

Laws about Private Communications Utah

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Question	Answer
What relationships qualify for privileged communications and how is "privilege" defined?	Confidential communications are afforded protection under Utah law. "Confidential communication" means information given to a sexual assault counselor by a victim and includes reports or working papers made in the course of the counseling relationship. Utah Code §§ 77-38-203 & 77-38-204. "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services. Utah Code §§ 77-38-403
Is the privilege qualified or absolute?	If the survivor is an adult, the statutory privilege between a sexual assault counsel and the victim is absolute, unless the counselor has an obligation under Title 80, Chapter 2, Child Welfare Services, or Title 80, Chapter 2a, Removal and Protective Custody of a Child, to report information transmitted in the confidential communication. Utah Code § 77-38-204(4). Communications between criminal justice system victim advocate and victim • A criminal justice system victim advocate shall provide the confidential communication to a prosecutor who is responsible for determining whether the confidential communication is exculpatory or goes to the credibility of a witness. • A criminal justice system victim advocate may provide the confidential communication to a parent or guardian of a victim if the victim is a minor and the parent or guardian is not the accused, or a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, or member of a multidisciplinary team assembled by a Children's Justice Center or a law enforcement agency for the purpose of providing advocacy services. • If a prosecutor determines that the confidential communication is exculpatory or goes to the credibility of a witness, after the court notifies the victim and the defense attorney of the opportunity to be heard at an in camera review, the prosecutor will present the confidential communication to the victim, defense attorney, and the court for in camera review in accordance with the Utah Rules of Evidence. • A criminal justice system victim advocate, as soon as reasonably possible, shall notify a victim, or a parent or guardian of the victim if the victim is a minor and the parent or guardian is not the accused: • whether a confidential communication with the criminal justice system victim advocate will be disclosed to a prosecutor and whether a statement relating to the incident that forms the basis for criminal charges or goes to the credibility of a witness will also be disclosed to the defense attorney; and

	of the name, location, and contact information of one or more nongovernment organization advocacy services providers specializing in the victim's service needs, when a nongovernment organization advocacy services provider exists and is known to the criminal justice system victim advocate. Utah Code § 77-38-405
Who holds the privilege and has the right to waive it? What are the standards for waiver of the privilege?	Holder of Privilege: • The victim holds the privilege, so long as the victim is not a minor. However, while the victim holds the privilege, waiving it requires input from the sexual assault counselor (see waiver of privilege below). • When the victim is a minor, the counselor may disclose confidential communications to the victim's parents or guardians if the counselor believes it is in the best interest of the victim (see exceptions to the privilege below). • For a victim that is a minor, the victim's parents or guardians hold the privilege and can consent to disclosure of a confidential communication to a third party based on representations made by the counselor that it is in the best interest of the minor victim to make such disclosure (again, while the victim's parents or guardians hold the privilege, waiving it requires input from the sexual assault counselor) (see waiver of privilege below). Waiver of Privilege: • There are three requirements before a victim herself or himself may waive the privilege: (1) the victim must be an adult; (2) the victim must give consent; and (3) the sexual assault counselor must believe the disclosure is necessary to accomplish the desired result of counseling. Utah Code § 77-38-204(3). • When the victim is a minor, and the counselor believes it is in the best interest of the victim to disclose the confidential communication to the victim's parents, the counselor can make that information available to the parents. Utah Code § 77-38-204(1). • When the victim is a minor, the parents or guardian of the victim may waive the privilege and consent to disclosure, but only if the sexual assault counselor has made representations that it is in the best interest of the victim to disclose the confidential communication. Utah Code § 77-38-204(2) • When the counselor has an obligation under Title 80, Chapter 2, Child Welfare Services, or Title 80, Chapter 2a, Removal and Protective Custody of a Child, to report information transmitted in the confidential communication. Utah Code § 77-38-204(4).
Are there any exceptions to the privilege?	The confidential communication between a victim and a sexual assault counselor is available to a third person only when: • the victim is a minor and the counselor believes it is in the best interest of the victim to disclose the confidential communication to the victim's parents or guardian; • the victim is a minor and the minor's parents or guardian have consented to disclosure of the confidential communication to a third party based upon representations made by the counselor that it is in the best interest of the minor victim to make such disclosure;

