Privacy on Campus: A Workbook for Advocates
Acknowledgements:
The Victim Rights Law Center thanks the Jeanne Clery Center; the College Advocates and Prevention Professional Association (CAPPA); the Idaho Coalition Against Sexual and Domestic Violence; the International Association of Forensic Nurses; and Jill Dunlap for their contributions to this workbook.

Copyright © 2020 by Victim Rights Law Center. All rights reserved.

Preparation of this material was supported by grant number 2017-TA-AX-KO22 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, and conclusions expressed are those of the author(s) and do no necessarily represent the views of the U.S. Department of Justice.
Workbook Orientation

This workbook was written for campus advocates, and community-based advocates who work on campus, to provide advocacy and support to campus survivors of sexual assault, domestic violence, stalking, dating violence, and sex trafficking (“survivors”).

Although not all campus advocates receive funding through the Office on Violence Against Women (OVW), we wrote this workbook for those who do. If your program or institution does not receive these funds, some of the confidentiality requirements we cover may be inapplicable. However, these requirements reflect best practices for confidentiality, even in organizations who are not legally required to follow them.

We included a self-assessment on pg. 4 to help you determine what you already know and clarify topics you might want to turn to first. The table of contents follows the assessment and is organized by topic. Many topics include supplemental materials and there is a list of additional resources that you can request from VRLC at the end of the workbook. You can work through sections in any order, skip anything that you already know, and come back to this workbook as you need to. We encourage you to retake the self-assessment periodically to see what you’ve learned or forgotten over time. We also include fill-in-the-blanks and mini-assessment sections throughout, as well as places to take notes, freethink, and color. We hope that you write all over this workbook. Make it yours!

A brief note on language: the entire institution does not need to maintain Violence Against Women Act (VAWA) confidentiality for survivors, but a victim services program that receives OVW funds must. We use “program” throughout to refer to the victim service provider that receives OVW funds and “institution” to refer to the whole university or college.

Finally, the Victim Rights Law Center (VRLC) provides national training and support on campus and privacy issues. If you would like to have a one-to-one consultation, please reach out to us at TA@victimrights.org.

¹This workbook refers to people who have experienced gender-based violence as “survivors” in some places and “victims” in others. This workbook uses “victim” where legislatures and/or criminal justice systems do for consistency and clarity (such as in the sections on the Violence Against Women Act). Otherwise, we use “survivors.”
Survivor Privacy Assessment

This self-assessment is intended to guide you in finding where to start. It is optional. A table of contents, organized by topic, follows on pg. 6.

**True or False:**

1. A Title IX Coordinator can offer confidential services to survivors.
   
   True [ ] False [ ]

2. Survivors can ask any campus employee to keep their conversation secret and any employee that agrees is legally bound to do so.

   True [ ] False [ ]

3. Privacy means secret without implying a legal or ethical obligation.

   True [ ] False [ ]

4. During the first conversation with a survivor, an advocate should explain what privacy protections the survivor can expect and from whom.

   True [ ] False [ ]

5. VAWA requires a written, signed release before a victim services provider can share any personally identifying information unless there is a court or statutory mandate to share it.

   True [ ] False [ ]

6. Electronic records are VAWA-confidentiality-compliant as long as they are encoded.

   True [ ] False [ ]

7. Best practice when making referrals includes a discussion of what confidentiality a survivor should expect from the referral.

   True [ ] False [ ]

8. If a student is a minor (under the age of 18) or their parent claims them as a dependent on their tax return, a parent must sign a survivor’s release of information.

   True [ ] False [ ]

9. VAWA confidentiality always allows advocates to tell law enforcement if a survivor threatens self-harm.

   True [ ] False [ ]

10. Programs should assess whether any subpoena they receive is a court order and notify the survivor, if it is safe and possible to do so.

    True [ ] False [ ]
Survivor Privacy Assessment

Answer Key

1. **False.** This question raises issues about the differences between privacy, confidentiality, and privilege (pg. 8) and about Title IX (pg. 10).

2. **False.** This question raises issues about the differences between privacy, confidentiality, and privilege (pg. 8) and referrals (pg. 17).

3. **True.** This question raises issues about the differences between privacy, confidentiality, and privilege (pg. 8).

4. **True.** This question raises issues about intake (pg. 11).

5. **True.** This question raises issues related to the Violence Against Women Act (pg. 13).

6. **False.** This question raises issues related to the Violence Against Women Act (pg. 13).

7. **True.** This question raises issues related to referrals (pg. 17).

8. **False.** This question raises issues related to the Violence Against Women Act (pg. 13) and FERPA (pg. 23; 37).

9. **False.** This question raises issues related to the Violence Against Women Act (pg. 13) and When Consent is Not Required (pg. 23).

