

Laws about Private Communications Washington

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Question	Answer
What relationships qualify for privileged communications and how is "privilege" defined?	Confidentiality between victim and sexual assault advocate A sexual assault advocate may not, without consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate. Wash. Rev. Code § 5.60.060(7) Confidentiality between victim and domestic violence advocate A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate. Wash. Rev. Code § 5.60.060(8) Wash. Rev. Code § 70.125.030 and § 70.125.065 ("Victims of Sexual Assault Act") Records maintained by a community sexual assault program and underserved populations provider shall not be made available to any defense attorney as part of discovery in a sexual assault case. Wash. Rev. Code § 70.125.065
Is the privilege qualified or absolute?	Wash. Rev. Code § 5.60.060(7) Qualified by Statute. Wash. Rev. Code § 70.125.030 and § 70.125.065 ("Victims of Sexual Assault Act") Qualified by Statute.
Who holds the privilege and has the right to waive it? What are the standards for waiver of the privilege?	Wash. Rev. Code § 5.60.060(7) and § 5.60.060(8) Holder of Privilege: • The victim is the holder of the privilege. Wash. Rev. Code § 5.60.060(7) Waiver of Privilege: No procedure specified. Wash. Rev. Code § 70.125.030 and § 70.125.065 ("Victims of Sexual Assault Act") Holder of Privilege: Not specified. Waiver of Privilege: • <i>State v. Wilder</i>, (1974) 12 Wash. App. 296, 529 P.2d 1109 • Communications are not privileged under § 5.60.060 unless they are confidential; the

	presence of a third person defeats the confidentiality of such communications. • <i>State v. Martin</i> (1998) 91 Wash. App. 621, 959 P.2d 152 • Ordinarily, the presence of a third person overhearing a communication will vitiate and undermine the viability of a privilege. • <i>State v. Espinosa</i>, 733 P.2d 1010, 1012-13 (Wash. Ct. App. 1987) • The presence of an investigating police officer during an interview with a sexual assault victim did not waive the privilege established under this statute because the police officer's presence during the interview was not casual, and instead, it was the rape counselor who was present as observer during the officer's interview with the victim and the officer was a necessary party to the communication. • The presence of third persons during an interview with a sexual assault victim, when desired by the victim, does not necessarily waive the privilege.
Are there any exceptions to the privilege?	Wash. Rev. Code § 5.60.060(7) • A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. • Any sexual assault advocate participating in good faith in the disclosing of records and communications shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action. • Good faith of sexual assault advocate who disclosed the confidential communication will be presumed. Wash. Rev. Code § 5.60.060(8) • A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. • This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under Rev. Code § 26.44.030(1) or to disclose relevant records relating to a child as required by Wash. Rev. Code § 26.44.030(15) Wash. Rev. Code §§ 70.125.030 and 70.125.065 ("Victims of Sexual Assault Act") In Camera Review: Provided for by statute. • Records maintained by a community sexual assault program and underserved populations provider shall not be made available to any defense attorney as part of discovery in a sexual assault case unless: • A written pretrial motion is made by the defendant to the court stating that the defendant is

requesting discovery of the community sexual assault program or underserved populations provider records;

- The written motion is accompanied by an affidavit or affidavits setting forth specifically the reasons why the defendant is requesting discovery of the community sexual assault program or underserved populations provider records;
 - The court reviews the community sexual assault program or underserved populations provider records in camera (i.e. private review by the judge) to determine whether the community sexual assault program or underserved populations provider records are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records to the defendant; and
 - The court enters an order stating whether the records or any part of the records are discoverable and setting forth the basis for the court's findings. Wash. Rev. Code § 70.125.065(1)-(4)
- *State v. Espinosa*, 733 P.2d 1010, 1012 (Wash. Ct. App. 1987)
 - The trial court is not required to balance on the record the probative value of the rape crisis center's records against the victim's interest in the confidentiality of such records because such a rule would defeat the purpose of the statute by requiring the disclosure of information that is presumptively privileged.