	• the victim is not a minor, has given consent, and the counselor believes the disclosure is necessary to accomplish the desired result of counseling; or • the counselor has an obligation under Title 62A, Chapter 4a, Child and Family Services, to report information transmitted in the confidential communication (see below). Utah Code § 77-38-204(1)-(4). If the victim is a minor and the sexual assault counselor has reason to believe that the victim is being or has been subjected to abuse or neglect, or observes that the victim is being subjected to circumstances which would reasonably result in abuse or neglect, the counselor must immediately notify the nearest peace officer or law enforcement agency. This requirement does not apply to a member of the clergy with regard to any confession made directly to him/her by the perpetrator while functioning in his/her ministerial capacity if the member of the clergy is, under canon law or church doctrine or practice, bound to maintain the confidentiality of the confession, but if the member of the clergy received the information from a source other than confession of the perpetrator, that member is required to report that information, and the member of the clergy may report a confession made by a perpetrator if the member of the clergy reasonably believes that a child is the subject of ongoing abuse or neglect. The reporting requirement also does not apply to an attorney or an individual employed by the attorney, gained from the representation of the client, unless the attorney is permitted to reveal the abuse or neglect to prevent reasonably certain death or substantial bodily harm. Utah Code §§ 77-38-204(4) and 80-2-602.
When and how may a judge review case documents in private?	The privilege is absolute for adult victims. As long as it is not waived and the victim is not a minor, then the trial court may never compel the release of confidential communications between the victim and the sexual assault counselor. The court may not even review the communications in private (i.e., in camera review is still prohibited) because the Utah Code does not provide for any exceptions allowing such a review. <i>State v. Gomez</i>, 2002 UT 120, 63 P.3d 72 (Utah 2002).
What other definitions are important to know?	Confidential Communication: • Information given to a sexual assault counselor by a victim; includes reports and working papers made in the course of the counseling relationship. Utah Code § 77-38-203(1). Rape Crisis and Services Center: • A nonprofit entity that assists victims of sexual assault and victims' families by offering sexual assault crisis intervention and counseling through a sexual assault counselor. Utah Code § 77-38-203(2). Sexual Assault Counselor: • An individual who is employed by or volunteers at a rape crisis and services center with at least 40 hours of training in counseling and assisting victims of sexual assault and who is under the supervision of the director (or designee) of a rape crisis and services center. Utah Code §

77-38-203(3).

Victim:

An individual who has experienced a sexual assault of whatever nature including incest and rape and requests counseling or assistance regarding the mental, physical, and emotional consequences of the sexual assault. Utah Code § 77-38-203(4).

Anything else I should know?

Utah Code § 53B–28–201 was amended in March 2017 to extend confidential communications protections to advocacy services at an institution of higher education in Utah (the “Confidential Communications for Institutional Advocacy Services Act”).

At an institution of higher education in Utah:

“Certified advocate” means an individual who:

- (a) is employed by or volunteers at a qualified institutional victim services provider;
- (b) has completed at least 40 hours of training in counseling and assisting victims of sexual harassment, sexual assault, rape, dating violence, domestic violence, or stalking; and
- (c) acts under the supervision of the director or director's designee of a qualified institutional victim services provider. Utah Code § 53B–28–201(1).

“Confidential communication” (a) means information that is communicated by a victim, in the course of the victim seeking an institutional advocacy service, to:

- (i) a certified advocate;
- (ii) a qualified institutional victim services provider;
- (iii) a person reasonably necessary for the transmission of the information;
- (iv) an individual who is present at the time the information is transmitted for the purpose of furthering the victim's interests; or
- (v) another individual, in the context of group counseling at a qualified institutional victim services provider.

and (b) includes a record that is created or maintained as a result of the confidential communication described above. Utah Code § 53B–28–201(2).

“Institutional advocacy service” means a safety planning, counseling, psychological, support, advocacy, medical, or legal service that:

(a) addresses issues involving:

(i) sexual harassment;

(ii) sexual assault;

(iii) rape;

(iv) domestic violence;

(v) dating violence; or

(vi) stalking; and

(b) is provided by a qualified institutional victim services provider. Utah Code § 53B–28–201(3).

“Qualified institutional victim services provider” (a) means an organization that:

(i) is affiliated with an institution;

(ii) employs or provides volunteer opportunities for certified advocates;

(iii) provides an institutional advocacy service to victims or families of victims; and

(iv) is designated by the affiliated institution as a qualified institutional victim services provider.

and (b) may include an institution's:

(i) sexual assault center;

(ii) victim advocacy center;

(iii) women's center;

(iv) health center; or

(v) counseling service center. Utah Code § 53B–28–201(4).

“Record” means a book, letter, document, paper, map, plan, photograph, film, card, tape, recording, electronic data, or other documentary material regardless of physical form or characteristics. Utah Code § 53B–28–201(5).

“Victim” means:

	• an individual who seeks an institutional advocacy service. Utah Code § 53B–28–201(6) • a victim of a crime as defined in Section 77-38-2; • an individual who is a victim of domestic violence as defined in Section 77-36-1; or • an individual who is a victim of dating violence as defined in Section 78B-7-102. Utah Code § 77-38-403 The definitions provided in the Confidential Communications for Institutional Advocacy Services Act are more expansive than the Utah Code, since Utah Code § 77-38-203 only includes confidential communications and does not expressly include records.
Statutory citation(s):	Utah Code § 77-38-201 Utah Code § 77-38-203 Utah Code § 77-38-204 Utah Code § 77-38-403 Utah Code § 80-2-602 Utah Code § 53B-28-201