

'You've been served': Responding to a subpoena

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Requirements and processes relating to subpoena's vary greatly according to the jurisdiction and type of Court e.g. Civil, Criminal, Children's or Family Courts.

The information provided here may not apply to your specific situation! Therefore, it is critical that in every instance, you seek independent and specialist legal advice. If applicable, follow your organisation's policy and procedure around responding to a subpoena.

It is always advisable to consult the issuing Court to clarify your obligations when responding to a subpoena.

Links to further information on the structure, function and proceedings of the four principal Courts of Australia (High Court of Australia, Federal Court, Family Court, and Federal Circuit Court) can be found here <http://www.ag.gov.au/legalsystem/courts/Pages/default.aspx>. This provides general guidance and does not act as a substitute for specific legal advice with regard to your circumstances.

State and territory courts fall within the responsibilities of the relevant state or territory Attorney-General or Minister for Justice.

What is a subpoena?

A subpoena is a legal document. It is a court order issued at the request of a party to a case who believes that a person, who is not otherwise involved in the legal issue, possesses relevant documents or information. A subpoena issued by a lower court, such as the Magistrates court may be called a 'summons' but in all other respects it will conform to the requirements of a subpoena. A subpoena compels a person to produce documents or give evidence in court proceedings.

There are three types of subpoena:

- a subpoena for production of documents (a written order requiring the person named to attend as directed by the order and produce a document or thing. Sometimes a, a court may excuse actual physical attendance at Court if all documents are lodged by a stipulated time set out in the subpoena.
- a subpoena to give evidence (a written order requiring the person named to attend as directed by the order as a witness to give evidence about what they saw or heard in a particular matter)
- a subpoena for production and evidence (written order requiring the person named to attend as directed by the order as a witness to give evidence and to produce a document or thing. Once documents/things have been produced to Court, parties need to seek permission from the Court to inspect the documents or things subpoenaed.

Do I have to respond to a subpoena?

Failure to comply/respond to a subpoena can lead to arrest and charge of contempt of court; however in specific circumstances there may be grounds to object. In deciding how to respond to the subpoena, where applicable, you should refer to organisational policy and procedure.

Objecting to a subpoena

If a party to a case objects to certain information being produced, the party will "raise objection" to subpoenaed information, usually by seeking a specific court hearing to determine the legitimacy and scope of a subpoena. The process to make an objection is usually set out in information provided with the subpoena. The process varies depending on which Court has issued the subpoena.

The person served with a subpoena may also object to disclosing documents required by the subpoena. It is important to ensure there are legitimate grounds to resist producing documents required under a subpoena. A court can order the party or person who has brought an unsuccessful objection to a subpoena to pay the legal costs of the party, who requested the Court to issue the subpoena, and has successfully resisted the objection to the subpoena.

When should I consider objecting to a subpoena?

You might consider objecting to a subpoena where:

- you do not have the documents requested in your possession
- records are under a different name
- If the subpoena does not comply with the relevant time limits (for example, subpoenas must be served at least 7 days before Court proceedings are due to occur).
- If the subpoena could be considered an abuse of process (for example to obtain documents not related to the legal issue in the Court proceeding).
- If it could be seen as oppressive (seeking numerous irrelevant documents in a short time frame).
- disclosure has the potential to cause harm or even danger to the client or to others
- Where the information being requested is very broad and non-specific
- Any other grounds of objection as allowed by the issuing court, or as advised by a legal representative or in keeping with organisational policy
- If records requested are confidential or highly sensitive or if the client has advised that they do not want the documents disclosed.

I think I have grounds to object to the subpoena. What should I do?

The grounds for objecting and the process for lodging an objection will vary according to the Court and / or jurisdiction. A list of Federal Courts and links to their sites can be found [here](#). State and territory courts fall within the responsibilities of the relevant state or territory Attorney General or Minister for Justice. A follow up call to the relevant court registry may assist to clarify enquiries.

Once you have submitted the objection, the Court may choose to examine the relevant documentation before a decision can be reached. The Court may:

- support the objection and prevent disclosure of documents
- partially support some of the objection but allow a partial disclosure of documents
- place limitations on the use and distribution of the information such that clients or others are

protected

- make other arrangements as per the processes of the relevant jurisdiction
- find a subpoena invalid and set it aside

If requested, do I have to submit the whole client file, even those parts that are irrelevant?

It may be illegal to remove or alter the contents of a file in any way even if you think the material is not relevant to the Court. You should comply with the subpoena, but object to irrelevant parts being disclosed rather than relying on your own judgement about what information is relevant and what isn't. Doing so may constitute a criminal offence. It is **always advisable** to check directly with the Court and clarify organisational policy and procedure, where applicable.

Can I provide the Court with a copy of relevant documentation, or do they need the originals?

The Court may require original documentation, in which case it is advisable to make a complete copy of the file prior to submitting to the Registry. Generally, photocopied documents will suffice unless specifically requested. Check directly with the Registry prior to the submission of any documentation.

