Protecting Survivors' Confidentiality and Privilege: Policy Guidelines for Oregon Advocates

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Policy Guidelines for Oregon Advocates: Table of Contents

I. Policy Guidelines Introduction

Survivors should get to choose what happens with their information Advocates and victim service programs must respect their choices and safeguard their information. These truths are at the heart of these Policy Guidelines for Oregon Advocates.

These policy guidelines are for community-based, non-profit, and Tribal domestic violence and sexual assault (DVSA) and trafficking victim service programs in Oregon. They were created to help programs supported by the Crime Victims and Survivors Services Division of the Oregon Department of Justice (CVSSD) and the Oregon Department of Human Services (ODHS) DVSA grant funds to draft confidentiality policies.

CVSSD and ODHS have incorporated the U.S. Violence Against Women Act (VAWA), Victims of Crime Act (VOCA), and the Family Violence Prevention and Services Act (FVPSA) confidentiality protections for all ODHS and CVSSD-funded DVSA (and other) programs across all grants.[1] The Office on Violence Against Women (OVW) further requires grantees and subgrantees to comply with the VAWA confidentiality provision and "policies and procedures for release of victim information."[2] CVSSD and ODHS DVSA grantee programs must also sign a Grantee Certification of Understanding and Compliance with Confidentiality and Privilege Requirements.

These policy guidelines also included recommendations for complying with Oregon's certified advocate-victim privilege[3] and confidentiality,[4] mandatory reporting,[5] and other relevant laws.[6] A victim services program may have other confidentiality requirements, but they would not override VAWA and state confidentiality laws, for example.

Oregon's certified advocate-victim privilege and confidentiality statutes apply to certain programs administered by Tribal governments, and Tribal advocates may meet the definition of "certified advocates."[7] Individual Tribes' codes, however, may determine their privilege, confidentiality, and reporting requirements for their jurisdiction. For example, a survivor's communication with a certified advocate who works for a tribal government program may be covered by Oregon's advocate privilege laws, but because the privilege is created by state (not Tribal) law, the privilege will only apply in state civil, criminal, administrative and school proceedings. It will not extend to any Tribal court or agency proceedings (unless the Tribe says it does). This can be challenging for

[1] 34 USC §12291(b), 42 USC §104062 (5)(F), and 42 USC 110, §10406(c)(5).
[2] 28 CFR § 90.4 (6).
[3] ORS 40.264.
[4] ORS 147.600.
[5] ORS 419B.005.
[6] ORS 147.600.
[7] ORS 40.264.

survivors and providers alike and can lead to uncertainty about what communications are private and confidential. We encourage victim service programs to ask for help when questions about protections for Tribal members arise.

Anyone providing services to "victims of domestic violence, sexual assault and stalking," must receive at least the required certified advocate training.[8] Each qualified victim services program is also required to maintain a roster of certified advocates who have completed the minimum training. CVSSD and ODHS require certified advocates to sign an Employee and Volunteer Certification of Understanding and Compliance with Confidentiality and Privilege Requirements form. This form may be found on the CVSSD website.

These guidelines incorporate federal and Oregon laws, rules, and recommended practices. Each Oregon CVSSD- and ODHS-funded program must have comprehensive confidentiality policies and ensure that anyone who works at the program, whether paid or volunteer, follows them. Victim services programs should ask an attorney to review their policies before they implement them.

II. Relevant Laws

Federal and Oregon confidentiality and reporting laws include, but are not limited to:

VAWA Confidentiality - 34 USC §12291; 28 CFR § 90.2 and § 90.4
FAQs "on the VAWA Confidentiality Provision"
VOCA Confidentiality – 28 CFR § 94.115
FVPSA Confidentiality – 42 USC §10406(5); 45 CFR § 1370.4
Certified Advocate-Victim Privilege - ORS 40.264
Confidentiality of Certain Victim Communications and Records (Certified Advocate-Victim Confidentiality) - ORS 147.600
Advocate Certification Training Requirements - OAR 137-085-0080
Reporting Child Abuse:
- Definitions - ORS 419B.005
- Policy – ORS 419B.007
- Duty of officials to report child abuse - ORS 419B.010
- Report form and content – ORS 419B.015
- Offense of false report of child abuse – ORS 419B.016

Reporting Elder Abuse:
- Definitions – ORS 124.050

[8] OAR 137-085-0080.

Policy – ORS 124.055
Duty of officials to report – ORS 124.060
Method of reporting – ORS 124.065

Reporting Abuse of Adults with a Developmental Disability, Severe and Persistent Mental Illness, or Receiving Certain Services for Substance Abuse Disorder or Mental Illness

Definitions - ORS 430.735
Abuse report – ORS 430.743
Duties of officials to report abuse – ORS 430.765
Regulatory definition of severe and persistent mental illness (SPMI) - OAR 407-045-0130(24)

If an advocate or service provider is ever unsure how to answer survivors' questions or wonders about any confidentiality requirements, they should talk with someone who can help them get correct information. ***Survivors should never be surprised by a disclosure made without their permission.***

III. Policy Guidelines

1. Overview

Survivor-centered victim service programs must protect survivors' privacy. Advocates and victim service programs should encourage survivors to ask questions about their confidentiality protections. If an advocate or service provider is ever unsure how to answer survivors' questions or wonders about any confidentiality requirements, they should talk with someone who can help them get correct information. **Survivors should never be surprised by a disclosure made without their permission.**

Survivors need to decide, as much as possible, when their information will be shared, what information will be shared and with whom, and why the information might be shared. Advocates

should not assume that survivors are aware of their protections or why safeguarding their confidentiality may be important. Advocates need to introduce these concepts, remembering that survivors in acute trauma may have more difficulty understanding the context. Most survivors aren't experts in victim services, so they may not know, for example, that a text message can be subpoenaed. And they may not know the consequences of making a social media post saying that they got services from a DSVSA program. For survivors to decide the when, what, where, why, and with whom of sharing information, they will need advocates' help.

