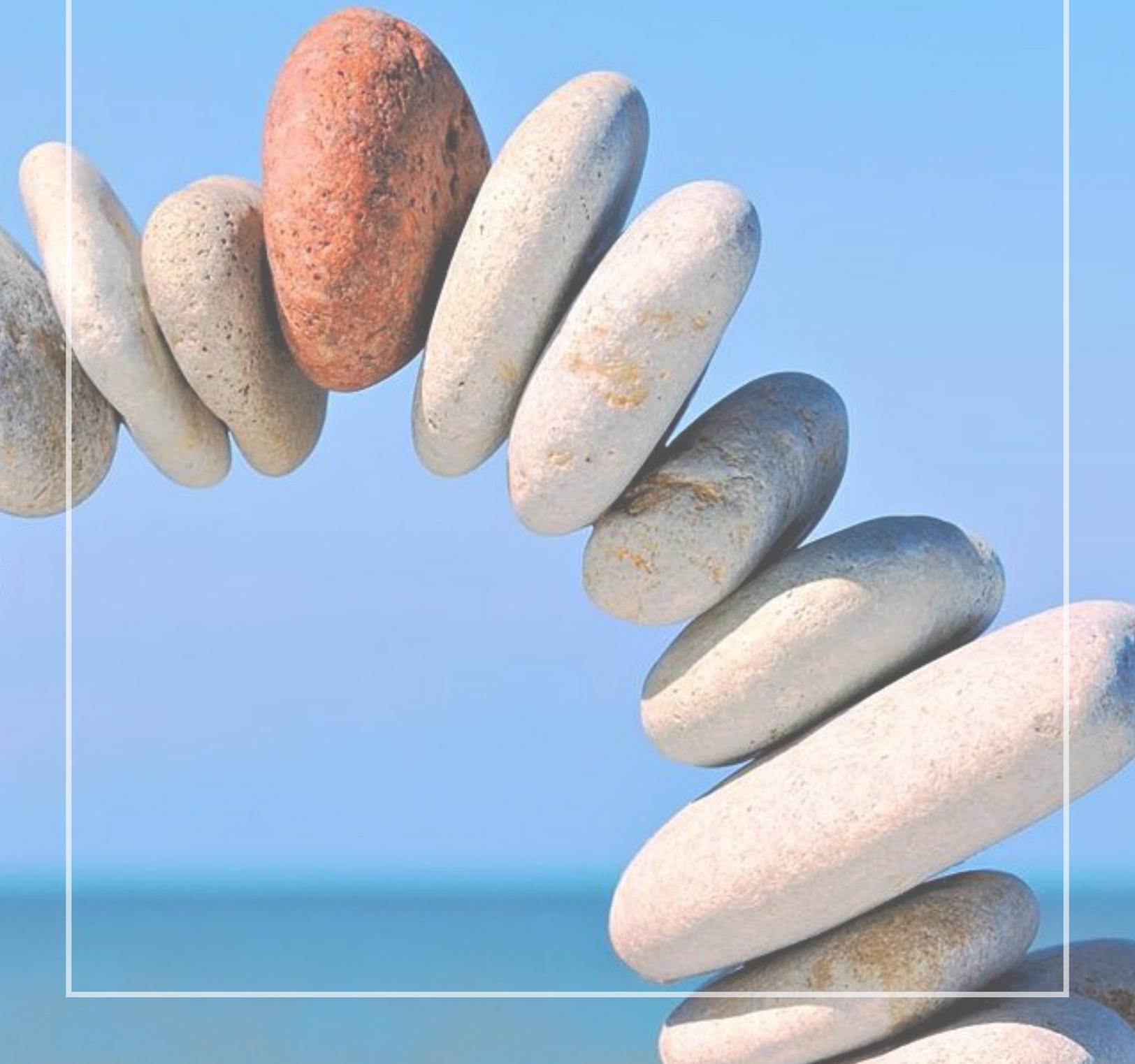


**Privacy, Confidentiality and  
Privileged Communications:**

# **Keystones to Safety**





# Privacy, Confidentiality and Privileged Communications: Keystones to Safety

*A Guidebook for Advocates and Survivors of  
Battering or Domestic Violence in Native Communities*



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# Forward

Privacy, confidentiality and privileged communications are the keystones to safety for survivors of battering or domestic violence. Protecting privacy and confidentiality of victims of domestic violence is directly related to a survivor's ability to trust, ask for advocacy, support and help. The law provides certain protections to conversations referred to as "privileged communications" between two individuals. All of these protections are important to understand as well as any legal limitations that local laws may impose.

This booklet will provide basic guidance for advocates and shelter programs to understand and implement or integrate these practices for the protection of those who experience violence policy, law and funding conditions, but also in terms of its impact on the safety and integrity of Native communities.

As Native people, we know that domestic violence is unnatural, and that before colonization, domestic violence, rape and child abuse were almost unheard of. Colonization tactics directly targeted Native women by attacking Native women, both physically and in their social status. Colonizing forces knew that tribal values would begin to erode and thereby tribal sovereignty would diminish. Because women form the backbone of Native communities, they could crack the foundation of Indian nations by attacking women and their sacred role within their communities. The legacy of colonization lives on in the current epidemic of violence against Native women, and in the growing intimate partner violence against men, LGBTQ and Two Spirited people.

Ending domestic violence<sup>1</sup>, is about reclaiming our traditional, non-violent, respect-based belief systems, and understanding the important and different role that men, women, children, Two Spirit/ LGBTQ, and elders play in our societies.

In addition, reclaiming Native values that governed most, if not all Native societies, such as respect, compassion and connections as relatives, puts the issues of confidentiality and privacy in a special context and provides us with important guidance about how and when to share information. If we think of ourselves as relatives rather than as advocates within a program, the issue of information sharing becomes first a matter of respect and privacy. In our own homes, we traditionally treat relatives and visitors in a special way, giving people time, space, food and whatever else they need without them ever having to ask. We do not have paperwork or lists of written rules for how we talk or host our relatives. Therefore, we encourage the advocate to use her Native values as she works with survivors, which will inevitably lead her down the right path for advocating for her client.

