



Victim Confidentiality Considerations For Domestic Violence and Sexual Assault Programs When Responding to Rare or Emergency Situations

A wide range of situations can arise for programs providing services to victims of domestic violence, dating violence, sexual assault, or stalking. Given the complex and critical safety issues faced by victims, programs should have policies to address victim safety and confidentiality in unusual or emergency circumstances. Examples of special situations that might arise include: medical and other emergencies; instances where a victim/client (or the victim's child) commits a crime while accessing or using services; and, situations where a victim brings civil or criminal claims against another client or the agency. Programs/agencies should practice best confidentiality and safety practices in each special circumstance that arises. However, situations vary. This piece cannot address all special circumstances that will arise for programs and is not to be considered *legal advice*. When addressing these or other situations, a program should always obtain legal advice from an attorney who is familiar with all the confidentiality and privilege laws relevant to your program and the victims you serve.

What Programs Need To Know About Confidentiality:

First and foremost: be an advocate. Remember it's the survivor's information. The survivor retains the right to choose when, how and what personal information will be shared, or not shared, and with whom. Agencies and advocates are responsible for respecting and honoring the victim's wishes and safeguarding any of the survivor's information that they collect or hold.

Law and General Principles: Your program must know the law that governs confidentiality and any exceptions¹ to those laws.

Federally, the U.S. Violence Against Women Act² and the U.S. Family Violence Prevention and Services Act³ each have specific confidentiality protections that apply to many domestic violence and sexual assault programs. State/territorial/ tribal laws also may have various confidentiality provisions that apply to domestic violence and sexual assault advocates⁴.

In general:

- Your program/agency has a legal obligation to protect the survivor's personally identifiable information.
- Your program should not release any information about the victim/client unless you have the clearly informed, written and signed, reasonably time-limited consent of the client. This is best practice in any situation. The survivor gets to choose when, how and what personal information will be shared, or not shared, and with whom.
 - Programs may only share the specific information the client allows in the release.
- Even when state/territorial/tribal law or court mandate requires the program to disclose or release information about the client, the program may only share the minimum information necessary to meet the statutory or court mandate.
 - The program/agency is required to take steps to notify the victim of any disclosure and to continue taking steps to protect the victim's safety and privacy.



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- ☑ If your program is unsure how laws apply to a certain situation, you should consult with a local attorney or other experts. Confidentiality and privilege laws vary by jurisdiction, as do other laws that may affect an agency or individual staff person's response. Furthermore, a particular situation may require a closer analysis of the ways federal, state/territorial/tribal, and local law apply, which may require localized legal advice.

How Programs Can Respond:

These examples illustrate several ways a domestic violence or sexual assault program can protect victim confidentiality when responding to special circumstances such as: medical and other emergencies; instances where a victim/client (or the victim's child) commits a crime while accessing or using services; and, situations where a survivor brings claims against another client or the agency.

A. Medical Or Other Emergency Situations:

Programs should honor victim confidentiality to the greatest extent possible, even in an emergency situation. Programs can request emergency services for medical or other emergencies without revealing a survivor's/client's personally identifying information. For example:

- ☑ The program can call to request emergency medical services and still not allow unnecessary responders (people) into the program. The program is also not required to share the survivor's personally identifying information with a medical or law enforcement responder.
- ☑ The program can provide the emergency operator enough information to respond (e.g. location of the program and the general nature of the emergency) without giving out personally identifying information about a client. For example, the program can say "there is a middle-aged woman having chest pains", or, "there is an abuser attempting to enter the shelter and putting someone in immediate risk of bodily harm".
- ☑ The conscious survivor can choose what information s/he will or will not share with the medical or police responders when they arrive. The fact that the survivor has chosen not to share certain information with the responders is HER/HIS choice; it is not the program's right or obligation to "fill in the blanks."
- ☑ If the survivor is unconscious, this does not negate confidentiality between the program/agency and the survivor. Without an informed, written, reasonably time-limited release of information, program staff should report the facts that led them to request an emergency response without revealing personally identifying information about the client. (e.g., "She came into the room about 15 minutes ago; her skin color went gray, and she passed out.") Remember that emergency medical personnel are experienced with handling non-responsive patients, without needing to know the detailed backstory.
- ☑ If a perpetrator attempts to enter the agency, a call to 911 can alert the police to the description of the abuser, express concern for staff and resident safety, without providing the name or any information about the victim (or victim's children), or even whether the victim has ever received services from the program. An abuser may become dangerous to people at the agency regardless of whether your agency actually provided assistance to the victim.



