



# NATIONAL CRIME VICTIM LAW INSTITUTE

## RELEASE OF INFORMATION FORM CONSIDERATIONS

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### *The Legal Background Informing Release of Information Forms*

Privacy can be understood as the ability to control the sharing of personal information. As one court has observed, “[t]he essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for [themselves] the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, and behavior and opinions are to be shared with or withheld from others.” *Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) (Spaeth, J., concurring in part). For many crime victims, “privacy is like oxygen; it is a pervasive, consistent need at every stop of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.” Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 473 (2005). In fact, maintaining privacy is so important that some victims refrain from accessing legal, medical or counseling services without an assurance that treatment professionals will protect their personal information from disclosure.

Understanding the importance of privacy to victims/survivors, and wishing as a matter of public policy to encourage access to services when needed, federal and state legislatures and professional licensing bodies have created frameworks of laws and regulations that help protect the information victims share with professionals from further dissemination. In fact, every jurisdiction has adopted statutory or constitutional victims’ rights; some of these explicitly protect victim privacy or dignity. Victims may also be able to invoke a federal constitution-based right to privacy. In addition to these broad rights, more specific privacy protections may be found in confidentiality obligations and privilege protections. Professionals who work with victims should understand these concepts and how these obligations and protections impact their work with victims. Each concept is summarized briefly below.

## Confidentiality

“Confidentiality” is a legal and/or ethical duty not to disclose a victim-client’s information learned in confidence.

As part of accessing services, victims frequently share highly sensitive personal information with professionals. A victim’s willingness to share this information may be conditioned on a professional’s promise to not disclose it. The promise to hold the victim’s information in confidence is governed by the professional’s ethical duties, regulatory framework and/or by other laws. Breaking the promise may carry sanctions. The promise not to disclose information that is shared in confidence—as well as the legal framework that recognizes this promise—are what qualifies this information as “confidential.”

Professional confidentiality obligations may be imposed by a code of conduct that is specific to one’s profession (*e.g.*, advocate ethics, social worker ethics, attorney ethics, medical provider ethics, mental health counselor ethics). In addition, certain laws may impose confidentiality requirements as a condition of funding. If an entity receives such funds, then it is bound by those confidentiality rules or risks losing its funding. Examples of laws that impose confidentiality requirements include the: (1) Victims of Crime Act (VOCA), 28 C.F.R. § 94.115; (2) Violence Against Women Act (VAWA), 34 U.S.C. § 12291(b)(2)(A)–(B); and (3) Family Violence Prevention and Services Act (FVPSA), 42 U.S.C. § 10406 (c)(5)(B). For example, VAWA (Section 3), VOCA and FVPSA regulations generally prohibit sharing personally identifying information about a victim without first obtaining the informed, written and reasonably time-limited consent of the victim.

When providing services—and ideally before any victim information is communicated from the victim to a service provider—service providers should discuss with victims the contours of the confidentiality obligations that apply to their work, along with a discussion of any limitations that may exist when it comes to maintaining the confidentiality of victim information. Although a victim can be assured that a professional may not ethically disclose their confidential information unless legally required to do so, it is important that victims understand that courts have the authority to require a professional to break the promise of confidentiality when certain conditions are met, such as when a court decides that the rights of an accused person outweigh the privacy protections afforded to the victim by law. Other circumstances that may compel disclosure of victims’ otherwise confidential information include if the information falls within the prosecution’s required disclosures to defendants pursuant to the United States Supreme Court case *Brady v. Maryland*, 373 U.S. 83 (1963), or if information shared with a mandatory reporter compels the reporting of child abuse or abuse of a vulnerable adult.

The basic rule of confidentiality is that a victim’s information may not be shared outside an agency unless the victim gives permission to do so; however, because some exceptions to this basic rule exist, it is important for service professionals to discuss in detail with the victim the circumstances under which the professional will be required to disclose information that the

victim has shared, so that the victim can make an informed choice when deciding what, if anything, they choose to share.

### Privilege

“Privilege” is a legal right of a person not to disclose—or to prevent the disclosure of—certain information in connection with court and other proceedings.