Advocates must also be mindful of the potential for undue pressure, even when unintentional. A survivor with immediate safety concerns may not care about their confidentiality in the moment or may feel that they have to tell an advocate what they think the advocate wants to hear. The inherent power imbalance between clients and service providers is something that advocates should be careful about.

Survivors' autonomy and safety depends on everyone at a victim services program protecting survivors' confidentiality and privilege. The credibility of a victim services program also depends upon community trust, so safeguarding confidentiality and privilege is essential to an agency's legitimacy and ability to serve survivors. Advocates need to protect survivors' information and records even when they no longer work for a program. Though most advocates have the same confidentiality, privilege, and mandatory reporting obligations, they need to know when obligations are different between programs and between different victim service providers. For example, although victim advocates are not mandatory reporters of child abuse, a foster parent is. So, advocates need to know if any service provider at their organization is a foster parent (or any other type of mandatory reporter), so that they can make sure survivors understand when reports must be made and when they cannot be made.

2. **Violence Against Women Act (VAWA) Confidentiality**

The Violence Against Women Act (VAWA) confidentiality requirements protect the privacy of survivors of any age and their families.[9] Any victim service provider receiving funding from the Office on Violence Against Women, even as a subgrantee, may not share personally identifying information (PII – defined in the next paragraph) collected in connection with services requested, used, or denied with anyone outside their victim services program unless either: 1. the program has a VAWA-compliant release of information from the survivor whose information will be released, or 2. The release is required by a statute, court order, or case law (court and statutory

[9] Violence Against Women Act, 34 U.S.C. § 12291(b)(2).

mandates are discussed further below). Similar confidentiality requirements apply under the Victims of Crime Act (VOCA) and Family Violence Prevention and Services Act (FVPSA).

3. Protected Personally Identifying Information

Personally identifying information (PII) shall not be released without a VAWA-compliant release of information. "Personally identifying information" is defined in VAWA as "individually identifying information for or about an individual including information likely to disclose the location of a victim, regardless of whether the information is encoded, encrypted, hashed, or otherwise protected."[10] Programs are required to protect information about the location of shelters to the extent that such information is likely to disclose a victim's location.

PII includes:

- First and last names
- Contact information (including a postal, e-mail or Internet protocol address, telephone or facsimile number, and social media handles/names)
- Identification numbers:
    - Social security number
    - Driver license number
    - Passport number
- Any other information that would serve to identify any individual, for example:
    - Date of birth
    - Racial or ethnic background
    - Religious affiliation[11]

Even a client's hair color or the ages of their children might be PII to someone outside a victim services program. For example, if an advocate discussed with someone outside of their program how a family came to the program and had four-year-old twins, there's a good chance someone will know which family they were talking about. This is especially true in rural communities or with programs providing culturally-specific services when people may know a lot of the same people.

[10] 34 USC § 12291(a)(25).
[11] 34 USC § 12291(a)(25).

IV. When Information May Be Released under VAWA

VAWA allows victim service providers to release PII in four situations (see the requirements for each below):

1) With a survivor's release of information (ROI)
2) When a statute mandates the release
3) When a court mandates the release
4) When sought by a legal fatality review

1. Information may be released with a survivor's release of information (ROI).

a. VAWA ROI Overview

A survivor may give a victim services provider permission to release their PII by knowingly and voluntarily consenting to the release of information (ROI) in writing.

VAWA requires a three step ROI process:[12]

1. Discuss with a victim:
    a. Why PII might be shared
    b. What PII could be shared under the release
    c. Who would have access to the PII if it is shared.
2. Reach agreement with the victim about what information will be shared and with whom.
3. Record the agreement about the scope of the release.

The ROI agreement and record must be:

- Voluntary – not a condition for receiving services. However, some of a survivor's goals might only be achievable with a release of information.
- Written[13] and signed[14] The writing and signature can be digital or on paper.
- Informed[15]
- For a specific duration, the reasonableness of which depends on the specific situation[16]
- Not a blanket release[17]

[12] 28 CFR § 90.4(b)(3)(ii)(A).
[13] 34 USC § 12291(b)(2)(B)(ii); 28 CFR § 90.4(b)(3)(ii)(A).
[14] 28 CFR § 90.4(b)(3)(i)(A).
[15] 34 USC § 12291(b)(2)(B)(ii); 28 CFR § 90.4(b)(3)(ii)(A).
[16] 34 USC § 12291(b)(2)(B)(ii); 28 CFR § 90.4(b)(3)(ii)(A).
[17] 28 CFR § 90.4(b)(3)(ii)(A).

- Specific about the scope and limited circumstances of the disclosure[18]
- Revocable

Because VAWA requires OVW-funded victim services providers to have a discussion and reach an agreement with a survivor before recording the agreement in writing, information should not be released based on an ROI from another program or agency, etc.

