cabinets) or electronic means (e.g., password protection). The researchers also will often destroy the key once it is no longer needed as an added protection.
3. If data to be collected is particularly sensitive, take steps to obtain a "Certificate of Confidentiality" through the National Institutes of Health (NIH). Be aware, however, that the legal protection of such certificates is not absolute.

Researchers should determine at the outset whether they can obtain the necessary data free from of any guarantee of confidentiality. If not, they should document the reasons requiring confidentiality. In some cases, confidentiality may be essential to protect data sources from an invasion of privacy, from embarrassment or distress, or from criminal prosecution, tax audits or other government investigations, as well as from litigation by others.

Researchers often seek protection from liability by adding a proviso that confidential data will not be disclosed except as required by law. Such a proviso may alert the source to the possibility of compelled disclosure and may strengthen the researchers' defense against a claim of liability premised in contract.