## NOTE:

Studies consistently indicate that women are disproportionately the victims of domestic violence, and the majority of those instances are committed by men against women<sup>2</sup>. Nonetheless, it is important to recognize that domestic violence can and does occur in two spirit and LGBTQ relationships and against men perpetrated by women<sup>3</sup>. As such, it is important to note that confidentiality requirements and concerns apply equally to all domestic violence survivors, whether female, male, LGBTQ or two spirited.

<sup>1</sup> For purposes of this resource, the term "family violence" is used interchangeably with "domestic violence". Further, for purposes of the Family Youth and Services Bureau, "family violence" is also used interchangeably with "intimate partner violence."

<sup>2</sup> Rosay, André B., "Violence Against American Indian and Alaska Native Women and Men," *NIJ Journal* 277 (2016): 38-45, available at <http://nij.gov/journals/277/Pages/violence-against-american-indians-alaska-natives.aspx>. (The study found that women were victims in 85% of the reported cases).

<sup>3</sup> Family Violence and Prevention Services Act (FVPSA) or other federally funded tribal programs may not discriminate based on sex, age, disability, race, color, national origin, or religion and all services must be comparable for everyone seeking services FVPSA § 10406(c)(2).

# Privacy, Confidentiality and Privileged Communications: Keystones to Safety

In a nutshell, it is the advocate's role to act as the biased supporter to survivors of domestic violence and to prioritize the safety of survivors and abuser accountability in all matters. Defending the confidentiality and privacy of those who have been battered is part of the sacred trust advocates have with those they serve.

Many of the questions about confidentiality can be answered merely by considering this special relationship between advocates and survivors and to remember the advocate's role: protection and support of the survivor. In thinking about confidentiality and privacy issues, there are several key questions that advocates should ask themselves when reviewing their policies:

- Whose need does this meet?
- What purpose does this serve?
- Is this policy respectful and uphold the integrity of the survivor?
- How does this support my ability to hold myself accountable to the survivors?
- How does this provide safety and help hold abusers accountable?
- Are these policies in compliance with funding requirements regarding confidentiality?

In addition, for Native advocates and programs, we should also ask:

- How does this reflect my cultural beliefs and values, and reclaim the status of women as sacred?

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## Practice Tip

First and foremost, remember, it is 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 and hold<sup>4</sup>.

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## The Potential for Danger

*"Every part of me hurt – my head, ribs, face, legs...He kicked me with his boots on, used a cast iron skillet. I couldn't stand the pain, the fear, all those people who did nothing. So I got really drunk, made it go away for a little while. Ended up in treatment. The counselor said I had to be honest about everything. During family days, I'm sitting there with my husband, my batterer and the counselor says to him, "Your wife told me about your anger problem..." On the way home he said nothing, but I knew what was coming... Last thing I remember about that night was him grabbing my hair and his fist coming at my face..." -A woman who has been battered*

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<sup>4</sup> See "Victim Confidentiality Considerations For Domestic Violence and Sexual Assault Programs When Responding to Rare or Emergency Situations," The Confidentiality Institute and the National Network to End Domestic Violence 2010 and 42 U.S.C. § 10406(c)(5) regarding non-disclosure of confidential or private information (42 U.S.C. § 10407(a)(2)(A)).

# Defining Privacy, Confidentiality and Privileged Communication

## Privacy

In our everyday lives, privacy is about respect, trust and personal integrity and autonomy. Respect for the right to privacy safeguards against the destructive nature of gossip and the sharing of individual's information without permission. It is a necessary element in healthy, considerate relationships. Many times, the right to privacy is discussed in terms of confidentiality – the legal rights of individuals to control information about themselves and make decisions that impact their lives. Policy and law often address these issues, but the right to privacy is also a cultural consideration. Our communities have expectations about what is private and what is not. A major part of an advocate's work is to shift the mainstream views of domestic violence from being a private family matter to a community's responsibility to respond, increase survivors' safety, hold abusers accountable, and restore Native values in their societies.

On the other hand, the tactics used by abusers are centered on an invasion of privacy: knowing where she is at all times, who she talks to, what she says, when and how she does things, how she dresses, who she texts or contacts on social media, etc. The abuser attempts to exercise power and control over his partner in every aspect of her life and in every decision. Survivors have reported not being allowed to use the bathroom with the door shut –he wanted total access, leaving her with no privacy.

Advocates focus on helping survivors regain power and control over their own lives, including the right to privacy. There are many challenges to this goal at a shelter. Within shelters, the most obvious challenge to privacy is simply the fact that there are many other survivors in crisis, often with their children, co-existing in limited space with limited resources<sup>5</sup>. Everything is shared, and many days, chaos is the norm. Managing the chaos, while attempting to get everyone's needs met and helping them get their lives back, is a daily struggle. Sometimes schedules and rules are established to try to maintain order. How this is done can either honor survivor's rights to privacy and control over their own life, or unintentionally, reinforce a lack of rights and control.

Shelter rules and schedules are a form of policy that can impact privacy. Some programs respond by creating layers of rules and posting schedules for everything – bedtimes, mealtimes, bathing, in an attempt to make order out of chaos. Sometimes, there can be major problems with this approach, even though it is well- intentioned. The critical questions we need to ask are, “whose needs do the rules meet, what is the purpose of the rules, and do these rules take away a survivor's voice in decisions that impact her/him and her/his children?” If the answers relate to the program staff and their convenience, then perhaps a revision of the rules might be necessary to support the shelter residents.