Legislatures throughout the country have recognized that the effective practice of some professions requires even stronger legal protection of confidential communications between the professional and the client. This recognition has resulted in the passage of laws that prevent courts from forcing these professionals to break the promise of confidentiality no matter how relevant the information is to the issues in the legal proceeding. This protection is a “privilege”—a legal right not to disclose certain information, even in the face of an otherwise valid subpoena. Key aspects of privileged communications are that: (1) they are specially protected, often by statute; (2) disclosure without permission of the privilege holder (*i.e.*, the victim) is prohibited; (3) they are protected from disclosure in court and other proceedings; (4) the protections may be waived only by the holder of the privilege (*i.e.*, the victim); and (5) some exceptions may apply. Examples of communications that may be protected by privilege depending on jurisdiction include: spousal; attorney-client; psychotherapist/counselor-patient; clergy-penitent; doctor-patient; and advocate-victim. Jurisdictions that recognize a particular privilege may narrowly define its terms, limiting its application. For example, among the jurisdictions that recognize an advocate-victim privilege, many define the term “advocate” to exclude those who are system-based (*e.g.*, affiliated with a law-enforcement agency or a prosecutor’s office).<sup>1</sup>

### Understanding the Difference between Confidentiality and Privilege

On a day-to-day basis, confidentiality obligations govern advocate interactions with victims/survivors; privilege, when available, comes into play to provide an additional layer of protection against disclosure in court and other proceedings.

Because ensuring a victim’s control over whether and how to disclose personal information is so important, and because community-based and system-based advocates can offer different levels of privacy protection to victim communications, every advocate must know whether their communications with a victim are confidential and/or privileged, as well as how courts have interpreted the scope of each protection and any exceptions that may exist. This information should be shared with victims at the very beginning of the relationship, in advance of information disclosure, so that victims understand the privacy protections that may apply to their communications with the advocate before choosing what information they wish to share

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<sup>1</sup> For a summary of laws that address advocate-victim privileges nationwide, see Confidentiality Institute, *Summary of U.S. State and Territorial Laws Related to Advocate Confidentiality & Privilege* (Dec. 23, 2021), [https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/61e9da8acfa98a276a13af1e/1642715790156/CI\\_Advocate+Confidentiality+%26+Privilege+laws\\_2022.pdf](https://static1.squarespace.com/static/51dc541ce4b03ebab8c5c88c/t/61e9da8acfa98a276a13af1e/1642715790156/CI_Advocate+Confidentiality+%26+Privilege+laws_2022.pdf) (last accessed Aug. 18, 2022).

with that advocate. Failure to thoroughly discuss this topic with victims/survivors may provide victim-clients with a false sense of security regarding their privacy and inflict further harm if their personal information is unexpectedly disclosed.

It is also important for advocates to be ready to offer victims referrals to other victim service providers who may have different privacy-related protections and obligations. These referrals enhance victim/survivor agency and ensure that victims have options when deciding what information, if any, to share with different victim services providers.

### Victims May Choose to Permit Sharing of Information

Importantly, victims may consent to sharing of their information by those with confidentiality and/or privilege obligations. As discussed above, many funding streams permit sharing of personally identifiable victim information only after first obtaining the informed, written and reasonably time-limited consent of the victim. For consent to sharing to be informed, victims/survivors must, among other things, have a thorough understanding of the potential consequences of permitting an advocate to share their information. These consequences may include the: (1) inability to “take back” a disclosure once it is made; (2) lack of control over the information once released; and (3) risk of the accused accessing the information. Best practice (and based on funding at times a required practice) is to use a Release of Information (ROI) form in connection with receiving and documenting a victim’s consent to share personally identifiable information outside of the agency.

### *Considerations When Creating a Victim-Centered Release of Information Form*

When drafting a Release of Information form (which is sometimes called an “ROI form” or “Release form”) for use with victims/survivors, it is important to keep in mind the VAWA/VOCA/FVPSA requirements, identified above, along with victims’ rights generally, and the goal of enhancing victim choice through the use of the form. Below are examples of key considerations to keep in mind when creating an ROI form and/or reviewing existing forms to identify potential improvements.

