



NNEDV

Frequently Asked Questions about U.S. Federal Laws & Confidentiality for Survivors

The Confidentiality Institute & the Safety Net Project at the
National Network to End Domestic Violence

What this is:

This piece addresses common confidentiality questions about several U.S. federal laws that may impact victims of domestic violence, dating violence, sexual assault, and stalking. It highlights key confidentiality and privacy provisions in 2005 reauthorization of the Violence Against Women and Department of Justice Reauthorization Act (VAWA)¹ and the 2010 reauthorization of the Family Violence Prevention Services Act (FVPSA)². With VAWA confidentiality provisions in mind, it also answers questions regarding the following U.S. federal laws: The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics (Clery)³, the Health Insurance Portability and Accountability Act (HIPAA)⁴, and, the Family Educational Rights and Privacy Act (FERPA)⁵.

In analyzing the meaning and application of the confidentiality and privacy provisions of VAWA, the purpose of the statute (to protect adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking and their families) must be kept at the forefront.

In general, these answers are intended for victim advocates employed by nonprofit or community-based agencies. Additionally, it is important that other partner agencies and professionals involved in collocated and coordinated community responses understand these answers. If you request information from another individual or agency, you want to be sure that any information you receive has been obtained properly. Many entities, including nonprofit advocates, must abide by strict legal confidentiality and privacy provisions when considering requests for information.

What this is not:

Confidentiality and privilege laws vary from state to state, as do other laws that may be impacted by VAWA legislation. The National Network to End Domestic Violence (NNEDV) is not an expert on individual state laws and does not provide legal advice to VAWA grantees. The analysis below 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.

Most significantly, the users of this piece should keep in mind that many situations are unique. These questions and answers are not to be taken as definitive answers to every circumstance that might arise for a victim or a domestic violence or sexual assault agency in regard to confidentiality and privacy. They are general guidance in how to think about the issues. If you have specific questions or situations that you wish to discuss further, please contact NNEDV's Safety Net Project by phone: 202-543-5566 or email: [tcip\[at\]nnedv.org](mailto:tcip[at]nnedv.org).

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VAWA 2005

1. Q: What is VAWA?

A: Initially passed in 1994, the Violence Against Women Act (VAWA) was the first U.S. federal legislation to acknowledge domestic violence and sexual assault as crimes. It provides federal resources to enhance investigation, prosecution, and community-coordinated responses. Reauthorized in 2000 and 2005, VAWA is administered by the U.S. Department of Justice's Office on Violence Against Women. VAWA 2005 reauthorized existing programs to combat domestic violence, sexual assault, dating violence and stalking, and created new programs and provisions to address the emerging needs of victims and communities.

2. Q: What confidentiality protections are provided by VAWA?

A: VAWA Section 3, 42 USC §13925(b)(2)(2008)⁶ became effective in 2006, and has a universal grant condition that requires VAWA grantees and subgrantees to maintain the confidentiality of personally identifying victim information. This condition protects the confidentiality of anyone who requests or receives services from a domestic violence, sexual assault, dating violence or stalking program that receives VAWA funds. Failure to follow the VAWA universal grant conditions regarding victim confidentiality and privacy could result in a loss of funding. VAWA prohibits disclosure of personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees' and subgrantees' programs unless the program gets the informed, written, reasonably time-limited consent of the individual. *For more information about VAWA provisions regarding consent for releases of information, please see our pieces, [Survivor Confidentiality and Privacy: Releases & Waivers At-A-Glance](#) and [FAQ's on Survivor Confidentiality Releases](#).*

3. Q: VAWA has an exception for statutory or court mandates. What does that mean?

A: VAWA grantees and subgrantees are prohibited from disclosing any personally identifying information unless compelled by statutory or court mandate. These mandates are the only exceptions to the VAWA confidentiality provision and the statute or court order must specifically address confidentiality in order to constitute an exception.

Statutory mandates can differ greatly from state to state because the statutory exception must be written into the state's or territory's law. The most common statutorily mandated exception is the mandatory reporting of suspected child abuse or neglect, which may be found in many states' laws.