Survivors and their children come to shelters because they are escaping the abuser and may have no place else to go. They seek safety, support and resources to be able to heal and re-create their lives. During this time, they are vulnerable and at the mercy of others. Many shelters resist creating elaborate rules and policies because the people in crisis need support and safety, creating unobtrusive policies are secondary. These shelters understand too many rules will make the shelter less friendly and less homelike, and in the end may undermine the relationships with survivors and their rights to privacy that support autonomy and individuality. Culturally based programs that recognize the different needs of the women and men they serve, as well as LGBTQ and Two Spirit individuals, rely on each individual's gifts and strengths to create a safe environment that builds upon mutual respect and

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<sup>5</sup> Shelters receiving federal funds are required to provide similar services to women and men survivors of domestic violence. However, how these services are provided may vary, as the needs of men and women survivors may differ, as may the needs of younger survivors of violence versus elders. Culturally based shelters recognize the different roles of men and women in our Native communities, as well as elders and youth, and the different needs they may have in seeking advocacy services.

support. For example, well-run shelters hold regular house meetings to discuss what needs to get done, who will do what and when.

This shared community living model comes from our own homes. Imagine all your relatives showing up. How do you organize and get things done? Usually visiting around the kitchen table sharing food, checking in with each other and problem solving with those involved in an informal, friendly way. We rely on our relationships with each other – we know who is good at what, who definitely shouldn't be making the bread, who needs a lot of sleep, etc. We know some relatives are quirky, raise their kids differently – we accept them as they are. We work it out.

Of course, a few basic safety rules are necessary, like no violence or weapons, no drinking or using illegal drugs. But aside from these, each person's privacy is honored. Residents do what they want, in the ways they want, without explanation as long as it doesn't interfere with another's rights. Conflicts are resolved as they come up, by talking directly, respectfully and individually. This approach promotes each person's right to privacy, which includes making basic decisions for themselves. This approach goes beyond policy and reflects the purpose and philosophy of advocacy: to end family violence and reclaim each individual's status as autonomous and sacred with the right to control their own life choices. This approach sees privacy as a matter of respect, which forms the foundation for a meaningful confidentiality policy.

*That shelter had more rules than my batterer! I went there to be safe and they told me when to put my kids to bed – even when I had to go to bed and turn the lights out. They told me what to feed my kids and when. They made me feel like a kid, couldn't make my own decisions. Why did they get in my personal stuff? I went back home. -A woman who has been battered*

## Confidentiality

*“When private information is shared, there is a shift in the balance of the relationship from the person sharing the information to the person receiving it. How that information may be used or revealed to others directly impacts the battered woman's safety and ability to seek justice. Sharing information about a specific battered woman threatens her autonomy and may threaten her safety, as well as her confidence in the domestic violence advocate and program.”<sup>6</sup>*

Family violence destroys all sense of trust and safety. Confidentiality is key to keeping everyone safe, and is the cornerstone of effective advocacy and shelter programs. Confidentiality is based upon principles of privacy and restricts what kind of information can be shared with whom, under certain circumstances. Maintaining confidentiality can sometimes be a matter of life or death.

<sup>6</sup> See “Confidentiality: An Advocates Guides” by the Battered Women's Justice Project, 2007. [https://www.bwjp.org/assets/documents/pdfs/confidentiality\\_an\\_advocates\\_guide.pdf](https://www.bwjp.org/assets/documents/pdfs/confidentiality_an_advocates_guide.pdf)

Program policy is the first line of defense for the right to confidentiality. Based upon principles of respect and right to privacy, a program confidentiality policy should clarify that:

- a. The right to share information is the survivor's. Survivors cannot "violate" their own confidentiality any more than they can violate their own protection order.
- b. A survivor decides what information to share/not share and with whom (including the advocate and program and within legal limits discussed in section "Limitations to Confidentiality").
- c. Advocates will not share information about survivors, without a signed, time limited, and specific release of information or if compelled by law.

It is also important to become familiar with the federal laws addressing confidentiality set forth in the Violence Against Women Act (VAWA) and the Family Violence Prevention and Services Act (FVPSA) and resulting grant requirements. Applicable excerpts are included at the end of this brochure as Appendix A. FVPSA grant requirements also provide that programs funded by FVPSA "must establish and implement policies and protocols for maintaining the safety and confidentiality of records pertaining to any individual provided domestic violence services. Consequently, when providing statistical data on program activities and program services, individual identifiers of client records will not be used."<sup>7</sup> Both VAWA and FVPSA also provide the same guidance on specific information that should not be shared.

Violating these provisions will not result in criminal sanctions for the individual, but a breach of confidentiality can cause a program to lose its funding, and more importantly endanger the health and safety of survivors, their children, and anyone receiving advocacy services.

## Privileged Communication

Privileged communication is an interaction between two people that the law recognizes as a private, protected relationship. Whatever is communicated between the parties remains confidential, and the law cannot force their disclosure. Privileged relationships include a patient and doctor, therapist or lawyer and client, and some others. Privileged communication between an advocate and victim/survivor, protects the confidentiality of the survivor and avoids challenges to advocates sharing survivor's information, thereby protecting victim/survivor's safety and privacy. Though, many tribes and states recognize communication between a survivor of battering and her/his advocate as privileged, many others do not recognize this privilege or might recognize the privilege with exceptions.<sup>8</sup> As sovereign nations, tribes can enact privileged communication laws. At one time, the Oglala Sioux Tribe enacted such a law:

### **Oglala Sioux Tribe Domestic Violence Code Sec. 224**

#### **Victim-advocate privilege applicable in cases involving domestic violence.**

- a. Except as otherwise provided in subsection 2, and in compliance with the Victim-Advocate Privilege Act, a victim of domestic violence may refuse to disclose, and may prevent an advocate, elder, or medicine person from disclosing, confidential oral communications between the victim and the advocate and written records and reports concerning the victim unless the privilege is waived by:
  - i. The victim; or
  - ii. The death of the victim.
- b. The privilege does not relieve a person from any duty imposed in the mandatory reporting of child abuse or neglect. A person may not claim the privilege when providing evidence in proceedings concerning child abuse and neglect.

