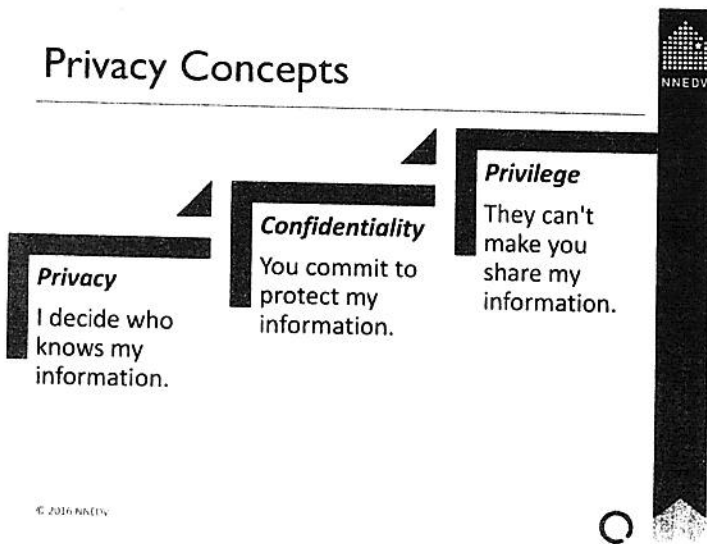
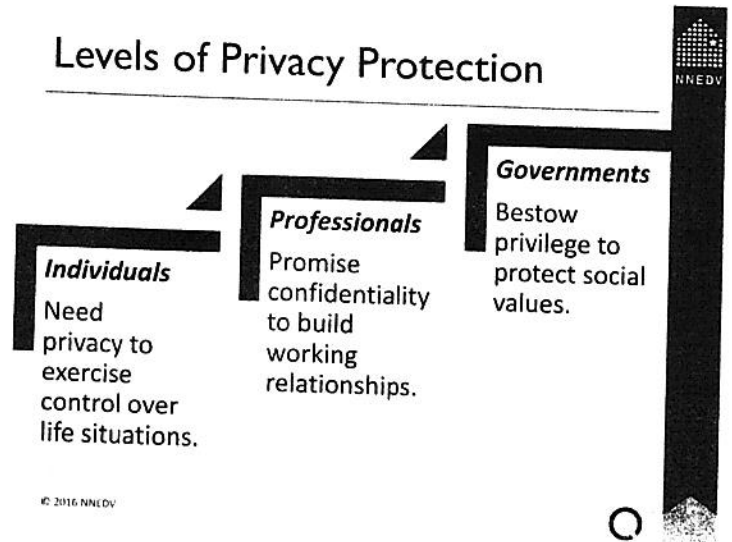


Privacy Concepts



Levels of Privacy Protection



Privacy = Choice

- I (Survivor) decide:
 - Who knows
 - My information
 - NOT necessarily about keeping secrets.
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Confidentiality = Protecting Choice

- I (advocate) protect
 - Survivor's right
 - To decide who knows your information
 - Builds trust & willingness to seek help
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Contacts for more information – 413-586-1125
Anthia Elliott anthia@safepass.org
Marianne Winters Marianne@safepass.org
Lynne Marie Wanamaker lmw@safepass.org

National Network to End Domestic Violence
Confidentiality Toolkit:
<http://techsafety.org/confidentiality>

Inside/Outside the Circle

Inside the Circle

Survivor chooses to share information with staff of Victim Services Program

- Law Enforcement
- Child Welfare
- Other V.S.P.'s
- Non Victim Service Programs
- Funders
- Auditors
- Allies

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Non-Personally Identifying, Aggregate Data

VAWA/FVPSA allows grantees to share:

- Non-personally identifying information in the aggregate regarding service to their clients.
- Demographic non-personally identifying information in order to comply with reporting, evaluation, data collection requirements.

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“Personally Identifying Information”

- *“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...”*
 - Name or address
 - Contact information (postal, email, internet protocol address, phone, fax)
 - Social Security, passport, driver’s license, student ID number
 - **Any other information, including date of birth, racial or ethnic background or religious affiliation that “would serve to identify any individual”**

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Personally Identifying Information

- 87% of the population in the United States are identifiable based on 5-digit zip, gender, and date of birth.
- 53% are identifiable by city/town, gender, and date of birth.
- 18% are identifiable by county, gender, and date of birth.

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When Is a Release Needed?

- Anytime personally identifying information about a survivor is shared outside of your agency.
 - A release is needed even to admit that a particular person has received services from your agency.



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W.I.T.S. Release

W	Written <ul style="list-style-type: none">• VAWA has no exception for oral
I	Informed <ul style="list-style-type: none">• Understand pros/cons of release• Release ≠ condition of service
T	Time-Limited <ul style="list-style-type: none">• Tailored, not standardized
S	Specific <ul style="list-style-type: none">• Clear identifiable items subject to release



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Guiding Principles

- Inform Survivors, They Decide
- Survivors must understand the potential consequences of disclosure.
 - Who is seeking information?
 - For what purpose?
 - Where else might the information go?
- Survivors get to choose whether or not a partnership/team as a whole discusses their individual situation or case in any way.



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Give Power Back to Survivor

- Vesting control over information with her/him.
 - Don't force them to give it to you.
 - Don't force them to turn it over to anyone else.
 - Don't turn it over to anyone else.
 - Don't decide for her/him.
- Survivor decides what is safe, what is risk.
- Survivor in best position to weigh consequences.