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If a statutory mandate such as a mandatory reporting law compels a release of certain information, your agency or collaboration still needs to have a clear understanding of who must report, when they must report, what they report, and, who they must report to. Grantees need to limit the information released to the minimum required to fulfill your legal obligation, take steps to protect the privacy and safety of those impacted by the disclosure, and, attempt to notify the victim of the disclosure.

Court mandates are specific orders given by a court of law. For example, in a state where victim advocate confidentiality is not absolute, a domestic violence program could make a motion to quash a subpoena for their records, and the court could decide to deny the motion to quash and order a domestic violence program to release specific records. *For more information about your individual state's victim advocate confidentiality provisions, see our [Summary of U.S. State Laws Related to Advocate Confidentiality](#).*

4. **Q:** *Is a subpoena for records a court mandated exception?*

A: Generally not. In the vast majority of U.S. states, a subpoena is not a court order. Best practice in every state is to ask the court to quash (invalidate) any subpoena that asks for a program's records. Responding to subpoenas can raise unique questions. For help in responding to subpoenas, programs should contact a local attorney with knowledge about U.S. federal VAWA and state laws regarding confidentiality. Programs may also contact NNEDV's Safety Net Project for resources to address subpoenas. See also, question 54 "*What should our DV/SA program do if we get a subpoena*" in our piece: [FAQ's on Survivor Confidentiality Releases](#).

FVPSA and Confidentiality

5. **Q:** *What is FVPSA?*

A: First authorized in 1984, the Family Violence Prevention and Services Act (FVPSA) is the only U.S. federal funding source dedicated directly to domestic violence shelters and services. Administered by the U.S. Department of Health and Human Services, FVPSA was reauthorized as part of the U.S. Child Abuse Prevention and Treatment Act (CAPTA) through fiscal year 2015 and was signed into law on December 20, 2010.

6. **Q:** *How does FVPSA confidentiality differ from VAWA confidentiality?*

A: With the 2010 amendment, the U.S. federal FVPSA confidentiality obligations (42 USC §10402) specifically parallel those of VAWA 2005. FVPSA prohibits their grantees from disclosing, revealing or releasing any victim's confidential or private information without the victim's informed, written and reasonably time-limited consent. All disclosures are prohibited unless compelled by statutory or court mandate. If disclosure of victim information is forced, adequate safety protections must be offered. Like VAWA, they include steps such as such as limiting release only to entities with a specific need to know, only providing the minimum amount of information necessary, taking steps to protect the privacy and safety of those impacted by the disclosure, and, making reasonable attempts to notify the victim of the disclosure.

Clery Act and VAWA Confidentiality

7. Q: *What is the Clery Act?*

A: The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery) 20 USC § 1092(f) requires all colleges and universities that participate in U.S. federal financial aid programs to keep and disclose information about crime on and near their respective campuses.

8. Q: *The Clery Act requires college and university campuses to report crime data, which could include domestic violence, dating violence, sexual assault, and stalking. Does Clery require a campus-based victim advocacy agency to report victim information?*

A: No. A victim in a college or university community still has the same confidentiality protections as someone outside of the campus setting. In terms of confidentiality, the strongest and most protective law is what should be followed. First, Clery does not require victim advocates or counselors to report criminal activity or any victim information to college or university officials. Second, Clery does not override VAWA/FVPSA confidentiality provisions, so if a campus-based program receives VAWA or FVPSA funds, it is required to follow those federal confidentiality provisions. Third, in some states, your state victim advocate confidentiality laws protections may apply to campus-based victim advocacy programs.

9. Q: *What provisions of Clery should I look at to better understand why non-security personnel are not required to report?*

A: Even before VAWA provisions specified that personally identifying victim information shall not be disclosed, Clery regulations created similar protections. As clarified by the commentary, *64 Fed. Reg. at 59063 (Nov. 1, 1999)*, Clery regulations do not require counselors, pastors, individual faculty, physicians, or any other non-security personnel to report crime statistics. Rape crisis and domestic violence counselors, even those paid by the college or university, are not campus security authorities and are thus not required to report criminal activity. By way of comparison, many campuses offer students prepaid legal services. If a student client tells a legal services attorney about a criminal act either committed by the student or of which the student is a victim, the legal services attorney is under no obligation to violate attorney-client privilege and reveal that confidential communication. Clery neither requires nor encourages breaches of privilege or confidentiality.