<sup>7</sup> 42 U.S.C. § 10406(c)(5) regarding non-disclosure of confidential or private information (42 U.S.C. § 10407(a)(2)(A))

<sup>8</sup> See "Confidentiality: An Advocates Guides" by the Battered Women's Justice Project, 2007. [https://www.bwjp.org/assets/documents/pdfs/confidentiality\\_an\\_advocates\\_guide.pdf](https://www.bwjp.org/assets/documents/pdfs/confidentiality_an_advocates_guide.pdf)

c. As used in this subsection, “advocate” means an employee of or volunteer for a program for victims of domestic violence who:

- i. Has a primary function of rendering advice, counseling, or assistance to victims of domestic violence; supervising the employees or volunteers of the program; or administering the program;
- ii. Has undergone a minimum of 40 hours of specialized domestic violence advocacy training; and
- iii. Works under the direction of a supervisor of the program, supervises employees or volunteers, or administers the programs.

This law demonstrates the ability of a tribe, as a sovereign nation, to define important principles such as privileged communications within a protected relationship to serve tribal purposes.

## Limitations on Confidentiality

When advocates work with survivors of battering, they need to be clear that they will do all they can to protect the survivor’s confidentiality. However, there are some limits imposed by law, including mandatory reporting requirements. Other limitations on confidentiality include:

- Duty to warn of imminent threats of bodily harm or that a violent crime is to be committed;
- Suspected child abuse or neglect (if a mandatory reporter);
- Presence of others when a communication is made (third party present where privileged communication exists);
- Waiver or signed release exists;
- Law enforcement or prosecution based advocates, who may have no confidentiality coverage or limited privileged communication;
- Program property, including records and files, may be subpoenaed;
- Advocates cannot guarantee other survivors in shelter or groups will maintain each other’s confidentiality. Speaking with each survivor and group about the urgent need for protecting confidentiality for each individual’s safety should be routine and can be one of the few rules in place;
- Confidentiality for every woman’s safety should be routine, and can be one of the few rules in place.

Advocates should inform the survivors they work with about these exceptions upfront, as well as about any other circumstances in which they will share information<sup>9</sup>. Again, it’s important to understand the Tribal, State, and Federal laws addressing confidentiality, privileged communications, and mandatory reporting requirements within your jurisdiction.

Each program should have a policy that outlines the steps to follow for each one of these possible situations. The policy should state that the advocate’s role does not stop just because a report is made to an outside agency, such as law enforcement. The advocate’s role only ends if the survivor chooses to end the relationship. If possible, we recommend survivors make their own law enforcement report while accompanied by an advocate.

Discussion of the reporting options, processes and possible consequences is strongly recommended before the reports are made, if at all feasible.

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<sup>9</sup> *In fact, it is recommended that survivors seeking services sign off on some form of acknowledgment that they have in fact been made of aware of such mandatory reporting requirements.*

## Practice Tip

Advocates should receive training on mandated reporting requirements for your tribe or community. Some tribes have their own laws around this issue, and some defer to the state they are located within. An example of mandated reporting is that certain professionals, such as counselors, teachers, police or social workers are considered mandated reporters. Some jurisdictions include advocates as mandated reporters, too. A mandated reporter who learns of child abuse and/or neglect generally has a duty to inform child protection services or law enforcement of the abuse. Some laws include exposure to domestic violence as abuse, thus it is important to understand what laws may apply to your community. When discussing confidentiality with the survivor, be sure to let her know that there are limited circumstances in which you have a duty by law to share this information.

Mandatory reporting laws<sup>10</sup> differ from tribe to tribe and state to state, so please become familiar with what your current laws may require. As well intentioned as such laws may be, the final outcome often further endangers survivors and their children, including separating and removing children into the foster care system or further isolating them and ensuring the abuser has complete control. Futures Without Violence, the national health resource center on domestic violence ([futureswithoutviolence.org](http://futureswithoutviolence.org)), offers the following six principles in their Compendium of State Statutes and Policies on Domestic Violence and Health Care to consider in determining if state or tribal mandatory reporting laws should be amended.

- Enhancing patient safety and increasing access to health care services;
- Improving health care provider responses to domestic violence victims;
- Preserving patient autonomy and control of the decision-making process;
- Protecting patient confidentiality;
- Recognizing the value of informed consent in health care environments; and
- Advocating for victims of domestic violence.

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<sup>10</sup> *Compendium of State and US Territories Statutes and Policies on Domestic Violence and Health Care; Futures Without Violence [www.futureswithoutviolence.org](http://www.futureswithoutviolence.org)*

# Key Questions to Consider When Implementing Privacy and Confidentiality Policies

Tribal and State laws vary in their protection of confidentiality, privileged communications, and any legal limitations such as mandatory reporting requirements. It is essential to become familiar with the laws applicable in your jurisdiction. It is also important to note that Indian tribes, as sovereign nations, have the ability to enact their own laws that protect the confidentiality of those who are battered, recognize privileged communications with advocates, and address mandatory reporting. Very often, advocates are the ones tirelessly leading the way working to get tribal laws adopted. Many resources are available with sample laws and policies that can be revised for your tribe. A few of these resources are provided at the end of this booklet. When creating the laws to govern privacy, confidentiality and privilege, be sure to have them reflect the understanding that shelters and advocacy programs are sacred places that can and do save lives. In addition, clear internal policies around privacy, confidentiality and privilege are important to establish to provide guidelines to the staff and advocates. The survivors need to be assured that staff are trained and be prepared with swift action if staff violate these policies.

