Questions & Answers from
"FAQ's About Survivor-Centered Services & Federal Confidentiality"
December 13, 2016

Subpoenas, Court Orders & Warrants

Q: We are getting lots of subpoenas of files, sometimes from Children & Family Services, sometimes for a criminal case against the client. Sometimes we are told we should not, sometimes we're told we can't. What are we to do?

> We know the subpoenas can be very frustrating. We suggest that you take a close look at the Tip Sheet called How to Respond to a Subpoena. If you are receiving many subpoenas, then you may have some systemic advocacy to do with your colleagues in the community to discuss when it is and is not appropriate to subpoena an advocate into court, and how subpoenaing advocates to testify undermines the ability of advocates to be trusted by survivors and to make an impact.
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> We also think it is important that your organization seek out a lawyer who is knowledgeable about your privacy laws and can routinely assist you when subpoenas come in. You may be able to connect with a pro bono attorney or this may need to be a budget line item for 2017. Confidentiality Institute can provide assistance to get a local lawyer well-educated about your confidentiality laws and public policy issues.

Q: Sometimes our agency gets an order from the court, ordering us to provide a service (such as family therapy or custody evaluations) that we don't or can't provide through our agency. What can we do?

> A: Courts are part of the coordinated community response to violence and it is important that advocates, mental health providers and supervised visitation programs communicate with judges as a group about the kind of work that you can do, the kind of work that you can't do, and the way in which a judge would appropriately get you involved in case. You can do this kind of communication by reaching out to the supervising judge in your area (sometimes called a chief judge), offering to train judges on what your organization does or does not do, and distributing written materials that explain to courts what you do and don't do.
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> If a judge does issue an order for you to provide some kind of service that you don't or can't provide, you can appear before the court to explain to the judge why the order is inappropriate and ask them to reconsider it. Also, ask the lawyers who were in court when the order was issued to tell you how the judge got the idea to order your organization to provide this service. You may find out that a lawyer suggested you because that lawyer didn't have a clear understanding of what you can and can't do, so the judge was following someone else's lead. Then you do education with that lawyer and other lawyers in your community about what services you can and can't provide.

Q: What about if police come to my shelter and have a warrant?

Unlike subpoenas, warrants are always court orders that have been signed by a judge. However, there are very specific rules about when judges are allowed to issue warrants and what police are allowed to do under a warrant. For instance, in most states, an arrest warrant for an individual would not give police permission to search a temporary shelter to look for the person, unless they also had a search warrant.

We recommend that programs reach out in advance to local police chiefs to reach agreement about the best way to handle potential warrants so that the least amount of trauma is inflicted on the residents in the shelter. Additionally, as with subpoenas, programs should line up an attorney who they contact if a police officer comes with a warrant. There should be a policy about exactly what staff should do upon learning of the warrant (usually, contact the Executive Director and the agency's attorney right away.) If a warrant is defective (meaning it was incorrectly filled out or doesn't give the police power to do what they want to do), then an attorney can help you negotiate with the police and bring down the tension before they enter the shelter.

Q: If a police officer contacts your shelter asking if someone is a client, how would you handle answering the question without breaking confidentiality?

A: The FAQ's on Survivor Confidentiality Releases has a section on Confidentiality and Partnerships that gives a nice process for handling such a situation. It works even better if you communicate with the police department in advance, letting them know that this is the way you will respond to contact from them, so they aren't surprised when it happens.

Q: Should we be sharing client information when CPS calls to follow-up on report that was made or to confirm whether someone is currently in our shelter and/or receiving services? If so, should we have CPS fax over proof of who they are before disclosing information? Do we have to have written consent from the caller to answer these questions?

The answer to this question will depend on the law in your state and is different for different stages of the CPS process. It is very important that you find out what your law actually says, what you are actually required to share and you share the minimum necessary to comply with that law.

A. Some states have a statute that requires the person who made a mandatory report to answer follow-up questions about the report. If that is your local law, then you would have to answer appropriate follow-up questions, you would not need a release, and you would follow VAWA protocol by making reasonable attempts to notify the survivor that you are sharing this information.

B. A call from CPS to find out if someone is in shelter or is receiving services may not be related to an investigation; more likely, it is related to services that a family is receiving after a report is investigated. Most states do NOT require confidential professionals to share information with a CPS worker during the services stage (which is very different from the investigation stage.) If a CPS worker calls you demanding information because they are providing services to a family, then you would only share if a law requires you to do so. Usually the law doesn't require you to share, and you would tell the CPS

worker about your requirements under VAWA/FVPSA/VOCA, and then talk to your client to find out what the client would like you to do in response to the call from CPS.