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- Once the emergency situation has been resolved, emergency responders may still ask for follow-up. In the wake of an emergency situation, the agency must still get informed, written, reasonably time-limited consent from the victim for any release of personally identifying information to medical responders, law enforcement or others.

B. Crime Or Other Claim Against The Domestic Violence Or Sexual Assault Program:

Programs should honor victim confidentiality to the greatest extent possible, even if a crime (or potential crime) occurs at the domestic violence or sexual assault program, or, if a program participant (client) brings a lawsuit against the agency.

- If a current or former program participant (client) brings a lawsuit against a domestic violence or sexual assault program, make sure your program consults a lawyer. Some situations may evoke exceptions to confidentiality laws that apply to the program or individual staff. For example, if a client sues their attorney for malpractice, that client cannot then invoke full client privilege to prevent the attorney from defending him/herself in the lawsuit.
- If the current or former client sues an agency or commits a crime against the program, the program should assess the situation and may take appropriate legal steps.
 - However, the program is still obligated to limit the disclosure of information concerning the survivor to the minimum amount necessary to address the issue.
 - The program is also required to take steps to notify the victim of the disclosure and do what it can to protect the victim's privacy and safety.
- If a client commits an infraction against the agency/program itself, it is important to determine whether the incident truly rises to the level where police need to be involved or a civil lawsuit or criminal claim is really necessary. Sometimes clients damage or steal property. This can legally be viewed as a non-emergency criminal activity in which the domestic violence or sexual assault program has been "injured" (e.g., damage to property, stolen property). Sometimes, your insurance company may only cover the claim if a police report is filed. However, the program still needs to fully assess the impact on the victim's safety and confidentiality. The program still has legal confidentiality obligations and might decide not to take legal action in order to protect the confidentiality and safety of the victim (or the victim's children).
- Things to evaluate include:
 - How significant was the incident? Is it relatively minor? In other words, is it essentially the cost of doing business? For example, is it a case of a client taking small items (blankets, sheets) when leaving or causing incidental or relatively minor damage to their room or the shelter.
 - Can you change your practices so the incident is no longer technically a crime? For example, if you notice a trend where survivors sometimes need to take blankets or the alarm clock when they leave, consider getting additional clocks and blankets donated and tell victims they are welcome to take these items when they leave, if needed and helpful.
 - What was the intention and context? Was it an accident? Was the victim's child involved? Can the unusual incident be understood in the context of the abuse this person has experienced?



Victim Confidentiality Considerations For Domestic Violence and Sexual Assault Programs When Responding to Rare or Emergency Situations

- What is the cost of the damage? How will the harm to the program/agency compare with the potential harm to the victim if the agency decides to make a public report (criminal or civil)? Programs should assess the potential message that will spread across the community if the program files claims against a victim/survivor
 - Can the program find other ways to address the issue rather than taking action through a criminal or civil claim for the alleged harm? For example, could the program consider arranging restitution rather than initiating prosecution?
- If the program/agency determines that the harm rises to the level where law enforcement should be contacted or a civil action brought to protect the agency's interests, the program is still obligated to limit the disclosure of information concerning the survivor to the minimum amount necessary to accomplish the purpose, and the program is required to take steps to notify the victim of the disclosure and do what it can to protect her privacy

C. Crime Or Other Claim By One Survivor Against Another Survivor Using Program Services

Programs should honor victim confidentiality to the greatest extent possible, even in the event of a non-emergency criminal activity where a survivor claims to have been wronged by another survivor (e.g., property taken).

- Before involving outside authorities, such as the police, try to address the issue internally. Discuss options for resolution and the safety and confidentiality implications of each option with both parties.
- The survivor who claims to have been wronged by the other survivor may choose to contact law enforcement and report the alleged crime. If s/he makes that choice, here are some confidentiality implications:
 - The survivor who chooses to contact law enforcement may do so, but the program may not share any personally identifying or individual information about either the complaining survivor or the alleged wrong-doing survivor without an informed, written, and reasonably time-limited release signed by each survivor.
 - The survivor who chooses to contact law enforcement should be advised to go to the police station to make a report, rather than having law enforcement come to the domestic violence or sexual assault agency, which could implicate other survivors' confidentiality and privacy.
 - In the case where one survivor (most likely, the complaining survivor) chooses to sign an informed, written, reasonably time-limited release of information and the other survivor does not, the program must be extraordinarily vigilant to avoid revealing any information that is not subject to the specific terms of the release. Additionally, the program may not reveal any individual personally identifying information about the survivor who did not sign a release.

