Domestic Violence Programs and Children's Records: Issues of Confidentiality and Release

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Introduction

The importance of confidentiality in the lives of battered women and their children cannot be understated. Preserving confidentiality for these women and children is central to ensuring their safety and allowing them to regain and retain control over their lives. The vital services of a shelter or domestic violence program mean nothing if anyone can access their records, putting battered women and their children in danger of being located. These records also need to be protected so that private, personal, and potentially damaging information about the recipients of services remain within their control.

Maintaining confidentiality of records should be a priority for all domestic violence programs, but how this protection operates may have more clarity for the records of battered mothers than those of their children. A battered woman should always be able to view her own file[1] at a domestic violence program and can consent to the release of the information contained in the file as dictated by VAWA, discussed below.[2] A significant confidentiality concern arises with records created when a battered woman *and her children* enter a shelter or utilize the services of a domestic violence program. Complicated questions, with less certain answers, about confidentiality and records access occur when such records or information are about children.

[1] Battered women or their attorneys may request copies of the contents of the client case file. Program staff should not permit anyone to make photocopies of case files or other program records. No files should be removed from the office, nor should any documents be removed from the files. However, the battered woman or her attorney (with executed release of information) may make handwritten notes about the contents of the file. Staff should advise battered women that such notes may be dangerous, depending on who has access or learns of their contents. Additionally, staff should advise battered women not to show such notes to a third party, such as a relative or friend, because doing so may constitute a waiver of any privilege related to the case file or any communications that it references.

[2] However, a battered mother's capability to release the information in her file should be limited when her file contains information on her children, discussed below.

- Who can access the records?
- Who can consent to the release of the children's records?
- Do the children have any voice in this process?
- How should programs respond to requests for the records of the children?
- Does a program's response depend upon the source or purpose of the request?

This paper cannot encompass the specialized regulations of every state, and is not meant to be the final word in the discussion about children's records.[3] Rather, it endeavors to provide guidance to domestic violence programs regarding children's records and to serve as a starting place for internal policy development on this issue.

Privilege and the Release of Records

Confidentiality and privileges are two essential components of battered women's safety and autonomy. A privilege exists when the law recognizes that a certain relationship (like between a husband and wife or sometimes between a battered woman and an advocate) is protected, and the communications in that relationship cannot be forcibly disclosed. Privileges can be created by statutes or case law. Confidentiality encompasses the protection of communications a battered woman believes to be private and intended only for the person to whom they are being communicated. Ensuring confidentiality of a battered woman's communications and information is crucial to her safety, but these statements or information do not always fall into a clear privileged relationship. While privilege keeps the information from being revealed by testimony in

[3] Readers are advised to consult with their program director and/or attorney, or state coalition, for state specific information about statutes, regulations or case law governing privilege, confidentiality and/or data practices requirements.

court, confidentiality laws protect information from being revealed to all improper persons, in any location or situation. The Violence Against Women Act is one example of a law which mandates confidentiality by restricting access to battered women's information.

When considering the release of children's records, privilege is an important factor. Whether privilege exists depends in large part on who works at the program and provides services. Privilege may exist between a battered woman or child and an attorney, a therapist, or a domestic violence advocate. Battered women's and children's relationships with these professionals may create a legally-recognized privilege protecting their communications, depending on each state's laws. The existence of a victim-advocate type privilege is especially varied.[4] This type of privilege may only apply to battered women and not their children, depending on how each statute defines "victim" or the recipient of the privilege.[5]

If privilege does exist, what is protected are the communications between the two parties of the relationship. The law gives some protection to certain types of relationships and the result is that the communications within those relationships are

[4] *See, e.g.*, Minn. Stat. § 595.02 (l) "A domestic abuse advocate may not be compelled to disclose any opinion or information received from or about the victim without the consent of the victim unless ordered by the court. In determining whether to compel disclosure, the court shall weigh the public interest and need for disclosure against the effect on the victim, the relationship between the victim and domestic abuse advocate, and the services if disclosure occurs"; Alaska Stat. § 18.66.200(c) "A victim or victim counselor may not be compelled to provide testimony in a civil, criminal, or administrative proceeding that would identify the name, address, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding, or the name, address, or telephone number of a victim counselor, unless the court or hearing officer determines that the information is necessary and relevant to the facts of the case."