Discussions about ROIs should also include:

- Alternatives to the release
- The risks and benefits of the release, including implications of releasing information to mandatory reporters or organizations with limited privacy protections[19]
- How to revoke the release

Consent for a VAWA-compliant ROI must be given by:

- Victim – If a victim has legal capacity to consent. A minor or a person with a legally appointed guardian who is permitted by law to receive the victim services without a parent or guardian's consent may release information without additional consent.[20]
- Unemancipated minor and their non-abusive parent or guardian - when the minor is not permitted by law to receive the services without the parent or guardian's consent.[21]
- Non-abusive parent or guardian - If a minor is incapable of knowingly consenting, the non-abusive parent or guardian may provide consent. If a parent or guardian consents for a minor, the grantee or subgrantee should attempt to notify the minor as appropriate.[22]
- Non-abusive court-appointed guardian may consent to release PII on behalf of an adult who doesn't have legal capacity.

Consent may not be given by an abuser of a minor or their other parent, or of an incapacitated adult.

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[18] 28 CFR § 90.4(b)(3)(ii)(A).

[19] Note that non-QVSP programs and their staff and volunteers that are not mandated to report abuse may choose to make such a report if they are not prohibited from doing so by VAWA, VOCA, FVPSA, Oregon law, or other privacy protections that limit such reporting. Advocates need to be sure that they understand the privacy protections of any organization to whom they refer a survivor or before advising a survivor on the risks/benefits of releasing information to another organization.

[20] 34 USC § 12291(b)(2)(B).

[21] 34 USC § 12291(b)(2)(B)(ii).

[22] 28 CFR § 90.4(3)(ii)(C).

b. VAWA ROIs in Multi-Service Settings

VAWA ROI requirements also apply to a victim services program sharing survivors' PII within a multi-service organization, e.g., a YWCA, Family Justice Center (FJC), or culturally specific community center. Victim services divisions or components of an organization, agency, or government, including tribal government, may only share PII with non-victim service divisions (this might be financial or administrative services) or the leadership of the organization, agency, or government, with an ROI. (Rember, an ROI may not be a condition of receiving services.) Executive leadership shall have access without releases only in extraordinary and rare circumstances. Routine monitoring and supervision are not extraordinary and rare circumstances.[23]

c. VAWA Requirements in Coordinated Community Response (CCR) and Similar Settings (such as Sexual Assault Response Team (SART), Multidisciplinary Team (MDT), Child Abuse Multidisciplinary Intervention (CAMI), co-located services, school outreach/prevention)

Service providers and programs must follow VAWA and Oregon confidentiality and privilege requirements with all community collaborations and teams. These confidentiality and privilege requirements cannot be overridden by a confidentiality agreement or memorandum of understanding. Only a survivor may consent to their information being shared with such a team (apart from statutory or court mandates). Services may not be conditioned on a survivor signing a release of information. In other words, a victim services program cannot deny all services to anyone because they do not sign a release of information. However, some of a survivor's goals might only be achievable with a release of information.

Similarly, a victim service program cannot agree to reveal PII or other confidential information while working with another organization. For example, if a victim service program provides services at a school, they cannot sign a "memorandum of understanding" or other contract term that requires them to report abuse in connection with victim services (see next paragraph about prevention and outreach) if they are not already a mandatory reporter under Oregon law.

d. A Note Regarding Prevention and Outreach

VAWA confidentiality and Oregon victim-advocate confidentiality and privilege apply to victim services.[24] Such services include support and advocacy services for victims, but do not include

[23] 28 CFR § 90.4(2)(iii).

[24] See the VAWA definition of "Victim services or services" at 34 USC § 12291(a)(51) and the definitions of "Qualified victim services program" and "Victim", both of which reference seeking or offering "safety planning, counseling,

broader prevention and outreach. However, since both VAWA and Oregon provide protections for people seeking services, once someone attending a prevention or outreach activity asks for help related to sexual assault, domestic violence, etc., they have probably now become a victim seeking services and their information would be protected. Advocates and victim service programs need to make sure that they are clear about how they will apply such protections in co-located, school, etc. settings.

e. VAWA ROIs and Media Requests for Information:

If anyone in the media asks a program about a survivor, the program must:

- Not tell the media representative anything about the survivor, neither confirming nor denying that the survivor ever requested, received, or was denied a program's services.
- Contact the survivor, if safe and otherwise reasonable to do so, to see if they want the program to release any of the recipient's PII. If the recipient wants their information shared, follow the usual ROI process.
- Promptly inform their CVSSD fund coordinator when the media asks for information about a service recipient. Oregon CVSSD requires any program receiving VAWA, VOCA, and/or ODSVS funding to do this. The program should not disclose any PII to the fund coordinator without an ROI.[25]

2. Information May Be Released When Required by a Statutory Mandate

OVW-funded victim services programs may release PII when a statute requires the release. Oregon statutes that may require programs to release PII (but typically do not) are mandatory reporting laws, discussed below. [See Section VI.]

3. Information May Be Released When Required by a Court Mandate

OVW-funded victim services programs may release PII when a court mandates the release. Court mandates in Oregon may include court orders, case law, and attorneys' ethical rules. Court orders are discussed below. [See Section VII.]

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support or advocacy services," at ORS 40.264 and ORS 147.600. Also, Oregon's child abuse reporting law specifically excludes "an employee of a qualified victim services program . . . that provides confidential, ***direct*** services to victims . . .." [Emphasis added.]