Anytime a CPS worker (or any other official) demands you share information, and you do not know THE LAW that requires it, you should: 1) politely acknowledge that they believe the law requires you to share, 2) inform them that VAWA/VOCA/FVPSA requires you not to share unless you are mandated to by law, and 3) ask them to send you the language of the actual law that requires you to share. That way you can read it (or have your agency attorney read it) to see what it really requires. It is quite common for CPS workers to assume they are entitled to information which they are not actually entitled to receive.

Of course, anytime you are sharing information with someone outside of your agency (whether by requirement of law or by request of the survivor), you should always take reasonable measures to confirm that you are really communicating with the person authorized to receive the information.

Written consent, when needed, should come from the survivor you are working with as a result of your conversation with the survivor to confirm this is what they want and helps them meet their needs.

Emergency Situations

Q: If we call 911 for a client that is in shelter should we be providing the shelter address?

In an emergency situation, you can provide the shelter address so that first responders are able to assist. If your shelter is a confidential location, however, you will want to discuss with local law enforcement how to best handle emergencies and still ensure the confidentiality of the location. Some jurisdictions are increasingly making records of 911 calls and other police activities available to the public. There is no uniform way that this is being done currently, so it's important to discuss with your local law enforcement agencies (any that may be involved when calling 911) what their practices and procedures are. For example, some departments do not share residential addresses from where a 911 call took place while others do. Some may only make public calls that are for medical emergencies, but not some other calls, such as those related to domestic violence or sexual assault, to help protect the privacy of any victims. That said, if a call has to be made for a broken foot vs. an assault, it's important to know if that would trigger any public disclosure. Once you know what their practices are with any public disclosure of location information, you can work with them to carve out options that will work best for survivor safety and well-being while also preserving the confidentiality of the shelter location.

Q: Our state does not have a statute mandating reporting for harm to self or others. Are we still able to get emergency services for someone in crisis?

Medical emergencies are covered in section A of the handout Victim Confidentiality Considerations for Domestic Violence and Sexual Assault Programs When Responding to Rare or Emergency Situations. You can call 911 and say a woman appears to be having seizures, just like

you would if you saw a stranger on the street. You would NOT be allowed to provide any of her details. Best is to have her give her own information (if she desires) to the 911 dispatcher.

Q: I have been informed by our primary funders at the state level that as a domestic violence agency, it would constitute a violation of client's confidentiality rights if we were to contact medical emergency/mental health services for a client who is presently experiencing what staff interpret as a mental health crisis, even if that client has a signed release of information on file. As an agency, what are our recourses of actions for the client while adhering to confidentiality compliance mandates (local, state and federal)?

Without a release or a state mandate to contact police in certain situations, doing so would be a violation. Since a lot of people are coming into programs with trauma (which may present as mental health crises, but not be), we want survivors to feel safe disclosing and being honest with us without fear of us calling the police. That lack of trust can lead survivors to not tell us when they are experiencing something they really need assistance with. Under VAWA, if you have a release, you can contact another agency, however that release needs to be written, informed, time-limited, AND specific. What are the releases that you have on file? A release in this instance should be extremely clear on what information will be shared and with whom. What is your process for keeping releases on file that apply to this situation?

Q: Are release of information forms needed between DV/SA programs? We have had other programs state that for safety reasons, information should be shared freely especially around safety issues. Does this include between advocates in different settings? Re: Rape Crisis Center and DV Shelter?

Releases are needed between organizations before identifying information can be shared about a survivor, even if they are organizations with similar missions (like two different DV shelters or a DV shelter and a rape crisis program). Imagine if you shared private information with a lawyer and that lawyer felt free to tell every other lawyer in the state your private information on the theory that they are all lawyers, too. A survivor decides for themselves whether having one DV agency share information with another agency increases or decreases safety and well-being. This issue is also covered in the FAQ's on Survivor Confidentiality Releases, especially the additional questions section.

Q: What about the new VOCA Rule confidentiality provisions?

The new VOCA confidentiality regulation for victim assistance grantees directly tracks VAWA's statutory confidentiality requirement. We are updating the toolkit to include the VOCA rule, but here is a link directly to the Federal Register publication with the new VOCA rules and the specific confidentiality rule is 28 CFR §94.115

Confidentiality & Clients Speaking Languages other than English

Q: Are there recommendations for obtaining Releases of Information (ROIs) when serving ESL clients?