## How Can the Challenges to Maintaining Confidentiality in Closely Knit Communities be Addressed?

Maintaining confidentiality about the location of a shelter in a closely-knit community is unrealistic. Policy can say that the physical address will not be advertised/publicized or shared by staff in any way except with those needing help, but people will know. Even so, safety of those at the shelter can be increased through public education efforts aimed at the community member's role in responding to violence (i.e., by-stander intervention, when to call police, understanding the critical need for confidentiality, etc.). While privacy fences and entryways may be visible signs of a shelter, they may also help maintain some semblance of safety. More important is maintaining the confidentiality of those in the shelter, those attending support groups and/or accessing other advocacy or program resources.

Once basic needs are met, assess the level of danger she faces, including whether the abuser is violent with others, has threatened or harmed the children, threatened suicide, etc. A determination then needs to be made with the survivor regarding whether she needs to be relocated outside of that community to another shelter for her own safety. This determination should take into account the information she shares about the response she has received from other programs. Remember, survivors know the tactics of their abusers and the community resources—trust their instincts when possible.

Trust is a huge part of successful advocacy and programs. People know each other and their entire families in tribal communities. Often advocates have grown up with either the survivor, or the perpetrator, or both. In smaller communities, they may even be related. These factors impact the community's perception of the

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### **Gathering & Acting on Information**

Before gathering other information, completing paperwork, etc., first take care of the obvious needs first, such as:

- Is the survivor safe right now?
- What are their immediate needs and concerns?
- Are there medical needs?
- When did they eat last?
- When did they sleep last? What about the child(ren)?

advocate's ability to maintain confidentiality. One program revised its confidentiality policy to mandate that once a survivor contacts the advocacy program, advocates could no longer talk about the survivor, even in conversations about interactions they had decades ago. The advocates would get "amnesia" so to speak. This change of policy happened after an advocate was overheard visiting with a friend about high school events that included the name of a woman who had been battered. Word got out that the advocate had breached confidentiality. The advocate had not, but the perception of a breach created a crisis for the entire program and negatively impacted the ability of others in the community to trust that their confidentiality would be protected.

Some programs have confidentiality and privacy policies that restrict law enforcement or anyone else from dropping off/picking up at the shelter. Instead, advocates pick-up at a different, safe location and then take them to the shelter. This gives law enforcement and others plausible deniability, which is especially important when they are given the duty to serve warrants for survivors that are the result of their abusers' manipulation of the justice system or for old traffic fines and the like.

Survivors and their children in a shelter need the support of their families and friends. Even so, visiting at the shelter is not advised unless there is a separate entrance and area for visiting in order to protect the confidentiality, privacy and safety of others in shelter. Visits can possibly be arranged at other safe locations. While finding a safe, confidential location in a small tribal community can be difficult, it is not impossible.

Survivors in a shelter can contact whomever they want. However incoming calls directly to a survivor in the shelter should be prohibited. Abusers are known to have relatives or friends call the shelter on their behalf and then they get on the phone and threaten and intimidate the survivor. To maintain confidentiality, it is strongly advised to have a policy that states:

*We have a confidentiality policy. We can neither admit nor deny whether or not we know anyone. If you would like to leave a message, we will post it. Should the person come here, we will inform them of the message. Whether or not they contact you is up to them.*

It is beneficial to let everyone know about this policy, so those in the shelter can inform their family and friends about the policy, to avoid misunderstandings and conflicts.

## How Can Advocates Support Survivors Safely Accessing Outside Resources and Services?

Advocates' ability to assist survivors in safely accessing outside resources and services relies upon advocates working with programs, agencies and organizations that survivors routinely utilize before a survivor walks through their door. Developing working relationships through conversations about shared concerns, providing educational opportunities about the dynamics and tactics of domestic violence/ intimate partner violence, the role of advocates and the necessity of and purpose of confidentiality lay the groundwork. Assisting allied organizations and programs in the development of policies and procedures that protect survivors' confidentiality and safety while getting both the survivor's and program's needs met, is extremely effective.

## Practice Tip

Work with your local housing authority regarding a way to maintain the survivor's privacy while accessing their services. Perhaps an arrangement can be made that allows the housing authority to receive a letter from the shelter requesting that a resident be placed on the list. Provided the request is on letterhead, the authority will prioritize the resident as housing becomes available. Note that to meet confidentiality, either the resident must sign the letter along with the advocate or Shelter Program Director, or a release of information must be completed and signed.

Commonly, other agencies expect advocates to share information on behalf of survivors including appointment times, documents, etc. This can compromise confidentiality, lead to misinformation and may not be very effective. Policy can provide for safe, helpful information sharing by outlining pre-arranged meetings and direct modes of communication between survivors and service workers. For example, workers and survivors themselves can set a schedule for meetings and times for the survivor to call in for those involved in aftercare, court or other matters. Advocacy programs can provide secure phones, help survivors get post office boxes or other safe addresses, take messages and assure releases of information include informed consent.

Remember, each situation, agency and community is different. There is no one policy that will fit every circumstance. However, if safety is the priority, and confidentiality is based on the need to know and informed consent, then the survivor and advocate can usually work together to get the survivor's needs met without further endangerment.

## What Paperwork and Information Is Needed?

This question is probably best answered by considering each piece of paper and request for information in the context of the key critical questions posed earlier:

- Whose need does this meet?
- What purpose does this serve?
- Is this policy respectful and uphold the integrity of the survivor?
- How does this support my ability to hold myself accountable to the survivors?
- How does this provide safety and help hold abusers accountable?
- Are these policies in compliance with funding requirements regarding confidentiality?

For Native advocates and programs, we should also ask:

- How does this reflect my cultural beliefs and values, and reclaim the status of women as sacred?

The less paperwork, the better. Once something is written down, it opens the door to breaches of confidentiality. Once written down, it becomes program property. Program property may be subject to disclosure and may be subject to a court ordered subpoena. This is an area where it would be good to advocate for laws and policies about what can be shared and under what circumstances.