10. **True.** This question raises issues related to subpoenas (pg. 28).
## Table of Contents

- Workbook Orientation .................................................. 3
- Assessment ................................................................... 4
- (Table of Contents) .......................................................... 6
- Confidential, Privileged, or Private: What Is the Difference? 8
  - Confidential ................................................................. 8
  - Privileged ................................................................. 8
  - Private ..................................................................... 8
- Capture Your Privilege Research ...................................... 9
- Other Laws That Impact Campus Survivors’ Privacy .......... 10
  - Title IX .................................................................. 10
  - HIPAA .................................................................. 10
  - FERPA .................................................................... 10
  - FOIA/ Sunshine Laws ............................................. 10
  - Clery ................................................................... 10
- You Had Me at Hello: Intake ............................................ 11
  - Defining Relationships and Setting Expectations .......... 11
  - Immediate Privacy Checklist ..................................... 12
- Protecting Survivors’ Information in the Office ............... 13
  - VAWA Confidentiality Requirements ......................... 13
  - What Is Personally Identifying Information? ............... 13
  - When Personally Identifying Information Is Requested 14
  - Records .................................................................. 15
- Referrals ........................................................................ 17
- On Campus .................................................................... 18
  - Title IX Coordinator ................................................ 18
  - Clery Coordinator .................................................... 18
  - Campus Counselors .................................................. 18
  - Chaplains, Campus Ministers, or Other Clergy .......... 19
  - Faculty and Staff ....................................................... 19
  - Campus-Based Sexual Assault Nurse Examiners ........ 19
  - Campus Advocates ................................................... 20
- Off Campus ..................................................................... 21
- Sharing Personally Identifying Information .................... 23
  - Written, Informed Consent ....................................... 23
  - When Consent Is Not Required .................................. 23
  - FERPA Request ......................................................... 23
  - Mandatory Reporting ............................................... 24
  - Duties to Warn or Protect .......................................... 24
# Table of Contents (cont’d)

- Clery Reporting ................................................. 25
- Court Mandates ............................................... 27
- Case Law ......................................................... 27
- Subpoenas ......................................................... 28
- Responding to Requests ........................................ 29
- Putting It All Together ......................................... 30
- Getting the Word Out: Ideas for Sharing ..................... 32
- Definitions ......................................................... 33
- Resources .......................................................... 34
- Why Privacy Matters ............................................. 34
  - Increase Access to Services ................................... 34
  - Safety .............................................................. 34
  - Control and Narrative Autonomy ............................. 34
  - Privacy Freethink ............................................... 34
- HIPAA ............................................................... 35
  - Who Must Comply with HIPAA? ............................. 35
  - To What Information Does HIPAA Apply? ................. 36
  - When Can a Covered Entity Use or Disclose Protected Health Information? ........................................ 36
- FERPA ............................................................... 37
  - To Which Institutions Does FERPA Apply? ................. 37
  - To What Information Does FERPA Apply? ................. 37
  - What Is a FERPA Education Record? ....................... 37
  - What Is a FERPA Treatment Record? ....................... 38
  - When Can an Institution Use or Disclose Education Records? ......................................................... 38
  - What Is a FERPA Education Record? ....................... 38
- Additional Resources .............................................. 39
Confidential, Privileged, or Private: What Is the Difference?

Confidential, privileged, and private are distinct concepts that can impact survivors’ experience and comfort with sharing information with you. Institutions, organizations, and individuals may use these concepts differently. We encourage you to make sure everyone in your program understands what you mean when you use them.

Confidential
Confidentiality is a legal, ethical, or licensing requirement that information shared within the professional relationship will not be shared outside of it. Often necessary for people to feel comfortable talking about private information, it is common in fields such as social work or psychology. Sometimes people use “confidential” when they mean “private” (see below).

Privileged
Privileges protect some confidences in court or administrative hearings. Attorney-client, clergy-penitent, and spousal privileges are some of the oldest. More modern privileges include doctor-patient, and privileges for domestic violence or sexual assault advocates and the survivors who seek their services. In some jurisdictions, campus advocates can have privileged conversations with survivors. Because privileges can change depending on where the parties are located, VRLC has developed resources for each of the 50 states, populated U.S. territories, and the District of Columbia that share the basics about privacy, including some privileges. You can find those resources by contacting VRLC’s privacy team at TA@victimrights.org.

Private
Privacy is an umbrella concept. When you tell someone that you will not reveal what they tell you, you have promised to keep that information private. Oftentimes – except in instances where a communication is privileged or confidential – the better way to explain how information will be protected is to use the word “private.” Sometimes in a campus environment, private means that you will not share information except when necessary. Private does not typically mean there is a legal or professional ethics requirement to keep the secret (see pg. 33 for Definitions).