Standard for In Camera Review:

- *State v. Kalakosky*, 852 P.2d 1064, 1077 (Wash. 1993)
 - Before a court will conduct an in camera review (i.e. private review by the judge) of records privileged under this statute, the defendant must make a particularized factual showing that such records are likely to contain material relevant to the defense and/or the failure to produce such records would impair the defendant's right of confrontation; the possibility of finding exculpatory material is insufficient to lift the privilege.
- *State v. Espinosa*, 733 P.2d 1010, 1011 (Wash. Ct. App. 1987)
 - When a privileged record contains nothing inconsistent with any evidence to which the defendant was given access or with the victim's trial testimony, disclosure of the privileged records is not required, even if intended to cross-examine or impeach the victim.
- *State v. Ahlfinger*, 749 P.2d 190, 194-95 (Wash. Ct. App. 1988)
 - Defendant will not gain access to rape crisis counseling notes simply because a witness for the prosecution used those notes to refresh his memory before testifying—the notes are still subject to the balancing analysis described above before disclosure can be compelled.

When and how may a judge review case documents in private?	Wash. Rev. Code § 5.60.060(7) Not provided by statute. In order to balance the interests of the privilege created by statute and a person's request for disclosure, criminal courts may use the in camera procedures of the Superior Court Criminal Rules of discovery (CrR 4.7(h)(6)) to consider whether there is material and disclosable evidence. <i>State v. Endres, 184 Wash. App. 1005 (2014)</i> Wash. Rev. Code §§ 70.125.030 and 70.125.065 (“Victims of Sexual Assault Act”) Provided for by statute. See section “Are there any exceptions to the privilege?” above addressing In Camera
What other definitions are important to know?	Confidential Communication: • No definition specified; statute prohibits examination of sexual assault advocate with respect to “any” communication between the victim and advocate without the victim’s consent. Wash. Rev. Code § 5.60.060(7) Sexual Assault Advocate: • An employee or volunteer from a community sexual assault program or underserved populations provider, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings. Wash. Rev. Code § 5.60.060(7)(a) Domestic violence advocate • An employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of children, youth, and families as defined in Wash. Rev. Code § 26.44.020. Wash. Rev. Code § 5.60.060(8)(a) Wash. Rev. Code §§ 70.125.030 and 70.125.065 (“Victims of Sexual Assault Act”)

Community Sexual Assault Program:

- A community-based social service agency that is qualified to provide and provides core services to victims of sexual assault. Wash. Rev. Code § 70.125.030(1)

Core Services:

- Services that are victim-centered community-based advocacy responses to alleviate the impact of sexual assault, as delineated in the Washington state sexual assault services plan of 1995 and its subsequent revisions. Wash. Rev. Code § 70.125.030(2)

Services for Underserved Populations:

- Culturally relevant victim-centered community-based advocacy responses to alleviate the impact of sexual assault, as delineated in the Washington state sexual assault services plan of 1995 and its subsequent revisions. Wash. Rev. Code § 70.125.030(6)

Specialized Services:

- Services intended to alleviate the impact of sexual assault, as delineated in the Washington state sexual assault services plan of 1995 and its subsequent revisions. Wash. Rev. Code § 70.125.030(8)

Sexual Assault: Means one or more of the following:

- Rape or rape of a child;
- Assault with intent to commit rape or rape of a child;
- Incest or indecent liberties;
- Child molestation;
- Sexual misconduct with a minor;
- Custodial sexual misconduct;
- Crimes with a sexual motivation;
- Sexual exploitation or commercial sex abuse of a minor;
- Promoting prostitution; or
- An attempt to commit any of the aforementioned offenses. Wash. Rev. Code § 70.125.030(7)

	Victim: Any person who suffers physical, emotional, financial, and psychological impact as a proximate result of a sexual assault. Wash. Rev. Code § 70.125.030(9)
Anything else I should know?	In addition to all other rights provided in law, a sexual assault survivor has the right to consult with a sexual assault survivor's advocate throughout the investigatory process and prosecution of the survivor's case, including during: any medical evidentiary examination at a medical facility; any interview by law enforcement officers, prosecuting attorneys, or defense attorneys; and court proceedings, except while providing testimony in a criminal trial, in which case the advocate may be present in the courtroom. Medical facilities, law enforcement officers, prosecuting attorneys, defense attorneys, courts and other applicable criminal justice agencies, including correctional facilities, are responsible for providing advocates access to facilities where necessary to fulfill the requirements under this subsection. The right in this subsection applies regardless of whether a survivor has waived the right in a previous examination or interview. Wash. Rev. Code § 70.125.110(1)(D)
Statutory citation(s):	- Wash. Rev. Code § 5.60.060(7) - Wash. Rev. Code § 5.60.060(8) - Wash. Rev. Code § 70.125.030 - Wash. Rev. Code § 70.125.065 - Wash. Rev. Code § 70.125.110