First step, if you do not speak your client's first language, then you need to follow best practices when working with a qualified interpreter (some addressed in prior Q&A here). Then make sure you are using a written release that your client can understand.

Make it a point to have your standard releases translated into languages you commonly see in the community you serve. The client can then fill in the specifics in their own language, and you can have the interpreter translate the client's written portions to you. If you have a client speaking a language for which you do not have a translated release, then you can have the interpreter read the language of the release to the client. At the bottom of that release, include a line in the client's language which says something along the lines of, "This release was read to me in my native language by a qualified interpreter. I understand what it says and I am signing here to indicate my consent to the instructions in the release." Include an English translation of that line, and have the client sign and date. Then, have the interpreter sign an "Interpreter's Affidavit" in English. That document will state in English the interpreter's name, that the interpreter is qualified to interpret between English and the language of the client, and that the interpreter read the document to the client in the client's language accurately and completely to the best of the interpreter's ability. This Interpreter's Affidavit gets attached to the client's release form.

Q: What about confidentiality when using outside interpreters?

When using interpreters who do not work for your agency, these are the general principles for best practice:

1. Releases are needed when a program shares identifying information about a survivor with someone else. If you are using an interpreter for an initial meeting or interview with a survivor, the survivor will be the one sharing identifying information with you and with the interpreter. The survivor will make choices about what they are comfortable sharing with both you and the interpreter but since the survivor is doing the sharing, no written release is needed.
2. If an interpreter is needed to communicate, then the presence of the interpreter in the room with you and the survivor will not have any negative effect on legal confidentiality and privilege protections for the conversation.
3. Make sure to check in with the survivor about the interpreter to ensure the interpreter is a safe person for the survivor. That means 1) telling the survivor the interpreter's name to see if they know each other, 2) checking in with the survivor to ensure they are comfortable with the behavior and demeanor of the interpreter during the meeting, and 3) paying attention to the survivor's demeanor and body language during the meeting in case there is a problem with the interpreter, but the survivor does not feel able to verbally express through the interpreter.
4. When relying on interpreters from outside your organization, make sure that you confirm that person's ethical and professional commitment to keeping all communications during the meeting confidential.

Q: What about using interpreters over a hotline? What is a client calls and you cannot talk with them without an interpreter?

If you are on a hotline with someone, then you generally don't have any information about that person yet so you aren't at risk of revealing any information to an interpreter. Remember, you don't need a release for a caller to talk directly to an interpreter. You would need a release if you were sharing the survivor's personally identifying information with the interpreter.

You should follow best practices to make sure that the client knows the interpreter's name and agrees that the interpreter is a safe person for the client. In small language communities, it is surprisingly common for native speakers to know each other's families, even across state lines.

Q: Under VOCA, would we have to get written and informed permission from the client to share the client's name with a potential interpreter (in order to do a conflict check with the interpreter)?

Under VAWA, VOCA & FVPSA, you would need a written release for staff at your agency to disclose the name of a client to an interpreter from outside your agency. The survivor could disclose her own name to the interpreter without any need for a release. It is important to start the conflict check with the survivor – get the interpreter's name and check with survivor whether that person poses any conflicts. It is surprisingly common in some language communities for interpreters to know the survivor and/or abuser personally.

Confidentiality Concerns Within an Agency

Q: Do you have any tips on confidentiality of electronic documents, faxing items, etc.? We are trying to cover more than just handwritten documents.

First off, we recommend that you take a look at the resource called Agency's Use of Technology Best Practices & Policies Toolkit as well as the FAQ's on Record Retention and Deletion.

And to supplement our retention handout, the Federal Government released Uniform Grant Guidance instructing that grantees only need to keep FINANCIAL files for 3 years after the final grant report is filed (90 days after the grant ends) and narratives and survivor files can be purged MUCH SOONER.

We suggest taking an inventory of all the places you manage, communicate, and store sensitive data and then individually looking at the process for each. There are going to be different concerns and different strategies for each option. For example, when faxing content that includes survivor information, we suggest always using a cover letter that specifies who it is sent to and contacting the person ahead of time if they share an office so they know to be near the machine and not leave sensitive data sitting for a long time where others could see it. We would also suggest that you look at the type of fax machine that you have and if it has a memory and is set to internally maintain a copy of what is sent. If so, that setting should be shut off since the sensitive information should not be maintained on the device where it could later be reprinted. In addition, if another agency does not seem to have good policies and practices about how they treat the sensitive information they obtain via fax, then your agency can consider using a different method for getting information to them or limit the information in your faxes.