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## Practice Tip

Know the law. Be sure to check your law regarding under what circumstances confidential information can be shared or accessed by someone other than the protected party. In many jurisdictions, an attorney signed subpoena will not justify access to confidential information; only a court or judge signed subpoena may entitle someone access to the protected information. However, even then the protected party can ask to have the subpoena quashed or dismissed if the request can be shown to not have a legitimate purpose and is more about power and control. In addition, if a court does find that the information can be accessed, sometimes the record can be “sealed” or reviewed “in camera” which means in the judge’s chambers. Check your local law.

Principles of advocacy based on our Native traditions support the right to confidentiality and lead us away from requiring documentation unrelated to the violence, eligibility issues, and case management. There is no need for documentation of behavior, emotional state, parenting skills, observations, assessments of any sort, etc. This sort of documentation can be inappropriate, and even outright dangerous. This kind of documenting is outside the role and training of advocates. Abusers have been known to use this kind of documentation as “evidence” that a survivor is an unfit parent, to misconstrue the effects of trauma as mental instability and/or to get others to collude with them against the survivor.

The rationale for any filing system and paperwork in a shelter should be based on the safety and needs of the people in shelter. If client information is stored on a computer, it is recommended that the computer not be connected to the internet, to avoid hacking. Further, information required by funders does not include any personal identifying information. Although you should keep some form of tally system to meet the needs of grant and statistical reports, there is never any need to get social security numbers, do background checks of any sort, or get birthdates (age or age range is sufficient).

Contact sheets (sometimes called intake sheets) may include: basic contact information (addresses, phone numbers, how they can be contacted, etc.), documentation about the violence (“excited utterances” about the battering only, documentation of the injuries, including photos if appropriate, threats and actions of the abuser), police and other systems responses (for policy and systems work), release of information forms (one per request), and dates only of participation in groups (if required by outside agencies). Generally, paperwork should be minimal and inform about the violence and the response of the advocate and other agencies, not about the survivor in shelter or receiving other advocacy. (Note regarding photos: Medical and/or law enforcement may take photos, may be requested by the survivor if the survivor chooses to not use those systems, check with the appropriate prosecutor to see if they are admissible and if there are any requirements. Always consider the possible negative unintended consequences of having this kind of documentation.)

Keep in mind that law enforcement and medical records contain a lot of information that does not need to be duplicated. Law enforcement and medical records are considered credible sources in court, more so than advocates’ records and are accessible by the survivor if needed, with a signed release.

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*HHS-2018-ACF-ACYF-FVPS – 1346 (14) Pursuant to 42 U.S.C. § 10406(c)(5), the applicant will comply with requirements to ensure the non-disclosure of confidential or private information, which includes, but is not limited to: a) grantees will not disclose any personally identifying information collected in connection with services requested (including services used or denied), through grantee’s funded activities or reveal personally identifying information without informed, written, reasonably time-limited consent by the person about whom information is sought, whether for the FVPSA-funded activities or any other federal or state program and in accordance with 42 U.S.C. § 10406(c)(5)(B)(ii); b) grantees will not release information compelled by statutory or court order unless adhering to the requirements of 42 U.S.C. § 10406(c)(5)(C); and c) grantees may share non- personally identifying information in the aggregate for the purposes enunciated in 42 U.S.C. § 10406(c)(5)(D)(i) as well as for other purposes found in 42 U.S.C. § 10406(c)(5)(D)(ii) and (iii). 11 An exclamation made at the moment of an accident or other unexpected and disturbing event, considered under the rules of evidence to be likely to be truthful because of the urgency of the surrounding circumstances and, therefore, an exception to the hearsay rule.”, <http://law.yourdictionary.com/excited-utterance>*

Survivors may need assistance to keep copies of protection orders, divorce papers, social security cards or other personal documents in a safe place. A locked file cabinet, designated for personal items and not program property, or a safe deposit box is the safest way to keep these types of records. It is safest to treat safety plans as personal property, depending upon their individual situation rather than as program files.

### **Practice Tip**

*“Coming from a different field, I was used to a lot of paperwork. I never gave a second thought about why we asked for the information we did. It was a real eye-opener to work in a domestic violence program and be challenged to think about why we needed information. I never thought about how invasive and disrespectful paperwork can be. Now I focus on documenting his violence and making sure I don’t objectify her. She’s not just a “client,” she’s my sister.” –Advocate*

## **What Information Should Be Shared Between Advocates?**

Keeping everyone fully informed about what information will be shared, with whom and for what reason is a safeguard for everyone involved. The safest and most respectful practice is to let each person speak for her or himself. Sometimes this isn’t possible, or they are just tired of repeating themselves. The question then is “do you have permission to share information with another advocate?” The other question that we often don’t think to ask is “does the other advocate have a need to know?” If an advocate needs to consult with another advocate to determine the best course of action, this is fine. But names and other identifying information do not need to be shared.

A recommended practice of having house meetings (not staffings about survivors in shelter) provides the opportunity to share necessary information about house issues, such as scheduling, chores, etc., themselves. Any other information is for the survivor to decide upon.

### **Practice Tip**

*“One morning after a busy night at the shelter, the advocate came into the director’s office and began telling her about a woman who came into the shelter the night before. The director stopped the advocate and asked why she was sharing the information, if there was something the director would need to do for the woman. The advocate said no, she just thought the director would like to know. The director turned it into a teachable moment. She said even though she was director and maintained confidentiality, the first step in maintaining respect for and protecting a woman’s confidentiality is whether or not there was “a need to know.” If there is no need to know, then the information does not get shared, even within the program.” –Advocate*

## **How Can Challenges to Confidentiality By Other Agencies Be Addressed?**

Some outside agencies/offices often challenge confidentiality and try to get advocates to release information. Establish a clear policy that cites the Federal laws (VAWA and FVPSA), and resulting grant confidentiality requirements as well as alternate ways of getting needed information. Advocacy program/shelter staff can also provide training to the other agencies about the dynamics of battering, the role of advocates, followed by meetings to explain the program policies, all of which are helpful in avoiding needless conflict.