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Victim Confidentiality Considerations For Domestic Violence and Sexual Assault Programs When Responding to Rare or Emergency Situations

¹ Exceptions include court or statutory mandates which are generally defined by state law, and can include things such as reporting of suspected child abuse or neglect, or dependent adult abuse, or the reporting of threats made to hurt oneself or others. Confidentiality and privilege laws vary by jurisdiction, as do other laws that may affect an agency or individual staff person's response. Furthermore, a particular situation may require a closer analysis of the ways federal, state/territorial/tribal, and local law apply, which may require localized legal advice. The National Network to End Domestic Violence (NNEDV) is not providing legal advice to state/territorial/tribal coalitions or individual programs. This piece is not intended to be a substitute for local, legal advice from an attorney who is familiar with a particular jurisdiction's laws related to confidentiality and privilege of victim/victim advocate relationships. If you have any questions, please contact the NNEDV SafetyNet Project at phone: 202-543-5566 or email: SafetyNet@nnedv.org.

² Section 3 of the U.S. Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005) provides, in relevant part:

- “(A) IN GENERAL. In order to ensure the safety of adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking, and their families, grantees and subgrantees under this title shall protect the confidentiality and privacy of persons receiving services.*
- “(B) NONDISCLOSURE.—Subject to subparagraphs (C) and (D), grantees and subgrantees shall not —*
- “(i) disclose any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees’ and subgrantees’ programs; or*
 - “(ii) reveal individual client information without the informed, written, reasonably time-limited consent of the person (or in the case of an unemancipated minor, the minor and the parent or guardian or in the case of persons with disabilities, the guardian) about whom information is sought, whether for this program or any other Federal, State, tribal, or territorial grant program, except that consent for release may not be given by the abuser of the minor, person with disabilities, or the abuser of the other parent of the minor.*
- “(C) RELEASE.—If release of information described in subparagraph (B) is compelled by statutory or court mandate—*
- “(i) grantees and subgrantees shall make reasonable attempts to provide notice to victims affected by the disclosure of information; &*
 - “(ii) grantees and subgrantees shall take steps necessary to protect the privacy and safety of the persons affected by the release of the information.*
- “(D) INFORMATION SHARING.—Grantees and subgrantees may share—*
- “(i) nonpersonally identifying data in the aggregate regarding services to their clients and nonpersonally identifying demographic information in order to comply with Federal, State, tribal, or territorial reporting, evaluation, or data collection requirements;*
 - “(ii) court-generated information and law-enforcement generated information contained in secure, governmental registries for protection order enforcement purposes; and*
 - “(iii) law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.*

³ The specific language from the 2009 U.S. Family Violence Prevention and Services Act (FVPSA) grant guidance states:

The FVPSA statute requires that local domestic violence programs maintain confidentiality of records pertaining to any individual provided family violence prevention and treatment services (42 U.S.C. 10402(a)(2)(E)). As a result, individual identifiers of client records may not be used when providing statistical data on program activities and program services. Confidentiality requirements have been strengthened and clarified with the passage of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. 109-162). In the interest of establishing a consistent Federal standard for domestic violence programs, HHS intends to follow the confidentiality provisions and definition of “personally identifying information” in sections 40002(b)(2) and 40002(a)(18) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(b)(2) and 42 U.S.C. 13925(a)(18)) as a more detailed guidance about how States, Tribes and their subgrantees funded under 42 U.S.C. 10402 should comply with the FVPSA confidentiality obligations, and requires such programs to comply with the VAWA confidentiality provisions. In the FY 2009 Performance Progress Report (SF-PPR), States, Tribes and their subgrantees must collect unduplicated data for each program rather than unduplicated across programs or statewide. No client-level data should be shared with a third party, regardless of encryption, hashing or other data security measures, without a written, time-limited release as described in section 40002(b)(2) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(b)(2)).

⁴ The Confidentiality Institute's *Summary of State Laws Related to Advocate Confidentiality* (2010) provides some state-level legal citations and a few notes on state privilege and legal definitions; it is updated periodically. However, your program needs to know the most current and accurate legal analysis relevant to your region, including any potential case law implications. For this information, the program should contact local lawyers and experts including your state/territorial/tribal coalition against domestic or sexual violence.