[5] But even then, privilege may still protect a mother's statements about her kids if such statements are recorded in her file. If the person seeking the information only wants information about a child and that information only exists in the mother's file and came from her communications to an advocate, the information could be privileged.

protected from forced disclosure.[6] Privilege can insulate those communications from a subpoena or protect the contents of a file that contains such information. Within each of the three relationships listed above, the battered woman or child would own the privilege and have the ability to claim it or waive it.

The most relevant types of relationships for programs to consider in regard to children and privilege are therapists or child advocates that work directly with children, and especially if these professionals keep separate files on the children. Privileges should apply equally to children if children are the "clients" of these professionals. The ability to claim privilege to protect a child's file will depend partly on how the file is maintained. If a therapist, for example, has a separate file for the "child client," the information in the file should be privileged. There are extra protections, outside the scope of this paper, that come with being a licensed therapist, such as those under the Health Insurance Portability and Accountability Act (HIPAA).[7] Programs that employ licensed therapists to work with children should be sure to consult these and other specialized protections for therapists and/or mental health professionals.

VAWA's Mandate on Confidentiality

The Violence Against Women Act is the most relevant federal authority on confidentiality of children's records. It regulates the steps all VAWA-funded programs must take to preserve confidentiality for persons receiving services. VAWA is also important because it is virtually the only federal law that discusses the records of children

[6] For example, attorney-client privilege is recognized in the Federal Rules of Evidence. FED. R. EVID. 502. A similar privilege is recognized between spouses at common law.
[7] Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996). The specialized protections for therapists under this provision are outside the scope of this piece.

separate from those of battered women themselves. VAWA gives multiple instructions on confidentiality:[8]

1. Protect the confidentiality and privacy of persons receiving services.
2. Do not disclose any personally identifying or individual information collected in connection with services.
3. Do not reveal individual client information without the consent of the client whose information is being sought and this consent must be informed, written, and reasonably time-limited.[9]
4. Absent consent of the client, the information may only be released when compelled by court or statutory mandate, and then only in strict accordance with any procedures set forth by statute or court order.
5. There are also various cautions about information-sharing and compliance with data collection requirements.[10]

VAWA specifies that when the person whose information is being sought is a minor, a valid release must include the consent and signature of both the minor and a parent or guardian.[11] There is an explicit exception that prohibits such consent from being given by the "abuser of the minor" or the "abuser" of the minor's other parent.[12] In accordance with this provision, if a battered woman enters shelter with her children, her batterer cannot consent to the release of her children's records, even if he is also the parent of her

[8] 42 U.S.C. § 13925(b)(2).
[9] While in this paper we refer to the release of the client "file," VAWA does not reference files, but instead client information. While it may be common for a program to keep all client information in one place and thus it is practical to talk about releasing a file, it is important to keep in mind that VAWA governs the release of any information, whether it is contained in a file or not.
[10] *See* 42 U.S.C. § 13925 (b)(2)(D).
[11] 42 U.S.C. § 13925 (b)(2)(B)(ii).
[12] *Id*.

child. One situation that remains unresolved, however, is whether a battered mother can authorize release of her child's records when she has been found to be an "abuser" of the child. Is she an "abuser" under VAWA who cannot consent to release?

How individual domestic violence programs are regulated also depends heavily on the laws of each state, particularly regulations tied to each funding source under which the program receives funds. Each state may have different or additional laws regarding the confidentiality of battered women and children and their records or information.[13]

Unresolved Issues in VAWA's Confidentiality Provisions

While VAWA is a great starting place when considering questions about releasing children's records, VAWA does not give definitive guidance on some of the more complicated situations that may frequently arise.

Defining "abuser"

Under VAWA, an abuser of a minor or an abuser of the minor's parent cannot consent for the release of the minor's information,[14] but VAWA fails to define "abuser." Given the purpose of VAWA, it most likely intended that a batterer would not be able to sign for the release of his children's records even if he only abused the children's mother. If the batterer also abused his children, similarly he would not permitted to give consent to release the children's records. But, as noted above, the more complex situation is when a battered woman in shelter with her children has been found abusive to those children herself. She would then be an "abuser" under the common meaning of that term, but whether she is an "abuser" for VAWA's purposes of confidentiality is not as clear.

[13] Consult with your program's director and/or attorney, or your state coalition regarding specific laws and regulations, as well as specific samples of policies to adopt.
[14] 42 U.S.C. § 13925 (b)(2)(B)(ii).