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Marianne Winters Marianne@safepass.org
Lynne Marie Wanamaker lmw@safepass.org

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A Primer on Privilege & Confidentiality For Victim Service Providers



** The purpose of this document is to assist providers in thinking through the nuances of the generic concept of legal privilege in a court of law. Providers will be better able to protect confidential survivor information if they understand how courts analyze legal privilege, and educate survivors and staff on how to ensure the greatest protection from disclosure. However, privilege is controlled by statute so providers must read and understand their local law in order to best protect survivor privacy.*

1. Introduction

The terms privacy, confidentiality, and privilege are often used interchangeably, but they are distinct ideas. Think of them as siblings, not identical triplets. This memo generally clarifies these three concepts to help advocates and victim service providers design and implement best practices around the protection of information.

Here is a shorthand way to distinguish between privacy, confidentiality and privilege:

- *Privacy* is a personal choice whether to disclose information,
- *Confidentiality* is a responsibility to protect someone else's choices about disclosure, and
- *Privilege* is a legal rule prohibiting the disclosure of private information against someone's will.

2. What do we mean by "privacy"?

Privacy is often referred to as the right to control information and decisions about oneself. Businessdictionary.com offers this definition:

The right to... determine whether, when, how, and to whom one's personal information is to be revealed.

A core mission in working with survivors of domestic and sexual violence is to restore power and control over daily life to the survivor. This includes power and control over his or her information. A survivor should always have the opportunity to ask, "How does the sharing of this information by my advocate impact my control over information about me? Is there another way to accomplish my goals that gives me more long-term control?"

While there are different laws that recognize and protect privacy, the idea of privacy itself is broader and deeper than any individual law.

3. What does "confidentiality" mean then?

Confidentiality means a responsibility to protect the information that someone else has shared. It is a promise that (1) the advocate will not intentionally disclose information, (2) the advocate will take protective measures to prevent inadvertent or unlawful disclosure of information, (3) the advocate will vigorously challenge any attempts to take the information, and (4) the advocate will alert the owner of the information about attempts to take it. Borrowing a definition from the medical community, confidentiality is:

A Primer on Privilege & Confidentiality

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A Primer on Privilege & Confidentiality For Victim Service Providers



The ethical principle or legal right that a professional will hold secret all information relating to a client, unless the client gives consent permitting disclosure.

(Adapted from the definition in Dictionary.com; The American Heritage Stedman's Medical Dictionary, Houghton Mifflin Company)

Confidentiality has long been a core element of effective domestic and sexual violence advocacy. In recent years, a number of laws have been amended to officially recognize the duty of advocates to practice confidentiality; specifically the Violence Against Women Act (VAWA) and the Family Violence Prevention and Services Act (FVPSA). Many state statutes have also been amended or passed. Formal legal recognition of confidentiality reinforces the long-standing ethical duty to protect survivor control over personal information.

One doesn't need to have legal privilege (as explained below) to practice and defend confidentiality. Privilege is useful in the legal context as it requires judges to respect confidentiality in the courtroom, minimizing the need to persuade individual judges and preventing judges from punishing survivors for protecting information. But, given that most demands and challenges to confidentiality come from outside of the courtroom, the presence or absence of privilege is not necessarily relevant to the daily issues around information. Strong confidentiality practices protect survivor privacy, and those confidentiality practices are now enshrined in federal and state laws. There are places, however, where the law does not address advocate confidentiality, so advocates draw on other sources of support to implement best confidentiality practices.

4. So what does it mean to have "privilege"?

Privilege typically means:

- 1) a court cannot force a survivor or her advocate to disclose information shared between the advocate and survivor, and
- 2) neither the advocate nor the survivor can be punished for a refusal to disclose the information.

If a judge's order requires an advocate to share legally privileged information, it may well be an invalid court order and should be challenged in the court system.

The privilege to not disclose confidential information is an exception to the general rule that a court is entitled to any information it wants in the search for the truth. *Jaffee v. Redmond*, 518 U.S. 1 (1996). For that reason, many courts are eager to find an excuse to rule that the holder of the privilege gave it up and therefore the court can demand disclosure. In the eyes of the courts, a person with a privilege that protects confidential communications must keep the information private or risk losing the ability to protect the information in court.

A. Who does the privilege belong to?

Think of privilege as a possession. Who holds it? In the professional privilege context, the client/patient/survivor owns or holds the privilege, *not* the professional. Because the survivor holds the privilege, the survivor has the right to waive it or give it up. A survivor is allowed to decide that s/he wants the information to be shared in court and wants the protected professional to share it.

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A Primer on Privilege & Confidentiality For Victim Service Providers



The precise contours of the law on privilege will depend on local law and practice. But the responsibility to enforce confidentiality as vigorously as possible should be a constant across the professional community responding to the needs of survivors of domestic, sexual, dating, family, stalking and trafficking violence.

Final Tips on Privacy, Confidentiality & Privilege:

1. Privacy is an individual right to make decisions about how much information to share with anyone.
2. Confidentiality is a legal or ethical duty to protect someone else's information from disclosure against their will.
3. Providing as much confidentiality as possible for survivors is integral to advocacy practice.
4. Privilege is a special protection that courts and legislatures can grant to confidential communications between survivors and advocates.
5. Privilege belongs to the survivor who has the right to assert it or waive it.
6. Advocates have a duty to vigorously protect a survivor's privilege until a survivor gives specific instructions that s/he is waiving privilege.
7. Whenever a survivor discloses confidential communications with an advocate, s/he runs a risk that the court will say s/he has waived the privilege.
8. If an advocate discloses privileged communications without survivor permission, the survivor still has the right to assert the privilege *and* the advocate may be liable for any damages resulting from the disclosure.

This project was supported by Grant No. 2013-TA-AX-K006 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.