It is not clear exactly what evidence or documentation is required. What should I do?

It is important to know exactly which records/documents you are being asked to provide as this:

- may have serious implications for the client
- may require disclosure of highly sensitive information about the client or others
- will ensure you have all the information necessary to meet your ethical obligations to your client/others
- will inform any grounds of objection you may have to the subpoena

If you are unsure of what evidence is required, you may be able to contact the legal representative of the issuing party as listed on the subpoena to request clarification in writing.

Social workers should be aware that in responding to subpoenas addressed to an organisation or service, rather than them as an individual, the most appropriate person to respond to the subpoena should be identified. In health settings, for example, this may mean forwarding the subpoena to a Medical Records Officer for follow up. An organisation should designate a senior employee to deal with any subpoenas to ensure a timely and consistent response.

If you do contact the relevant legal representative, it is critical that you do not disclose any client information in the course of your discussion. Your aim is simply to clarify the specific nature of the evidence sought by the Court.

Do I need to get the clients consent to share subpoenaed information?

Sections 5.2.3 Informed Consent and 5.2.4 Information Confidentiality / Privacy of the AASW [Code of Ethics](#) (2010) outline Social Worker responsibilities regarding the sharing of client information.

Accordingly, and if safe to do so, social workers should always aim to get written informed consent from a client or authorised representative before sharing any information. However, if a court compels you to produce information and you do not have any grounds of objection, or if a court overrules your objection, it is not a breach of confidentiality to then produce the documents required under a subpoena.

If the information relates to a child or young person you should be guided by relevant legislative requirements in your State (5.2.3 d).

If the information relates to a person who cannot grant informed consent, Social Workers will, with the client's permission where possible, obtain informed consent from a party empowered by the relevant State legislation (5.2.3 c).

Social workers should be cautious not to pressure clients into waiving confidentiality or that you do not incorrectly comment on relevance of information or how information will be used.

The client has not given consent for me to share information. What should I do?

If written consent is not given or it is not safe to obtain consent, and if there are no grounds to object to the subpoena, the Social Worker may be legally required to provide the Court with the requested evidence. However, this must be verified with the specific Court and according to the relevant legislation.

You should aim to inform the client when information must be shared without consent, unless by informing the client harm may be caused to the client or another party (5.2.4 f).

Your client can seek their own advice as to whether they wish to challenge the terms of the subpoena.

Where information is being shared without client consent, it may be advisable to make the Court aware that you have taken steps to fulfill your ethical obligations and that the information is being provided without client consent.

In addition, it is important that limits to confidentiality are always discussed with clients at the outset of the professional relationship, as per sections 5.2.4 (d) and (e) of the AASW [Code of Ethics](#) (2010).

If you do not have grounds for objection, but think that certain information contained in documents is sensitive, you can mark the specific information as sensitive and request that the Judge or Magistrate decide on limitations of disclosure of this information. A Court may rule that only the lawyers for a party can view the documents in question to determine relevance, before the actual party making the request can have access.

Requested documentation includes information about third parties. Is it acceptable to provide this to the Court?

A Social Worker has the same obligations to protect the confidentiality of third parties mentioned in relevant documentation (see 5.2.4 (a)). It is important to deal sensitively with information pertaining to third parties. Third parties may be able to object to some levels of production.

Unless directly relevant to the matter before the Court, you may consider pursuing avenues available to you to protect the confidentiality of such information. This may include, for example, lodging an objection.

Are some client records protected even if subpoenaed?

Yes

Some jurisdictions protect client records from production in court proceedings and the extent to which you can give evidence about them.

For example, all states and territories, except Queensland, have enacted legislation that provides some level of legal protection for counselling notes in criminal trials relating to sexual offences against adults. For more information on this, please see the following information provided by the Australian Institute of Family Studies:

<https://aifs.gov.au/publications/law-and-sexual-offences-against-adults-australia/protection-counselling-communications>

For more detailed information on the protections relating to counselling notes for sexual assault against adults criminal cases in each state and territory please see the following information from the Australian Law Reform Commission:

<http://www.alrc.gov.au/publications/27.%20Evidence%20in%20Sexual%20Assault%20Proceedings/sexual-assault-communications-privilege>

The above information should be treated as a guide, and not a definitive statement of the law applicable to every situation.

In any case, it is always advisable if unclear about the protection of records, to seek legal advice through appropriate organisational and/or legal channels.

If social workers/counsellors surrender notes when they should not, or surrender notes they have not been asked to surrender, they might be in breach of privacy law. Releasing confidential records without proper written authority to do so, may lead to a complaint or legal proceedings.

If you have any further questions, or would like to discuss an ethical considerations in more detail, please contact the Ethics and Practice Standards Consultation Service on 03 9320 1044 or ethicsconsult@asw.asn.au