#### **Form Selection**

- Have you considered whether it best serves victims/survivors to use a single form that both explains the contours of your privacy obligations and serves as a Release of Information form, or whether separate forms would be clearer and more effective?
- Have you considered whether you want to use a single Release of Information form when releases are authorized to more than one external organization, or whether separate forms should be used for each external organization?
  - In this analysis, consider:
    - the differences in privacy obligations and protections of each external organization;
    - the differences in mandatory reporting obligations;
    - the differences in types of information that may be requested by different entities; and

- that victims/survivors may not want to authorize the release of the same information to each organization receiving their information.
- Have you thought about the victim-related information you collect as part of the form, and why you may need that information? Best practice is to be familiar with the reasons for collecting victim-related information (*e.g.*, age, social security numbers, addresses, pronouns, etc.) so the service provider can explain to the victim/survivor why that information is being collected. Question whether it is necessary for the ROI form to include potentially sensitive, private, or locating victim-related information, such as a victim’s date of birth, social security number, or address.

### **Clarity of Privacy Obligations**

- Do you clearly identify your privacy obligations and any limitations of those obligations (*e.g.*, mandatory reporting duties and other disclosures required by law)?
- Do you clearly explain the circumstances under which you would have to share information, even in the absence of a release?
- Do you clearly state that victims/survivors do not have to sign a release in order to receive (or continue to receive) services?
- Do you clearly define all privacy-related terms? These terms may include some or all of the following words/phrases:
  - Confidential
  - Privilege
  - *Brady* Disclosure Obligation
  - Mandatory Reporting
- Do you clearly identify the personnel (by profession or role) that are bound by the privacy obligations and by the release authorization?
- Does the form include identification of how information may be shared (*e.g.*, by telephone, by email) and whether the victim/survivor can elect the method by which it is shared?

### **Clarity of Information Provided**

- Is all information readily understandable by someone without detailed knowledge of the legal system or the criminal justice process?
- Do you spell out/define all acronyms?

### **Identification of Information Subject to Release**

- Is the specific information covered by the release clearly identified?
- Have you considered the method best suited for victims/survivors to identify the information that they would like shared (*e.g.*, selecting specific information from among a selection of options, describing the information in a narrative format)?
- Have you considered adding a place where victims can specify specific types of information that they do not want shared?
- Do you avoid the use of catch-all wording, such as “my confidential information,” “relevant information,” “information about my case,” and language such as “including but not limited to”?

### **Time Period for Authorization**

- Is the release form time-limited?
- Do you allow the victim/survivor to determine what timeline for release they feel comfortable authorizing, with a fillable option for the timeframe, or is the timeframe pre-filled?

### **Modification of Release Authorization**

- Does the form explain to victims that they may revoke their authorization to release information and how to revoke it?
- Does the form explain how to extend or expand the authorization of release?
- Is specific contact information for the person or department that handles revocation of a Release of Information form included in this context?

### **Accessibility**

- Is the form accessible?
  - Is the form available in multiple languages?
  - Is it written at an appropriate reading level, free of undefined acronyms, using words that are understandable by someone unfamiliar with the justice system or victim services?
  - Is the form available in large font?
  - Is the form available in braille?
  - Is the form formatted so that it can be clearly navigated by a person using a screen-reader (e.g., including alt-text on all images, properly formatted reading order, accessible formatting for fillable PDFs)?

### **Consistency of Information and Use of Form**

- Do you have an instruction/training document for staff and volunteers in your organization/agency and provide training on processes to ensure that any person presenting the form on behalf of your agency is addressing and providing information consistently and thoroughly?
- Do your practices include instructions to provide the victim with a copy of the form and instructions for revoking consent, so that they have their own copy of the information?

### **Working with Child-Victims**

- Does your form explicitly address instances where the victim is a minor?
- If the approach of your organization/agency differs depending on the age of a child-victim, does the form explicitly explain the differences?
- Have you considered whether a separate form should be created for use with child-victims?

### **Legal Compliance**

- Do your policies and procedures comply with all applicable jurisdiction-specific laws and regulations?