10. Q: *Do campus security authorities have to report personally identifying victim information?*

A: No. Even those campus security authorities who are required to report crime statistics are prohibited from reporting victim identifying information. 34 CFR 668.46(c)(5). The commentary on the regulations noted that “although reporting a statistic is not likely, of itself, to identify the victim, the need to verify the occurrence of the crime and the need for additional information about the crime to avoid double counting can lead to identification of the victim.” *64 Fed. Reg. at 59063 (Nov. 1, 1999)*. The 1999 Clery regulations promote victim privacy rights in a way that is consistent with the later more specific confidentiality provisions in VAWA 2005, Section 3 and FVPSA 2010.

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HIPAA and VAWA Confidentiality

11. Q: What is HIPAA?

A: The Health Insurance Portability and Accountability Act (HIPAA) is a U.S. federal law originally enacted in 1996 with extensive security and privacy regulations, which guides how medical providers must handle patients' protected health information in the context of payment for services. HIPAA set out a national minimum standard for privacy of health information; state standards may provide more protections. HIPAA applies to medical records maintained by health care providers, health plans, and health clearinghouses, and to the maintenance and transmission of those records. The extent of the privacy protection for an individual's medical information can depend on where the records are located and the purpose for which the information was compiled, and whether insurance payment is requested for a given medical procedure or service. See 45 CFR §§ 164.501 to 164.534.

12. Q: What is the HIPAA privacy rule?

A: The HIPAA privacy rule creates a minimum standard for protection of private, protected health information, regardless how that information is maintained (i.e., on paper or electronically)(45 CFR § 164.520), and describes permitted uses and disclosures, and when consent for disclosure is and is not required. See 45 CFR §§164.506 to 164.514.

13. Q: Is our domestic violence or sexual assault victim advocacy agency required to follow HIPAA?

A: Generally not. HIPAA regulations apply to "covered entities", which are health plans, health care clearinghouses, and health care providers. Domestic violence and sexual assault agencies rarely fall into one of those three categories. If you want to determine whether your agency is a covered entity, answer the series of questions on the HHS website, which is: <http://www.cms.gov/HIPAAgenInfo/Downloads/CoveredEntitycharts.pdf> . If you are a covered entity, you will be required to follow the specific HIPAA regulations, so you should seek help from an attorney in your community who specializes in health care law to be sure you are complying with HIPAA requirements.

14. Q: Which is the most protective: HIPAA, VAWA, or my state law?

A: As between HIPAA and VAWA, both are protective of personal information, but VAWA is generally seen as more protective, and having fewer exceptions to confidentiality. State laws can vary, and may be more or less protective than either HIPAA or VAWA. In any event, advocacy programs should follow the most protective confidentiality law that applies to them.

15. Q: What are some exceptions to HIPAA confidentiality?

A: HIPAA permits certain limited disclosures of protected health when there is a risk of domestic violence, even in some circumstances where the patient does not consent to the disclosure. 45 CFR § 164.512. The HIPAA privacy rule provides for a permitted disclosure of protected health information about an individual whom the provider reasonably believes to be a victim of abuse, neglect or domestic violence. 45 CFR §164.512. When a provider makes a permitted disclosure, the provider is required to notify the individual of the disclosure unless informing the individual of the disclosure would place the individual at risk of serious harm. See 45 CFR §164.512(c). Victims of

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domestic violence who seek medical help are at grave risk if the fact that they sought help is revealed. Although HIPAA permits disclosure of protected health information of a victim of domestic violence without her consent in certain, limited circumstances, it does not require it, and advocacy agencies can help medical providers understand that they should rarely, if ever, share a victim's protected health information with government authorities unless absolutely required to do so.

16. Q: *We've been hearing a lot of information about electronic health records. What does that mean for victims and confidentiality?*

A: HIPAA sets out specific security standards for electronically maintained health information. See 45 CFR § 164.302 to § 164.318 (minimum requirements for administrative safeguards, physical safeguards, technical safeguards, organizational requirements, and requirements for policies and procedures and documentation of electronically maintained protected health information). Victim advocacy programs should be aware of what the HIPAA regulations specifically require so that victim information can be as protected as possible.