[25] The CVSSD fund coordinator will notify CVSSD management and the DOJ Media Director about this request from the media.

4. Fatality Reviews

If someone served by an OVW-funded victim services program dies, the program may share PII about that person being sought for a fatality review if the following conditions[26] are met:

a. The underlying objectives of the fatality review are to prevent future deaths, enhance victim safety, and increase offender accountability.
b. The fatality review includes policies and protocols to protect PII about the victim, including PII about the victim's children, from further release outside of the fatality review team.
c. The program makes a reasonable effort to get an ROI from the victim's personal representative (if any) and from any surviving minor children or their non-abusive guardian if the children can't knowingly consent.
d. The information released is limited to that needed for the purposes of the fatality review.

V. Oregon Certified Advocate Confidentiality and Privilege

In addition to VAWA's confidentiality requirements, Oregon has established victim-advocate confidentiality and privilege that protect survivors' communications and records.

1. Victim-Advocate Confidentiality

Oregon victim-advocate confidentiality[27] protects confidential communications an advocate or victim services program has with a victim and service-related records. Without the written, informed consent of the victim that is reasonably limited in duration, a certified advocate or a qualified victim services program may not disclose:

1. Confidential communications between a victim and the certified advocate or qualified victims services program made in the course of safety planning, counseling, support or advocacy services.
2. Records that are created or maintained while providing services regarding the victim.[28]

Also, a certified advocate or a qualified victim services program may disclose confidential communications or records without victim consent only:

[26] 34 USC § 12291(b)(2)(H); 28 CFR § 90.4(b)(4).
[27] ORS 147.600.
[28] ORS 147.600(2).

1. To the extent needed to defend any legal action brought against the advocate or victim services program[29]; or
2. As otherwise required by law (discussed further below).[30]

2. Oregon Advocate Confidentiality and Privilege Definitions

The victim-advocate confidentiality and privilege provisions share these definitions:

Certified advocate – a person who:

- Completed at least 40 hours of the Attorney General's approved DVSA and stalking advocacy training,[31] and
- Is an employee or volunteer of a qualified victim services program.[32]

Confidential communications – a written or oral communication not intended for further disclosure to third persons except:

- Persons present when the communication is made to further the interests of the victim with seeking safety planning, counseling, support or advocacy services,
- Persons reasonably necessary for the transmission of the communication, or
- Other persons in group counseling.[33]

Qualified victim services program (QVSP) –

- A nongovernmental, nonprofit, community-based program receiving moneys administered by Oregon's ODHS or DOJ, or the USDOJ, or a program administered by a Tribal government, that offers safety planning, counseling, support or advocacy services to victims of DVS or stalking, or
- A SA center, victim advocacy office, women's center, student affairs center, health center or other program providing safety planning, counseling, support or advocacy services to victims that is on the campus of or affiliated with a two-year or four-year post-secondary institution that enrolls one or more students who receive an Oregon Opportunity Grant.[34]

[29] An advocate or program should consult with an attorney before they disclose information to defend themselves in a legal action.
[30] ORS 147.600(3).
[31] OAR 137-085-800.
[32] ORS 147,600(1)(a); ORS 40.264(1)(a).
[33] ORS 147.600(1)(b); ORS 40.264(1)(b).
[34] ORS 147.600(1)(c); ORS 40.264(1)(c).

Victim – a person seeking safety planning, counseling, support or advocacy services related to DVSA or stalking at a qualified victim services program.

3. Certified Victim-Advocate Privilege

The Oregon victim-advocate privilege is an evidence rule that protects survivors' information in legal proceedings, including post-secondary institution (e.g., a college or university) disciplinary proceedings.[35] The privilege states that except in cases where an advocate or qualified victim services program needs to defend itself in legal proceedings, a victim may refuse to disclose and prevent any other person from disclosing:

1. Confidential communications made by the victim to a certified advocate during safety planning, counseling, support or advocacy services.
2. Records that are created or maintained while providing services regarding the victim.

In *Oregon v. Sacco*, 373 Or 63 (2024) the Oregon Supreme Court held that disclosure of records created or maintained by a qualified victim services program, Clackamas Women's Services (CWS), was prohibited under the Oregon victim-advocate privilege and confidentiality statutes. This means that the trial court could not require CWS to share the information in those records, if any.[36]

Only staff or volunteers providing services directly to clients should have access to clients' personal or confidential information or records. Board members may not have access to this information unless they are providing services in a separate role. When any non-service providers enter a confidential victim service provider's facility, they must agree in writing that they will not disclose the location of the facility, the identity of any clients they identify on or near site, or any PII they encounter. [See Section VIII.] Victim services programs will keep any client's personally identifying or confidential information safely stored when advocates are not actively working with it.

[35] ORS 40.264(6).
[36] 373 Or 63, 79-80.

*VAWA confidentiality and Oregon certified advocate-victim privilege require programs and advocates only to disclose information when a statute requires such a report. In addition, both VAWA and Oregon confidentiality require that the information provided in such a report be limited to **only** the information that is specifically required to be included in such a report.*

VI. Oregon Mandatory Reporting

1. Mandatory Reporting: The Basics

Oregon has statutes that require certain professionals to report abuse against children, elders, or adults with specified disabilities, among others. Other statutes, (for example Title IX and the Clery Act), may require disclosures as well. Advocates should reach out for support with any additional reporting requirements that could affect their work with survivors. VAWA confidentiality and Oregon certified advocate-victim privilege require programs and advocates only to disclose information when a statute *requires* such a report. In addition, both VAWA and Oregon confidentiality require that the information provided in such a report be limited to **only** the information that is specifically required to be included in such a report. Therefore, program policies need to ensure that advocates and programs do not report more than the information they are required to disclose.

