

“I Can Neither Confirm nor Deny”

The Why and How of Confidentiality for Advocates

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Objectives

- Discuss federal confidentiality requirements for sexual assault and domestic violence advocacy programs.
- Explain the exceptions to federal confidentiality requirements.
- Describe the essential components of a release of information.

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Guiding Principles

- Competent
- Safe and Confidential**
- Respect, Dignity and Compassion
- Trauma-Informed and Survivor-Centered
- Informed by Survivors
- Culturally Relevant
- Free and Voluntary
- Universally Accessible
- Available to All

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Confidentiality means

- Survivors own their information and get to make their own decisions about if, when, and how it is shared
- Protecting survivor's choice

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Discussion:

Why is confidentiality so important in advocacy work?

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Confidentiality increases

- Safety
- Autonomy
- Trust
- Good boundaries
- The likelihood of survivors seeking services



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Discussion:

What practices do you (and your agency) currently use to protect survivor information?



Seven horizontal lines for writing.

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Confidentiality Practices

- Limited documentation
- Release of information
- Informed consent
- Confidentiality agreement for staff, volunteers, Board
- Locked files
- Comprehensive confidentiality training for staff
- Policies and procedures around confidentiality, including data breach
- Secure database with limited access



Seven horizontal lines for writing.

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Discussion:

What are some of the barriers or challenges to providing confidential services?



Seven horizontal lines for writing.

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Federal Confidentiality Requirements

Pop Quiz:

Which federal laws include confidentiality provisions for victim service providers?



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Federal Laws

- **Violence Against Women Act (VAWA)**
 - Confidentiality provisions effective 2006
- **Family Violence Prevention and Services Act (FVPSA)**
 - 2010 Amendment parallels VAWA confidentiality language
 - 42 U.S.C. 10406(e)(5)
- **Victims of Crime Act (VOCA)**
 - 28 CFR 94.115

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VAWA Confidentiality 34 USC §12291 (a)(20) & (b)(2)

- (2) **Nondisclosure of confidential or private information (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 subchapter shall protect the confidentiality and privacy of persons receiving services.

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VAWA Confidentiality, cont'd 34 USC §12291 (a)(20) & (b)(2)

- B) **Nondisclosure** Subject to subparagraphs (C) and (D), grantees and subgrantees shall not—
 - (i) disclose, reveal, or release any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees' and subgrantees' programs, regardless of whether the information has been encoded, encrypted, hashed, or otherwise protected;



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What is “personally identifying information”?

- Information that may directly or indirectly identify an individual
- Information that would disclose the location of a survivor
- An individual’s name, address, other contact information, social security number
- Could include information such as a person’s race, birth date, number of children, etc., depending on the circumstances

Frequently Asked Questions on the VAWA Confidentiality Provision



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Exceptions to Confidentiality Provisions

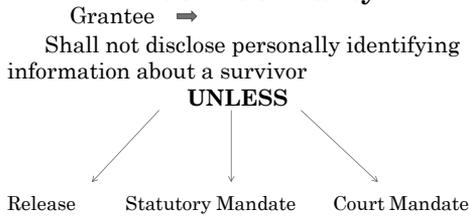
Pop Quiz:

What are the three exceptions to federal confidentiality provisions?



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Exceptions to Federal Confidentiality



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Statutory Mandates

- Statutory means
 - A law that is passed by legislature and signed by an executive
 - Not internal policies and procedures
- Mandate means
 - A requirement, not permission

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Exceptions to Federal Confidentiality

- If a statute or court compels the release of information, the grantee releasing the information must:
 - Make reasonable attempts to provide notice of the release to affected victims; and
 - Take steps necessary to protect the privacy and safety of persons affected by the release.

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Subpoenas

- What is a subpoena?
 - A written document which demands that an individual testify in a specific case, turn over information, or do both.
 - Most are issued by an attorney or prosecutor in various types of court cases including criminal, juvenile court, and grand juries.

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True or False

Most subpoenas are not court orders.

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True!

Most subpoenas are not court orders.

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Best Practice

- All subpoenas should come through the ED or designee.
- Attempt to contact the survivor to advise of the subpoena, if it is safe to do so.
- Talk to attorney about motion to quash (invalidate).
 - Cite the reasons as to why you should not be required to hand over survivor files nor share survivor information.
 - Protected by federal law
 - Don't keep records

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Warrants

- Arrest Warrants
 - An order authorizing law enforcement to place a specified person under arrest for possible commission of a crime.
 - Arrest warrants alone do not give law enforcement the right to enter a shelter to arrest a survivor because the shelter is not the survivor's home.
 - Officers must obtain a search warrant for the person at the shelter location or get the consent of the ED or designee.

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What if it is discovered that a client staying in shelter has an outstanding warrant for his/her arrest? Does this fit under exemptions? What are the requirements for cooperating with authorities?

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Mandatory Reporting of Child Abuse K.S.A. 38-2223

- Who are mandated reporters of child abuse?
- What information “shall” be reported, “if known”?