One option is to decide that battered mothers who are found to be "abusers" of their children cannot sign to release the children's records. This would strengthen protections for abused children in shelter and decrease the potential for misuse of their records; however, it would also severely restrict the children's ability to release their own records, if the child cannot sign for the release on his or her own. On the other hand, if VAWA's prohibition on the abuser consenting to release records was only intended to ensure batterers cannot access the records of their victims, be they adult women or children, another option is that VAWA did not intend to keep battered mothers from releasing their children's records, even if they are deemed "abusers" of those children.

The answer to this question has important implications for the rights of children. If the term "abuser" is read expansively to prohibit any parent who has abused her or his child from releasing records, it makes it difficult to determine who, if anyone, can authorize release of a child's shelter records. The batterer cannot release and the abusive battered mother cannot release, but the child probably cannot release on her or his own, given VAWA's provision that release of a minor's information can be done only with consent from the minor *and* a parent or guardian. VAWA does not specify another adult who could co-sign the release with the minor. Nor does VAWA envision the possible conflict created by opposing wishes of a parent and a guardian.[15] On the other hand, if VAWA excludes battered women from the definition of abuser, abusive battered mothers would be allowed to control access to and release of their child-victim's records.

[15] The authors are envisioning a scenario where a court, in a family or juvenile case, appoints a *guardian ad litem* for a child and asks the guardian to release a child's shelter records, over the objection of the battered mother parent. While unlikely, such a scenario is possible and, if such should happen, programs should seek immediate assistance and legal advice from their program attorney and state coalition. BWJP is also available to strategize with programs about appropriate responses in these and other confidentiality situations.

Just as VAWA does not define the term "abuser" it also lacks guidance on how to determine what actions make a person an "abuser." Programs will have to decide how, if ever, they will determine that battered mothers are "abusers" under VAWA who cannot release the records of their child-victims. One possible option is that a finding of abuse by a court or child protection agency is sufficient for a program to treat a battered mother as an "abuser." Another option is that if shelter or program staff witness abusive behavior toward the child, then the mother can be treated as an "abuser" who cannot release her child's records. Programs should be cautious about accepting reports of abuse from outside agencies, which may use this label differently or have different requirements for proof.

Types of files

The filing method utilized by a program can affect which persons have authority to release those files. VAWA directs that client information should not be revealed without a valid release.[16] This direction may be complicated for programs depending on who they define as "clients" and how they record, compile, and store client information. Programs should consider the questions that arise when they use one of the following filing methods:[17]

[16] To reveal individual client information a program must gain the consent of the client whose information is being sought and this consent must be informed, written, and reasonably time-limited. 42 U.S.C. § 13925 (b)(2)(B)(ii).

[17] This list of file types is not exhaustive and is not meant to include every type of file a program might use. No matter what filing method is employed, staff and advocates should not write specific quotes or statements from a battered mother in the file or include the advocate's opinions or performance assessments in the file. For additional information and recommendations on recordkeeping practices, see *Confidentiality: An Advocate's Gui*de, Battered Women's Justice Project, 2007; available at www.bwjp.org.

1. Battered mother's file alone

If a file contains no information about children, the battered mother can authorize release of her whole file and all the information contained in it. Absent information about her children, the release is less likely to implicate the children's rights or their safety separate from that of their mother.

2. Battered mother's file which includes information about her kids

If a file is tied to the mother as the client, and also includes information about her children, the mother may be able to authorize release unilaterally. However, programs facing a release in this situation should consider the rights and interests of the children, as well as the possible outcome and effects on the children. Such considerations are especially vital when the program believes that the purpose of any record request is, in actuality, to obtain specific information about the children.

Programs also need to consider the age of the child in question. A 16-year-old who entered shelter with her battered mother arguably should have more control over her information than a three-year-old in the same situation. Release of a parent's file which contains information on a child has the potential to violate VAWA because client information may be released without proper consent. Whether there is a violation depends on how programs and courts define the scope of "client" under VAWA, and whether a child in the situation described above falls into that definition. Programs must have written policies in place which account for the consideration of these safety issues.

There are multiple responses to address or avoid the dilemma presented by this filing method. First, the program could set a policy that, although their files are labeled

by the parent's name, if the file contains information about a child over a certain age,[18] that child also has to consent for the release of the information. As an alternative, if the child does not consent to the release of the information, the mother's information could still be released but any information about the child could be redacted from the mother's file. If the request is truly seeking information about the child and not the mother, the minor's consent should always be obtained, as required under VAWA.