An advocate or program may only make a report of harm when all the following are true:

1. The person reporting is on the list of public or private officials who are required to report. This means that they are someone who must report because of their profession, employment, or other status (e.g., being a foster parent or paid coach).
2. The person who may have been harmed is covered by the mandatory reporting law (e.g. child, elder, person with specified disabilities, etc.).
3. The person who may be required to report has come into contact with the person who has suffered abuse, neglect, or injury or the person(s) causing the abuse, neglect, or injury.

4. The person who may have been harmed experienced abuse, neglect, or other injury as defined in the relevant statute. **AND**
5. The person reporting is not exempt from reporting.

Each of these requirements is explained in more detail here:

1. The person reporting is on the list of public or private officials who are required to report.

   Very few advocates or victim service programs are required to report under Oregon's mandatory reporting laws. This is because victim service programs' advocates are not on the list of "public or private officials" who must disclose information under the laws and are not, therefore, required to report child abuse, elder abuse, abuse of persons with severe and persistent mental illness or with developmental disabilities, etc.[37]

   The child abuse mandatory reporting law does include employees "of a public or private organization providing child-related services or activities"[38] on its list of public or private officials who must report. However, the law then expressly excludes from the list employees "of qualified victim services program[s] as defined at ORS 147.600 who provide confidential, direct services to victims of domestic violence, sexual assault, stalking or human trafficking."[39]

   Because mandatory reporters in Oregon have a duty to report at all times, if someone working at a victim services program has a duty because, for example, they are a foster parent, then they will be required to report while working at the program if they meet the rest of the requirements for reporting. Programs need to determine if they will hire mandatory reporters and, if they do, how they will ensure that survivors won't have their information disclosed by unknowingly triggering a report. Programs with victim service providers who may be mandatory reporters need to consider if they will keep any reporters from staffing hotlines, doing intake, etc.

2. The person being reported about is covered by the mandatory reporting law.

   In the unlikely event that an advocate is on the list of public or private officials who must report, they need to be sure the person about whom they are considering making

[37] Child abuse: ORS 419B.005; elder abuse: ORS 124.060; abuse of certain adults with severe and persistent mental illness who are receiving mental health treatment from a community program, developmental disabilities or substance use disorder: ORS 430.765, and OAR 407-045-0130(24).
[38] ORS 419B.005(5)(bb).
[39] ORS 419B.005(5)(bb)(B).

a report about is covered by the reporting statute. For example, in the child abuse reporting statute, a child is defined as an unmarried person under 18 years old or a "child in care" as defined in ORS 418.257. So a married 17-year-old who is not a child in care does not meet the definition of a "child" for the mandatory reporting law. Similarly, a report regarding the abuse of a person with a "severe and persistent mental illness" (SPMI) is mandatory only when the person with SPMI is receiving treatment from a "community program"[40] **and** has a "serious functional impairment that currently substantially interferes with or limits their ability to protect themselves from abuse as documented by their health record or other credible evidence."[41]

3. The person required to report has come into contact with the person who has suffered abuse, neglect, or injury or the person causing the abuse, neglect, injury.
   Reporting child abuse, elder abuse, or abuse of adults with a developmental disability, SPMI, or Receiving Certain Services for Substance Abuse Disorder or Mental Illness, is only mandatory when a public or private official either (1) comes into contact with the person whom they have reasonable cause to believe has been abused, neglected, or injured, or (2) comes into contact with the person they have reasonable cause to believe is perpetuating abuse, neglect or injury. A public or private official is not mandated to report when they only hear about the abuse from others, for example, and have *not* been in contact with the person being harmed or causing the harm.

4. The person experienced abuse, neglect, or other injury as defined in the statute.
   To report child abuse, for example, a public or private official would need to have a reasonable cause to believe (not just a suspicion) that a child they have come into contact with has experienced one of the types of harm listed at 419B.005(1) (or an adult with whom they have come into contact with has caused the harm). ORS 419B.150(b) defines "reasonable cause" as "a subjectively and objectively reasonable belief, given all the circumstances and based on specific and articulable facts." A general sense or suspicion that a child is experiencing harm of some kind, etc. does not meet the standard.

5. The advocate/person reporting is not exempt from reporting.
   Some privileged communications with psychiatrists, psychologists, clergy members, attorneys, or guardians ad litem are exempt from mandatory reporting. Check the statutes to see if an exception applies.

[40] OAR 407-045-0130(9); ORS 419B.045(5)
[41] ORS 430.765; OAR 407-045-0130(3)(a) & (24)(b).

If all these conditions are met, the person making the report may only report what a statute requires. Each mandatory reporting statute has a list of **what must be disclosed when a report is made**. This information typically includes (though check the relevant statute to confirm what must be disclosed) **if known** to the person making a report:

a. The names and addresses of the person believed to have been harmed
b. The persons responsible for care of the person being harmed
c. With child abuse, the child's age
d. The nature and extent of the abuse, including evidence of previous abuse
e. The explanation given for the abuse and
f. Any other information that *the person making the report believes* might be helpful in establishing the cause of the abuse and the identity of the perpetrator.[42]

Tribes may have Tribal codes/laws with statutory mandates and abuse reporting requirements. Some Tribal codes specify which Tribal members, staff, etc. may be mandatory reporters. Advocates need to know all their local Tribes' mandatory reporting laws.