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Mandatory Reporting Requirements

- If you **ARE** a mandated reporter, you should tell the survivor up front the scope and limits of your ability to provide confidentiality.
 - Survivors may be given the option to work with someone who is not a mandated reporter.
 - You should consult with a supervisor before making a report.
 - If a report must be made, you can give survivors the option to self-report.
- If you **ARE NOT** a mandated reporter, you need a written, informed, time-limited release to disclose any sort of suspected abuse of a child/elder/disabled adult.

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KSA 39-1431

- **Abuse, neglect or exploitation of certain adults; reporting abuse, neglect or exploitation or need of protective services; persons required to report; penalty for failure to report; posting notice of requirements of act.**
- “An employee of a domestic violence center shall not be required to report information or cause a report of information to be made under this subsection.”

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Confidentiality When Responding to Emergency Situations

- Safety issues faced by survivors can be complex.
- Programs should honor survivor confidentiality to the greatest extent possible, even in emergency situations.

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Confidentiality When Responding to Emergency Situations

- Medical or Other Emergency Situations
 - Conscious survivor
 - Can choose what information he/she will or will not share with medical or police responders when they arrive.
 - It is not the program's right or obligation to "fill in the blanks"
 - Unconscious survivor
 - This does not negate confidentiality between the program/agency and the survivor.
 - Without a release, program staff should report the facts that led them to request an emergency response without revealing personally identifying about the client.

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Releases of Information

- **W**ritten
- **I**nformed
- **T**ime-limited (reasonably)
- **S**pecific

However, don't assume that a release is the solution.



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Written

- A written release is always required, even during a global pandemic.
- However, “written” is not defined in the federal confidentiality statutes.
- “Written consent” can include appropriately verified electronic techniques.



Guidance for Kansas Domestic Violence and Sexual Assault Programs Facilitating Remote Written Informed Consent During COVID-19

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When Using Technology, Ask the Following:

1. Did the advocate and survivor have an actual discussion where the advocate supported the survivor to make an informed decision? The same discussions to ensure informed consent that would normally occur in-person need to also happen remotely. This could potentially be on-line, but a phone conversation is best and eliminates any potential issues with impersonation.

Guidance for Kansas Domestic Violence and Sexual Assault Programs Facilitating Remote Written Informed Consent During COVID-19

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When Using Technology, Ask the Following:

2. Is there something in writing that clearly gives instructions that can be referred to by both the advocate and survivor? This would typically be the program’s Release of Information Form that includes what information the survivor wants released and to whom, when the permission to release ends, etc.).

Guidance for Kansas Domestic Violence and Sexual Assault Programs Facilitating Remote Written Informed Consent During COVID-19

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When Using Technology, Ask the Following:

3. Can the advocate confirm that it is the survivor giving these instructions, and not someone impersonating the survivor? This is why a phone conversation is best.

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Options for Obtaining Remote Consent

- Screenshot of the completed release sent to survivor, survivor responds with consent
- Survivor texts what specific information they want the advocate to share and with whom, and by when the release should occur
- Survivor writes down what they want the advocate to do and by when they want the advocate to do it. The survivor then takes a picture and texts it to the advocate

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Informed Consent

- Discuss with the survivor who will have access to the information, what specific information will be shared, and any safety considerations
- Remind them that they are never obligated to sign a release
- Talk about other ways that needs could be met without a release
- Discuss risks and benefits
- Explain how consent can be revoked
- The survivor decides how to proceed

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Reasonably Time-Limited

- The length of time a release is effective should be the minimum length of time necessary to meet the client's purpose
- A survivor's situation may change significantly in a short period of time
- In general, a release should not be more than 15-30 days
- A release can be reaffirmed and extended if the survivor decides that it is still valid and authorizes a new expiration date

FAQ's on Survivor Confidentiality Releases, NNEDV

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General Principles for Releases

- A survivor cannot be required to provide a release in order to receive services
- Releases should be survivor-centered to enhance services provided and not for the sole purpose of easing program administration
- Always consider the most protective privacy option
- Whenever releasing information about a survivor, adhere to the "minimum necessary concept"

FAQ's on Survivor Confidentiality Releases, NNEDV

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Review and Wrap-Up

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Always remember, less is best.

The less information we keep, the less is released in the event of a court order, breach, etc.

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Review of Exceptions

Grantee →
 Shall not disclose personally identifying information about a survivor

UNLESS



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Review of Exceptions

Grantee →
 Shall not disclose personally identifying information about a survivor

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Releases of Information must be:

- **W**
- **I**
- **T**
- **S**



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Releases of Information must be:

- **W**ritten
- **I**nformed
- **T**ime-limited (reasonably)
- **S**pecific



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Resources

- National Network to End Domestic Violence
<https://nnedv.org/>
 - How to Work with Survivors Regarding the Release of Personal Information
 - FAQ on Confidentiality Releases
- Confidentiality Institute
<https://www.confidentialityinstitute.org/>
- FAQs on the VAWA Confidentiality Provision
 - <https://www.justice.gov/ovw/page/file/1006896/download>
- Guidance for Kansas Domestic Violence and Sexual Assault Programs Facilitating Remote Written Informed Consent During COVID-19
 - <https://www.kcsdv.org/covid19/>



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Questions?

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