Remember that a release would always be needed to share information in any way and that you should also talk with survivors about how the information will be transmitted in case they have concerns. For more thoughts on electronic documents, check out our template policy on electronic materials and our content on using an In-House Server vs. Cloud Storage.

Q: How should confidentiality be handled between staff at a victim service agency, between those that actually provide the direct services those that are in administrative or other leadership roles that are not involved with direct services?

From the FAQ's on Survivor Confidentiality Releases
You can share information with your supervisor or team; although it is best practice that information be shared on a "need-to-know" basis. Agencies should have a policy in place about internal information sharing. For example, it may be appropriate to inform a supervisor or colleague of the status of an individual's court case or if they are possibly suicidal. It may not be necessary or appropriate, however, to share with a supervisor or co-worker that an individual told you s/he is an incest survivor in addition to recent violence that brought her to your program.

This is going to heavily depend on roles, responsibilities, and obligations that may vary depending on state laws and other requirements – like licensure reporting requirements. Each agency will have to look at what they need to do and how to create a policy that allows for survivors to feel comfortable disclosing or sharing more with one staff and not the whole agency, but also allows the staff to communicate any issues when it's important to do so. Whatever the policy is, it's important that survivors are aware of it so they are never sharing something with someone with the idea that it would never be shared with anyone else if that is not the case.

Legal Questions

Q: Is there any case law that has challenged electronic consent? Is there a best practice, i.e. notarization of release?

We are not aware of any case considering whether electronic consent is acceptable under VAWA. In terms of best practices for electronic releases, agencies should:

1. Consider whether having the agency disclose identifying information is actually the best way to address the survivor's need;
2. If having the agency disclose information is the best way to meet the survivor's need, then the program should ensure that it discusses with the survivor the details of the disclosure: how much information, which specific information, disclosed to whom, disclosed when, and disclosed by which method.
    a. Ideally, have a verbal discussion with the survivor (making reasonably certain that it is actually the survivor you are communicating with.) That discussion could be an electronic discussion if necessary, but you must consider two important things:
        i. Is it safe to record & exchange all of this detail electronically? Is the survivor concerned about electronic communications being monitored

by an abuser or other person that the survivor does not want reading this level of detail?

ii. Can the program confirm that it is actually communicating with the survivor whose information is at issue? It is relatively easy to impersonate another person via email.

b. Complete an actual written release within your office with the necessary details about the release that the survivor wants made. If it electronically possible and safe, you could send that release to the survivor who then might confirm in writing electronically that is reflects their wishes. If it not electronically possible, you could read the release over the phone and have the survivor send written confirmation that is what they want you to do.

c. Have survivor sign the actual written release at the next opportunity. You could do this by mailing a copy with a stamped return envelope or signing it next time they are physically in the same place as you.

For more best practices around releases generally, please see FAQ's on Survivor Confidentiality Releases.

Q: Does confidentiality under these programs survive death?

The confidentiality language in VAWA, VOCA, FVPSA does not say it expires upon the death of the person. The recent VAWA regulations offer specific restrictions on how information can or cannot be shared with a Fatality Review team after a victim has died, thus indicating that the federal authorities believe confidentiality protections do extend after death. Confidentiality should be protected after death because 1) concern about information being disclosed after death can cause people to withhold information while they are alive and 2) public disclosures of information shared by a deceased victim of abuse can result in harm to living children, extended family or friends of the deceased.

In states where victim service providers have a privilege, the statute may specifically state that it ends or stays in place after a person's death. It is important to read your state statutes. If the state statute does not mention the effect of death, then you can look at the state's general approach to privilege after death for other professions. There may be case decisions explicitly protecting privilege after death for lawyers, doctors, psychologists or social workers, and that can show that the state courts generally believe privilege should extend after death.

Q: Who is and how far does liability go if confidentiality is violated?

This is not the kind of answer that we can accurately answer in a generic sense. Liability will depend on local law as well as federal law that applies to your work. In some states, it is considered a misdemeanor crime to violate the advocate confidentiality and privilege statute. In other states violating the confidentiality statute could result in a personal injury lawsuit for damages. If VAWA confidentiality is violated, a program could be subject to special conditions before it is allowed to receive more funding or may not be able to receive future funding.