Memoranda of understanding and/or inter-agency policy and procedure can be developed from these meetings. It is extremely important to clearly prioritize safety and accountability, repeatedly emphasize the “need to know” aspects of confidentiality, each survivor’s individual right to privacy and promote direct communication with the individual survivor if she/he chooses.

Too often there is an expectation that advocates should cooperate with other agencies. There is also the unrealistic expectation that advocates should somehow act like foster parents for survivors. Obviously, neither assumption is true. Depending upon the situation, advocates might accompany survivors to meetings, court proceedings, etc., to provide support. If, for example, a woman is involved with child protection and must adhere to a plan that includes participation in groups, an advocacy program can provide the dates of attendance with a signed release. No other information is required. If child protection wants to know how a survivor is doing or check their “progress,” the advocate can clarify that no notes are taken, and strongly recommend that a direct meeting with the survivor be arranged. Oftentimes, there are other service providers involved that can provide this information to child protection. If the other agency person insists upon “input” from an advocate, first ask for a meeting. If those alternatives will not work, make sure to request a release, with specifics about what information is to be shared with whom, for what period of time, for what purpose and with discussion about possible consequences (the “fully informed” part of a release), is signed for each instance. At times, a request for information will result in a trainable moment for the uninformed, non-domestic violence service provider. Embrace the opportunity to share with them your purpose and be ready with a concrete example of why the confidentiality is necessary.

Very often outside agencies assume that because they know the survivor is at the shelter, and that they are aware of this fact, that they should be able to call the shelter and ask to speak directly with her. Advocates should follow their confidentiality policy, share the policy with the person calling and state they cannot confirm or deny that the survivor is there. On the flip side, a survivor may need to have an outside agency contact her. If contact is scheduled ahead of time, then conflicts and breaches can be avoided.

## What Information to Share in Multi-Disciplinary Team or other Task Forces?

Multi-Disciplinary Teams (MDT) and other task forces may think because they all have the same goal—protecting survivors and their children from further harm—that they can talk freely among themselves and expect the advocate to do so, too. They may require all individuals to sign a confidentiality agreement and feel that empowers them to gain information from you—it does not. First, the primary goal of such task forces should be the creation, implementation, and oversight of effective, consistent policies and procedures that benefit a certain population within the community and the delivery of services. As such, the focus should be on the actions of each agency’s employees in implementing these policies, not on the actions of individuals they work with. Second, a signed confidentiality agreement does not substitute for a signed release of information.

Even if the task force members agree to not share any information outside of the task force, it is still a breach of confidentiality if an advocate shares private, confidential communication in this group setting. Lastly, the standard for maintaining confidentiality should always be sharing information on a need to know basis. For these reasons, participation by advocates in these tasks forces should be undertaken only after careful consideration and with a good understanding by the participants of what the advocate’s role is.

## What Challenges to Confidentiality Occur When Advocates Are At the Scene or Ride-A-Longs?

A strong working relationship with law enforcement is every advocate's dream. However, the role of the advocate as a biased supporter, and the integral requirement of confidentiality is much different than the role of police officers that must remain objective and enforce the law. Advocates arriving at a crime scene can sometimes be seen as a breach of confidentiality for the survivor. Aside from law enforcement, the abuser's friends, relatives, and sometimes even gang members, will see the advocate and know or assume that the survivor is working with the advocacy program. Also, many officers would prefer no other civilians be involved at a scene, since they have to be concerned about an additional person's safety and possible interference with the investigation.

Although ride-a-longs with law enforcement can be instructive to the advocate to understand the policy and procedures officers must follow, the same concerns apply about confidentiality and safety. The presence of an advocate can also create a conflict of interest, especially for survivors that do not want to report or where the abuser manipulates the criminal justice system. It is preferable to establish a policy for officers to refer survivors to the advocacy program, offer to assist in making contact and possibly provide transportation to a safe location to meet the advocate at a place other than her home or the shelter.

### **Practice Tip**

Post on every door and phone in a shelter:

*We have a confidentiality policy. We can neither confirm nor deny that we know or work with anyone. However, if you would like to leave a message we will post it. If the person you are seeking is here and wants to respond, we can assist in doing that, if requested.*

## The Heart of Our Native Nations: Conclusion

Shelters and advocacy programs should be safe places for survivors to escape their abuser, not treatment programs or social service agencies. Our relationships should be based on the reality that we are relatives, not professionals treating “clients” or “cases.” As relatives, we are responsible for the safety of our community members. We are also responsible for holding our relatives who batter accountable for their violence. These principles **MUST** guide our work and our confidentiality and privacy policies.



## Additional Resources

### **National Indigenous Women's Resource Center (NIWRC)**

515 Lame Deer Avenue, Lame Deer, MT 59043

P.O. Box 99, Lame Deer, MT 59043 (mailing)

Telephone: 1-406-477-3896

[www.niwrc.org/resources](http://www.niwrc.org/resources)

As the National Indian Resource Center dedicated to ending violence and increasing safety for Indian women and children, the NIWRC offers the following resources aimed at enhancing the capacity of Tribal Nations, Alaska Native Villages and Native Hawaiians to prevent and respond to violence against Native women and their children.

### **Tribal Law and Policy Institute (TLPI)**

161 Marie Avenue E. St. Paul, MN 55118

1-651-644-1145

[www.tribal-institute.org](http://www.tribal-institute.org)

TLPI is a Native American owned and operated non-profit corporation organized to design and deliver education, research, training, and technical assistance programs which promote the enhancement of justice in Indian country and the health, well-being, and culture of Native peoples.