3. Family file or lumped file

This type of file is similar to #2 above, but instead of defining the file as the adult's, this type of file intentionally contains information on a whole family or more than one individual. This type of file would raise most of the same issues as #2 above, where a child's rights and safety interests should be considered when the release would include the child's information as well as that of the parent. In this situation, programs should ask whether they consider the file to belong to only the parent or to all persons with information in the file. According to VAWA, any client whose information could be revealed should have to consent to the release. Once again, the age and developmental level of children will matter and programs should determine specific criteria that would require a minor's authorization to release their records.

4. Child's file alone

A minor of appropriate age and/or maturity can consent to the release of their own file, with the consent of a non-abusive parent. At least one commentator with extensive experience with confidentiality matters indicates that programs could choose an age at

[18] There is uncertainty regarding the results of any legal challenge to this type of release. However, the best practice suggests that if a child is over a certain age, such as 16, or if the child enters shelter alone, she should have the ability to sign any release of information on their own. Such provisions must be decided by individual programs and clearly set forth in their policies on confidentiality and releases.

which a child would be able to release his or her own file independent of any consent from a parent or guardian.[19] Particularly when children have their own files, they should play a major role in any decision to release their information, in line with program policies on the age and developmental level of children. The requirements for a valid release by a minor are the same as for an adult battered woman.[20]

Considerations for Children's Files:

1. When children enter the program with a parent, are the children considered "clients"?
2. Do these children have their own files or is their information put in a parent's file?
3. If the children do not have their own files, how does including the children's information in the same file as their parent affect the children's autonomy?
4. Can children enter the program on their own, without parental or guardian agreement or accompaniment?
5. If yes, do these children have their own files?
6. Does the child's age affect whether the child has her/his own file?
7. Would keeping separate files for children more adequately ensure that no client information gets released without consent?

[19] This may be especially appropriate when a child enters shelter without a parent, for instance a 15-year-old enters shelter to escape an abusive dating relationship. Julie Field, *Survivor Confidentiality and Privacy: Releases and Waivers At-A-Glance*, National Network to End Domestic Violence, 2008.

[20] To reveal individual client information a program must gain the consent of the client whose information is being sought and this consent must be informed, written, and reasonably time-limited. 42 U.S.C. § 13925 (b)(2)(B)(ii). Absent consent of the client, the information may only be released when compelled by court or statutory mandate, and then only in strict accordance with any procedures set forth by statute or court order.

8. When multiple clients or family members are contained in one file, how is the file labeled?
9. If you keep children's information in parent files, is it possible that children's information could be released against their wishes or without consulting them at all?

Important Questions on the Release of Children's Records

- What is the nature of the program keeping the records?
- What are the state-specific regulations that govern how this program can release client records?
- Who works at this program? Who provides services to children in the program? If other professionals like attorneys or therapists work at the program and work with children, do they keep separate records on the children? (This may give their files privilege protection)
- How are records kept at the program? Is any information collected on children? Where is this information kept?
- What is the purpose of the collection of this information? What information is truly necessary to record?
    - Can that purpose be addressed in another way?
    - Does recording this information enable program staff to do their jobs?
    - Is a written record required by a funding agency and how much information is absolutely required?

- Is a written record of this information required for statistical reporting purposes?
- Is a written record of this information necessary to protect the program or staff from liability?
- Is there a way to record the information without including identifying information?

- Whose information is being requested?
- What harm could come to the children if the information was disclosed to the abuser or abuser's attorney?
- In light of this risk, should the information be recorded at all?
- If the information should be recorded, what is the best format to use for the record? How permanent is the record form? How detailed/summary?
- Who is requesting the records? What kind of request is it? Has an advocate fully explored all possible ramifications of any release with the child and/or battered mother?

Tips and Best Practices on the Release of Children's Records[21]

- The data kept in client files should be limited to demographic and statistical information. Opinions of advocates and other subjective comments should not be written in client files. This is especially true in regard to information about children because this information may be released without the express consent of that child. Avoid any verbatim statements or any personal

[21] For additional recommendations on recordkeeping practices and other issues relating to confidentiality protections for battered women, see *Confidentiality: An Advocate's Guide*, Battered Women's Justice Project, 2007; available at www.bwjp.org.

materials of clients (letters, reports, etc.) Do not include details of any safety plan developed with a battered woman. Do not include comments about a survivor's general parenting or specific parenting skills.