Advocates working at qualified victim services programs or who are OVW-funded victim services providers who are not mandated to report abuse under state or Tribal law, may not report if someone comes to them for services unless that person goes through the VAWA ROI process. [See Section IV. 1.].

Advocates must know their personal mandatory reporting status under, for example, Tribal law or other employment (e.g., an ODHS, school, or nursing home employee) or licensing (e.g., a licensed clinical social worker, certified childcare provider, or health care provider), as well as any exemptions (e.g., a lawyer, clergy, psychiatrist). They also need to know if any of their victim service program colleagues are mandatory reporters and what type of abuse that person must report.

Informed consent to advocacy services requires that a survivor is advised – before they make a disclosure – if an advocate or any of their colleagues is a mandatory reporter of any kind of abuse.

If advocates or victim service programs must release information because of a statutory or court mandate, VAWA requires them to make reasonable attempts to notify the survivor of the disclosure and take steps necessary to protect the privacy and safety of persons affected by it, for

[42] ORS 419B.015.

example other families or classmates. "Reasonable attempts" would not include those which threaten the safety of a survivor.

In the unlikely situation when an advocate is a public or private official who is mandated to report, best practice is for them to immediately notify their supervisor or executive director (where appropriate) that a particular report is mandated. (Remember that without an ROI, the service provider may only share the name of the person who has come for services with the supervisor, et al., if they are part of their victim services program. See multi-service programs above.) The duty to report is personal to the public or private official,[43] so they need to determine if they are required to report apart from what the person notified thinks. However, the supervisor, for example, may be able to help the advocate to follow the necessary analysis and steps for reporting and confirm that a report must be made.

2. Community Partners and Abuse Reporting

In addition to knowing who in their own program is a mandatory reporter, advocates and victim service programs must know the reporting requirements of community partners to whom they might refer survivors. An advocate and survivor should be sure to discuss these reporting requirements as part of any ROI conversation before a survivor allows the advocate or victim services program to disclose their PII to another person or program. Since an ROI is only valid when the survivor provides informed consent, the survivor must understand whether information sharing may initiate an abuse report. REMEMBER: Some programs report abuse, neglect or injury (or suspected abuse, neglect, or injury) voluntarily, meaning even if they are not *mandated/required* to report, they may choose to make such a report. Advocates and programs must be sure to understand the confidentiality policies and procedures of referral programs, including their reporting protocols.

3. **Advocates do not Typically have a Duty to Report an Intent to Commit Certain Crimes or to Protect Survivors or Third Parties**

Sometimes mental health professionals have a duty to protect or warn someone if they think a patient is about to seriously harm themselves or a third party. This duty can be mandatory (the professionals must make a report) or permissive (the professionals may make a report). In Oregon, there is no apparent mandatory "duty to protect", even among healthcare workers, though there are laws that allow disclosures to protect in certain circumstances.[44]

[43] ORS 419B.010(3).
[44] ORS 179.505(12)

In Oregon, ORS 40.252 asserts that certified advocates, along with health care providers, psychotherapists, regulated social workers, and offsite process counselors have "no privilege . . . for communications" (meaning that the evidence rule prohibiting/protecting disclosure does not apply) when all three of these requirements are met:

1. In the "professional judgment of the person receiving the communications," the communications reveal that the "declarant has a clear and serious intent at the time the communications are made to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse or death" or involving aggravated animal abuse in the first degree.
2. "In the professional judgment of the person receiving the communications, the declarant poses a danger of committing the crime. **And**
3. The person receiving the communications makes a report to another person based on the communications. ORS 40.252(1).

However, remember that victim service programs in Oregon who receive OVW funding may only disclose PII when a statute or case law **mandates** the disclosure (or has informed consent to release it or a final court order requires the release). And confidential communications may be shared without consent "as otherwise required by law." [Emphasis added.] In the event of intent to commit a crime, the law is not demanding a disclosure – it is only saying that there is no victim-advocate privilege (among other privileges) in legal proceedings when communications reveal someone's intent to commit certain crimes. The law itself states, "**The provisions of this section do not create a duty to report any communication to any person**." ORS 40.252(2). Not having a "duty to report" means that a report is not mandated. Because victim service providers may only disclose PII when mandated, the bottom line is that they may not disclose information even when a crime might occur.

Although advocates may not release PII without informed consent when survivors are indicating clear, serious, and credible threats of harm, they have other options. For example, they might:

1. Get a survivor's permission to share information (through the ROI process) to work with them to prevent the harm. Ideally this would be done before a crisis if the advocate has concerns that a survivor may want this release.
2. Work with them to deescalate the harm.
3. Accompany them to outpatient services.
4. Engage with law enforcement or supportive services without disclosing PII.

If a survivor does not want any confidential information or records released in response to a subpoena, the program must take efforts to protect that information. The program may contact an attorney to quash the subpoena or file a motion for a protective order, etc., based on confidentiality and advocate-victim privilege.