### **The Indian Law Resource Center**

602 North Ewing Street Helena, MT 59601

Telephone: 406.449.2006

[www.indianlaw.org](http://www.indianlaw.org)

The Center provides legal assistance to indigenous peoples of the Americas to combat racism and oppression, to protect their lands and environment, to protect their cultures and ways of life, to achieve sustainable economic development and genuine self-government, and to realize their other human rights.

### **National Network to End Domestic Violence (NNEDV)**

1400 16th Street NW Suite 300 Washington, DC

20036 Telephone: 202-543-5566

[www.nnedv.org](http://www.nnedv.org)

This site offers comprehensive information to educate and provides useful tools. The frequently asked questions section provides an overview of the obligations of programs in ensuring survivor confidentiality and privacy, the federal laws that require confidentiality, and information about what programs can do to ensure confidentiality.

Victim Confidentiality Considerations For Domestic Violence And Sexual Assault Programs when Responding to Rare or Emergency Situations.

NNEDV Technology and Confidentiality Resources

Toolkit: <http://tools.nnedv.org>

### **Battered Women's Justice Project**

1801 Nicollet Ave South, Suite 102 Minneapolis, MN 55403

Telephone: 800-903-0111, ext. 1

[http://www.bwjp.org/files/bwjp/articles/Confidentiality\\_Advocates\\_Guide.pdf](http://www.bwjp.org/files/bwjp/articles/Confidentiality_Advocates_Guide.pdf)

BWJP's Criminal and Civil Justice Office offers training, technical assistance, and consultation on promising practices of the criminal and civil justice system in addressing domestic violence. Criminal and Civil Justice staff can provide information and analyses on effective policing, prosecuting, sentencing, and monitoring of domestic violence abusers, as well as protection orders, confidentiality issues, divorce and custody, and separation violence. Go to [www.bwjp.org](http://www.bwjp.org) for more information.

### **The Confidentiality Institute**

Tools available at: [www.confidentialityinstitute.org](http://www.confidentialityinstitute.org)

TCI provides up-to-date, state-specific, sophisticated training, toolkits, and on-call technical assistance to help an agency handle its most significant confidentiality and privacy challenges, whenever they arise.

### **The Alliance of Tribal Coalitions to End Violence**

[www.atcev.org](http://www.atcev.org)

The Alliance of Tribal Coalitions to End Violence is a nonprofit organization formed by Tribal Domestic Violence and Sexual Violence Coalitions located across the United States (including Alaska), which can help to connect tribal domestic and sexual assault programs to a Tribal Coalition located near them for specific training and technical assistance.

### **Futures Without Violence**

[www.futureswithoutviolence.org](http://www.futureswithoutviolence.org)

For almost two decades, the National Health Resource Center on Domestic Violence (HRC) at Futures Without Violence has supported health care professionals, domestic violence advocates, survivors and policy makers at all levels as they improve health

care's response to domestic violence. The HRC offers personalized, expert technical assistance, online toolkits for health care providers and DV advocates to prepare a clinical practice to address domestic and sexual violence, a free E-bulletin and webinar series, and other resources. The HRC also holds the biennial National Conference on Health and Domestic Violence—a scientific meeting at which health, medical, and domestic violence experts and leaders explore the latest health research and programmatic responses to domestic violence.

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## Appendix A

### Excerpts of Applicable Federal Law for Grantees and Battered Women Programs

#### **VAWA 2013**

#### **SEC. 3 Universal definitions and grant provisions**

#### **SEC. 40002. DEFINITIONS AND GRANT PROVISIONS.**

#### **(b) GRANT CONDITIONS. –**

#### **(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 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; and

(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.

## **FVPSA**

### **SEC. 10406. Formula grants to States**

#### **(c) Grant conditions**

##### **(5) Nondisclosure of confidential or private information**

###### **(A) In general**

In order to ensure the safety of adult, youth, and child victims of family violence, domestic violence, or dating violence, and their families, grantees and subgrantees under this chapter shall protect the confidentiality and privacy of such victims and their families.

###### **(B) Nondisclosure—**Subject to subparagraphs (C), (D), and (E), grantees and subgrantees shall not -

(i) disclose any personally identifying information collected in connection with services requested (including services utilized or denied), through grantees' and subgrantees' programs; or

(ii) reveal personally identifying information without informed, written, reasonably time-limited consent by the person about whom information is sought, whether for this program or any other Federal or State grant program, which consent -

###### **(I) shall be given by -**

(aa) the person, except as provided in item (bb) or (cc);

(bb) in the case of an unemancipated minor, the minor and the minor's parent or guardian; or

(cc) in the case of an individual with a guardian, the individual's guardian; and

(II) may not be given by the abuser or suspected abuser of the minor or individual with a guardian, or the abuser or suspected 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 release of the information; and

(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 information, in the aggregate, regarding services to their clients and demographic nonpersonally identifying information in order to comply with Federal, State, or tribal reporting, evaluation, or data collection requirements;

(ii) court-generated information and law enforcement-generated information contained in secure, governmental registries for protective order enforcement purposes; and

(iii) law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.

## **VAWA 2013, SEC. 3 Universal definitions and grant provisions**

### **SEC. 40002. DEFINITIONS AND GRANT PROVISIONS.**

#### **(18) PERSONALLY IDENTIFYING INFORMATION OR PERSONAL INFORMATION.—**

The term 'personally identifying information' or 'personal information' means individually identifying information for or about an individual including information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault, or stalking, including—

(A) a first and last name;

(B) a home or other physical address;

(C) contact information (including a postal, e-mail or Internet protocol address, or telephone or facsimile number);

(D) a social security number; and

(E) any other information, including date of birth, racial or ethnic background, or religious affiliation, that, in combination with any of subparagraphs (A) through (D), would serve to identify any individual.





National Indigenous Women's Resource Center

P.O. Box 99, Lame Deer, MT 59043

1-406-477-3896 | niwrc.org