- Keep accurate notes about services provided and referrals made. Include factual notations that indicate dates and types of services provided.
- Share information with other staff (as appropriate and needed) orally rather than in writing and, if information must be shared by written memorandum, the document should be destroyed after reading
- Be conscious of legal requirements for disclosure upon subpoena, especially where there is no statutory privilege attached to the advocate-battered woman relationship.[22]
- Children receiving services, like their mothers, must be fully informed of any potential mandated disclosures to persons outside the program BEFORE they are asked to make statements of a sensitive nature.
- State laws may mandate reporting of suspected child maltreatment and/or abuse (and prescribe criminal penalties for violation of the rule), regardless of the existence of any other testimonial privilege. Victims must be informed of such requirements before being asked to disclose information that they might believe will be held in confidence.[23]

[22] For recommendations and strategies for responding to subpoenas or court orders for records, see *Confidentiality: An Advocate's Guide*, Chapter 3, Battered Women's Justice Project, 2007; available at www.bwjp.org.

[23] In some states, by law or practice, domestic violence advocates are considered to be mandatory reporters of child abuse. Readers are again advised to check with the program's director and/or attorney, or state coalition, to determine how this issue is handled in a particular state.

- Create written program policies encompassing confidentiality, informed consent for waiver/release and methods for informing clients of such policies that facilitate and enhance program operations, while also preserving client confidences to the greatest extent possible. Make sure that all staff know of and strictly adhere to such policies.
- Create written polices describing appropriate substantive content of client records and ensure that all staff are fully and regularly trained on and utilize such policies.
    - Policies must be informed by legal advice on state and federal law applicable to records handled by the program.
    - Policies must be informed by the purpose of the program and be designed, in any event, to promote and protect victim safety and autonomy.
    - Policies must be set out clearly in writing and be the subject of ongoing training and supervision.
    - Policies must be made available (in an accessible format and language) to all victims in advance of conversations which may result in disclosure of sensitive information.
    - Policies must be subject to regular review. Staff's understanding of the policy and how to implement it must be the subject of supervision and training.
- Domestic violence programs should maintain the limited records they do keep in secured filing cabinets, providing access only to designated staff. Program

records, such as financial documents or personnel files, should be kept separately from case files (i.e., shelter intake files). Only designated staff should have authority to review case files and/or make notations in case files. Board members should not have access to case files or program records, except in specific situations determined by the Executive Director along with the program's attorney, if applicable. Funders and researchers should have access only to aggregate statistical information and the domestic violence program should consider having such people sign confidentiality agreements as an added protection.[24]

- When a child is no longer using any of the domestic violence program's services, certain records regarding her situation should be destroyed, just as they would with adult battered women. This purging should not occur until she has ceased using all of the program's services, not just after leaving the shelter. The program must have a written policy for the retention and destruction of client case files and other sensitive program records, delineating a length of time such records are kept and how they are destroyed, unless there is ongoing litigation. All staff must rigorously adhere to such policies.
- Battered women and children must also be fully informed as to their right to revoke any consent to release information, at any time. Although a release must be in writing, a battered woman or child may orally revoke her release and this oral revocation should be honored immediately by the domestic violence program until she can sign a written document.

[24] For recommendations regarding other recordkeeping issues and practices, see *Confidentiality: An Advocate's Guide*, Chapter 2, Battered Women's Justice Project, 2007; available at www.bwjp.org.

- It is vital that program staff fully discuss with a battered woman or child what happens, what could happen, and what cannot be known or fully predicted after a waiver or release is signed. Domestic violence programs should not engage in a practice of asking for routine waivers in order to share information with different agencies in the community; such blanket releases fail to acknowledge the individual ramifications that such information-sharing might have for each battered woman. Any release should be specific in purpose and time-limited in duration.
- In general, programs should not (and do not have to) release client information without a specific court order.[25]
- Obtaining consent to release a client's information should never be a condition of receiving services from a program.

Conclusion

Confidentiality for battered women and their children is paramount to their safety and autonomy. To ensure the highest level of confidentiality, programs should follow VAWA's provisions on the consent needed for the release of records. Additionally, programs should develop policies to respond to the situations presented above, which reflect the need for balance between individual rights to information and protection of victims of domestic violence and child abuse.

[25] For recommendations and strategies to respond to subpoenas or court orders for records, see *Confidentiality: An Advocate's Guide*, Chapter 3, Battered Women's Justice Project, 2007; available at www.bwjp.org.