VII. Subpoena Response

As noted above, VAWA allows release of information when a statute, case law, or court order requires the release. Subpoenas can be issued with authority from a court or under statute. Subpoenas **alone** are unlikely to qualify as a mandate requiring an advocate or victim services program to release information or documents. A program might receive a subpoena that demands that an advocate or other person working for a victim services program testify. Otherwise, subpoenas, typically called subpoenas duces tecum, demand that someone produce copies of documents.

Victim service programs need to have a subpoena response policy that all service providers understand and are equipped to follow.

To respond to a subpoena:

- Don't share any information with the person delivering the subpoena.
- If the subpoena is delivered in person or opened in the mail, note when it was delivered or opened, who delivered it, who received it, and any other information about who served it, etc. Keep the envelope or other documents that came with the subpoena, if any.
- Immediately notify a supervisor, executive director, and/or another "custodian of records" as applicable at the victim services program.
- Note whether the subpoena is accompanied by a check for an appearance fee and mileage

If reasonably possible a victim services program should contact the person/people whose information has been requested by the subpoena. The reasonability of the contact should include consideration of a survivor's safety. Advocates need to know if a survivor wants the information shared and consents to release it via the subpoena. If they do, best practice is to complete an

informed ROI with them. Review the records or information that would be disclosed in response to the subpoena so that the survivor(s) can give informed consent to the disclosure. Advocates and/or victim services programs should encourage the survivor(s) to speak with an attorney about protecting their interests.

If a survivor does not want any confidential information or records released in response to a subpoena, the program must take efforts to protect that information. The program may contact an attorney to quash the subpoena or file a motion for a protective order, etc., based on confidentiality and advocate-victim privilege. A writ of mandamus[45] may need to be filed with the Oregon Supreme Court.

If an advocate and/or victim services program cannot safely contact someone whose information has been requested by the subpoena, they must protect a survivor's privacy and safety, as well as that of other persons who might be affected by the release of information.

If confidential information is ordered to be released even after exhausting all available legal remedies, the program must protect privacy and safety of the survivor and any others affected by the release of information.

VIII. **Protecting Survivor Confidentiality When Non-Service Providers Visit a Program's Worksite**

Programs need to ensure that survivors' PII and confidentiality are protected when non-service providers access their worksite(s). Programs should restrict access to areas where survivors may be present. Survivors should always be warned if anyone who is not a certified advocate or is a mandatory reporter will have access to service areas. For example, if maintenance work needs to be done in a victim services program space, survivors should be notified in advance where the work will be done, who will be doing it, and when so they can take steps to protect their privacy. Programs may want to refuse visitors' access to confidential shelters and other spaces. If possible, programs might establish separate entrances for survivors, especially if main entrances are shared with others outside of their victim services program. Anyone who may need to come to the program site (e.g., for maintenance), should have a clear understanding of survivors' privacy expectations before they come.

[45] A "writ of mandamus" is an order in which the Supreme Court tells a lower court to do, or keep from doing, something related to a case. In cases involving survivor-advocate privilege and confidentiality, these writs have been used to stop a lower court from ordering the release of privileged information. See: *I.H. v. Ammi*, 370 Or 406 (2022) and *Oregon v. Sacco*, 373 Or 63 (2024)

Victim services programs need to know how they will protect survivor privacy when law enforcement or other officials may demand access to their premises or records. Policies also need to describe how service providers will contact emergency services without disclosing PII. Programs should work with attorneys when drafting such policies. The Office on Violence against Women (OVW) recommended practice is that checks written for survivor support, e.g., rent or utilities, do not include the name of the program. Programs may want to have a separate name, checking account, and "cover story" for repairs, deliveries, etc. to limit knowledge that a space is related to a victim services program. Motel staff providing emergency housing should not know that a person staying there is receiving services from a victim services program.

Programs should require signed confidentiality agreements from anyone not a staff member or volunteer who accesses survivor service areas.

IX. **Inadvertent, Accidental or Unauthorized Release of Information**

Programs must take reasonable efforts to prevent inadvertent (accidental) releases of PII.[46] For example, programs should not share PII by email or other electronic methods without survivors' understanding the privacy risks and giving permission to use such methods. Informed consent will require that service providers understand the basics about how communication platforms protect confidentiality and the risks that information might be accessed by others so that they can let people they serve make informed choices about using them to communicate. Victim service programs should double-check that any information that is mailed or otherwise shared outside the program is **only** information a survivor has allowed the program to disclose. In other words, programs must ensure that they are only sharing what is allowed to be shared by an ROI.

Victim service programs must have written procedures in place to respond in the event of an actual or imminent breach of PII. When confidential information is or may have been inadvertently released or released without authorization by the victim, a victim services program must do two things:

(1) Make reasonable attempts to notify the victim (survivor safety is a factor in determining if an attempt to contact is reasonable); and

(2) Take steps necessary to protect the privacy and safety of the persons affected by the release of information.

In the case of an actual or imminent breach (unintentional or unauthorized disclosure) of PII, a program must also report the breach to CVSSD immediately so CVSSD can report to the

[46] CFR 90.4(b)(5).

OVW/OVC program manager within 24 hours. The report to CVSSD must not include any PII. In certain situations, programs may also need to comply with Oregon's consumer protection laws.[47]

X. Information That May Be Released without an ROI

Victim services providers may share *non-personally identifying* aggregate data and demographic information regarding services to their clients to comply with federal, state, Tribal, or territorial reporting, evaluation, or data collection requirements, if doing so does not identify a survivor.[48]

Victim services programs should only keep the least amount of information they need to provide services. For similar reasons, they should not hold onto records, documents, or other items for clients.