17. Q: *We've provided substance abuse and mental health services up until now, and now we have a VAWA grant. How can we be sure that we are complying with VAWA?*

A: Generally, both VAWA and HIPAA protect private information. Your agency can comply with VAWA confidentiality provisions by never releasing any personally identifying information without an informed, written, reasonably time-limited release from an individual, unless, you are subject to a specific state-law mandated reporting obligation (such as child abuse or neglect reporting) or a court order. Our model [Client Limited Release of Information Form](#) is available in English and Spanish.

18. Q: *What if the abuser wants access to a child's medical records under HIPAA?*

A: Under federal HIPAA regulations, the personal representative of a minor normally acts on behalf of a minor vis a vis medical records. This means the personal representative (usually the parent) has a right to control access to the minor's health and mental health records. However, health care providers may refuse to treat a parent as a personal representative (and thus refuse to provide the parent with access to the minor's medical records) if the providers have a "reasonable belief" that: (a) The minor has been or may be subjected to domestic violence, abuse or neglect by the parent, guardian or other giving consent; or (b) Treating such person as the personal representative could endanger the minor; and the provider, in the exercise of professional judgment, decides that it is not in the best interest of the minor to give the parent, guardian or other such representative access. 45 C.F.R. § 164.502(g)(5). Victim advocacy agencies can provide training to medical providers on how to make this type of assessment more safely and accurately.

FERPA and VAWA Confidentiality

19. Q: *What is FERPA? How does it protect a student's personal and private information?*

A: The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99, gives students the right to access to their education records, to seek to have those records amended, and to have some control over the disclosure of personally identifiable information from the education records. These FERPA rights are held by the parents of the student until the student turns

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18 years old or enters a postsecondary institution⁷. Under FERPA, educational institutions are prohibited from sharing information in a student's record with any person or institution without the student's written permission, or that of her parent or legal guardian if she is under the age of 18. 20 USC § 1232g(b); 20 U.S.C. § 1232g(d). Whenever a school receives a request for records, it must notify the student, who may then deny or grant access.

20. Q: *How does FERPA compare to VAWA?*

A: FERPA is, in many ways, less protective than VAWA. Although under FERPA a student's record cannot be shared without written permission of the student or parent or guardian, under FERPA, a subpoena is a specific exception to confidentiality. If there is a court-issued subpoena in a civil action, FERPA enables the disclosure of records upon notification to the student. If a school receives a court-issued subpoena in connection with a criminal prosecution, FERPA requires disclosure, even without notification to the student. 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.31 (2010).

21. Q: *Does FERPA apply to the preschool program we offer at our domestic violence agency?*

A: Probably not. FERPA confidentiality requirements are tied to Department of Education funding, which would generally not apply to your preschool program. In any event, VAWA confidentiality practices regarding releases (informed, written, and reasonably time-limited) provide best practice for releasing educational information from a preschool program as well.

22. Q: *If we are required to follow VAWA and we reveal information about a client in violation of VAWA, can we be sued and ultimately held liable?*

A: Yes. The agency could be sued by the client or former client, and could be at risk of losing VAWA funds if it does not follow VAWA confidentiality protections. By comparison, HIPAA has a specific civil rights cause of action for a violation of its privacy regulations. On the other hand, FERPA does not allow any civil action for damages by the student whose privacy has been violated. However, if the violation has not yet occurred but is imminent, a victim may move for a civil injunction enjoining the school from sharing information.

¹ U.S. Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), enacted as Public Law 109-162 on January 5, 2006.

² U.S. Family Violence Prevention Services Act (FVPSA 2010) reauthorized as part of the U.S. Child Abuse Prevention and Treatment Act (CAPTA) and enacted as Public Law 111-320 on December 20, 2010.

³ U.S. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery), codified at 20 U.S.C. § 1092(f), with implementing regulations at 34 C.F.R. 668.46.

⁴ U.S. Health Insurance Portability and Accountability Act (HIPAA) originally enacted in 1996 as Public Law 104-191.

⁵ U.S. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

⁶ 42 U.S.C. § 13925 Definitions and grant provisions [http://www.ovv.usdoj.gov/docs/overarching_definitions.pdf]

⁷ U.S. Department of Education. "Frequently Asked Questions about FERPA" [<http://www2.ed.gov/policy/gen/guid/fpco/faq.html>] Last modified July 14, 2005.