XI. Record Keeping

1. Questions to consider when creating and maintaining records

A program must keep paper and electronic records confidential and secure on- or off-site and when they are transported or sent.

Programs might consider these questions when they are creating and maintaining records:

- Why is PII collected and maintained?
- What purpose does it serve?
- Does program keep or collect information not needed?
- Where is PII maintained?
    - computers
    - paper files
- How is PII protected in and out of the office?
- Do people take information out of the protected office space?
- How will information be protected when advocates no longer work for the program?
- Could it be lost or stolen?

[47] See, for example, ORS 646A.604.
[48] 34 U.S.C. § 12291(2)(D)(i)(I).

As noted above, subpoenas, typically called subpoenas duces tecum, demand that someone produce copies of documents. If records are successfully compelled to be disclosed by a court order or statutory mandate [see Section VI and VII], the only information that can be disclosed is what is in the records. Therefore, victim services programs should only keep the least amount of information they need to provide services. For similar reasons, they should not hold onto records, documents, or other items for clients.

2. **Recommendations for protecting records**

Additional recommendations for keeping service-related records protected:

- Only certified advocates have access to records containing PII.
- Programs should lock filing cabinets with PII and only allow controlled access to file storage areas.
- Records should not typically include:
    - Casual comments
    - Staff or residents' opinions
    - Quotes or statements made by or about a survivor (including email, letters)
    - Opinions, criticisms, observations, or speculations
    - Information from other sources
    - Information unrelated to providing services
    - Photographs (unless needed for service delivery)
    - Information that could compromise survivor safety or autonomy if released.
- Programs that maintain electronic records must safeguard information kept on computers or in the cloud. These safeguards need to include:
    - Protected internet and cloud access, including during maintenance
    - Program ownership of and exclusive access to data stored in the cloud
    - Electronic information is firewalled from access outside of the program through internal controls or use of separate computer systems
- Programs must establish remote work policies that ensure:
    - Information is only stored or accessed on program-owned devices
    - Information will be securely transferred or deleted
    - Systems use password security or other authentication
    - Device storage is secure

3. **Document retention and destruction policies** should include:

- Destruction policies for both paper and electronic records (consult relevant legal requirements and grant requirements which may be different depending on the services the program offers);

- Paper records should be shredded or otherwise made unreadable
- If records are taken off-site, programs should:
    - Provide locking briefcases
    - Require that service providers never leave confidential records unattended, even in a locked vehicle
    - Store records in locked cabinets that only the services providers can access

XII. Use of Video Cameras

As described above, victim service programs are not allowed to share personally identifying information of people seeking services. This includes information in video records and live monitoring. So, victim service programs may not share video records and live feed with security companies, law enforcement, building management, etc., unless they have met the legal obligations for sharing information under VAWA and Oregon confidentiality and privilege laws. Grant conditions may prohibit or otherwise limit the use of cameras.

When victim service programs are working in a space where a third party is recording and sharing recordings without regard to survivors' confidentiality, the programs need to assess how they will inform survivors that they are being recorded when they come to a site and determine what alternatives they will offer when a survivor may not safely visit the program due to the recordings. Programs should consider alternative locations if they cannot adequately control the third-party recordings.

When victim services programs are recording people who seek or use their services solely for internal purposes, they need to consider why they are recording people and what they will do with those recordings. They will need to protect these recordings as well as they protect all other information and records about survivors. NNEDV has two resources that may help programs assess the harm and alternatives to video recording: 1. "Interior Video Surveillance Compromises Survivor Privacy and Healing," and 2. "External Video Surveillance: Minimizing Harm." Any victim services program using, or thinking about using, cameras should also talk with an attorney about Oregon's third-party recording laws.

XIII. Ensuring Ongoing Confidentiality Competence

Policies need to address how everyone affiliated with a victim services program will protect confidentiality. Here are some points to address:

- DVSA service providers must attend the 40 hours of advocate certification training, two hours of which must focus on confidentiality and privilege, before they have any contact with

survivors or PII. [See Section V.]. Best practice is to update expertise in this area at least every three years.

- Board members must attend two hours of training on confidentiality and privilege as part of a 12-hour requirement that is a perquisite to Board service when a program receives ODSVS funding. They should also complete the 40-hour advocate certification training for staff and volunteers, though this is not a legal or contractual requirement. Remember, even board members who have received this training should not have access to information about survivors unless they meet the other requirements of certified advocacy and are acting in that role.
- Consequences for anyone at the victim services program breaching confidentiality should be included in the confidentiality policy, including termination as appropriate.
- Supervisors must remind service providers that they need to continue to maintain confidentiality and privilege when they are no longer with the program consistent with the confidentiality agreement they signed when they began work at the program. Supervisors may want to give the service providers who are leaving a copy of the agreement as a reminder of this obligation.
- The program should provide robust onboarding and ongoing training on confidentiality, privilege, releases of information, mandatory reporting, and data breach response.

Confidentiality is a core principle of trauma-informed and survivor-centered services. Confidential support can help survivors recover from trauma and find their path forward. Confidential advocacy gives survivors control of their information and how it will be shared. QVSPs and advocates must understand the legal underpinnings and develop the skills to ensure that survivors receive confidential services.

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