---

2 We use “jurisdiction” because it encompasses territorial, tribal, state, and federal laws. We recognize that this word also implies local laws or ordinances, which may have implications for other areas of your work, but are not relevant here.
Why Does this Terminology Matter?

You need to know the difference between private, confidential, and privileged in three moments. The first is when you describe what services you provide to the campus community so people can make informed decisions about approaching you for services. The second is at the start of services when you’re setting privacy expectations. The third is if your notes, records, or testimony is requested, either by the institution, a court, or the survivor. For promoting your services, see pg. 11. For the start of services, see pg. 11. Records and information requests are addressed on pg. 15.

Capture Your Privilege Research

Throughout this workbook, you will find fill-in-the-blanks sections to capture the specific policies, laws, and rules that apply to your role, on your campus. Filling these in should help to solidify your understanding and may also help start conversations with other campus personnel.³

In my jurisdiction, ____________________________________________

professions have privilege.

I can/cannot have privileged communications with _______________________

__________________________________________

³In addition to the space we provide throughout this workbook to capture what you’ve learned, on pg. 30 there is a template you can use to gather all of the information in one place, if you’d like.
Because of jurisdiction-specific laws and institutional policies, each institution likely has a unique set of rules that can impact survivors’ private information. While detailed analysis of these laws and their implementing regulations is beyond the scope of this workbook, here is an overview of the federal statutes that may have some impact on campus survivors’ privacy.

**Title IX**
Title IX is the federal civil rights law that protects people from sex-based discrimination in their education. In 2018, Secretary of Education Betsy DeVos proposed sweeping changes to, and rolled back previous interpretations of, Title IX. As of the date of this publication, those proposed changes are still in process. Title IX impacts campus survivors’ privacy; contact your campus counsel or the VRLC TA team for up-to-date information.

**HIPAA**
The Health Insurance Portability and Accountability Act (HIPAA) is a federal law that governs the release and protection of electronic medical records and patient privacy. Some campus health centers’ student health records are governed by FERPA, and not HIPAA. Typically, off-campus health centers and medical treatment facilities are HIPAA compliant. For in-depth Q&As about HIPAA, turn to pg. 35.

**FERPA**
The Family Educational Rights and Privacy Act (FERPA) is a federal law that governs the release and protection of student educational records. A campus health center’s student medical records are probably governed by FERPA, not HIPAA. For more information and a detailed overview of how FERPA operates, turn to pg. 37.

**FOIA/Sunshine Laws**
Survivors’ names are sometimes released in response to requests under the Freedom of Information Act (FOIA) and/or public records laws (sometimes called “sunshine laws.”) These laws are meant to provide governmental transparency by requiring the release of certain information when requested. Even if the institution is not subject to FOIA or other public records laws, certain information collected by the federal government (such as Clery Act or Title IX complaints) might be.

**Clery**
The Jeanne Clery Act is a federal law that requires colleges and universities that receive federal funding to share statistics on campus crime and campus safety-related policies and procedures with the public. Clery contains reporting requirements for campus security authorities and these reporting requirements can impact survivors’ privacy. This is covered in depth on pg. 25.
You Had Me at Hello: Intake

The intake process begins at the first hello, whether over the phone or in-person. This section is about the information you or your program collects from that point on. Who greets survivors as they arrive in the office? What do they ask? What paperwork are survivors asked to bring with them or fill out? What do survivors need to know to give informed consent for services and how can that information be delivered in the most survivor-centered, trauma-informed way possible? In this section, we cover informed consent at intake and walk you through a recordkeeping self-audit.

Defining Relationships and Setting Expectations

Whether you’re meeting for the first time at a scheduled appointment, in an emergency room, or somewhere else, you must inform your survivors what privacy protections you can offer. Cover this information as soon as practical, and definitely before they share any private information with you.

As we discuss in the Privacy section (pg. 13), the privacy protections that you promise a survivor can range widely. Much of this depends on your laws, licensing, and/or professional ethical requirements.

If your conversation is privileged, explain what that means. Explain your mandatory reporting obligations, if any, and be explicit about what information you would have to share and with whom. Explain how survivors can access their record and any impact their access might have on their privilege or confidentiality.

If you are a campus security authority (CSA) under the Clery Act, disclose your responsibility to survivors and explain what it means for their privacy. For further information on advocates as CSAs and Clery reporting, see pg. 25.

If you are unsure of your privileges, mandatory reporting obligations, or other privacy laws that might impact the survivors you serve, turn to pg. 4 and complete the assessment. At the back of this workbook (pg. 30) you can find a fill-in-the-blanks style form for you to gather this information in one place. We encourage you to contact us at TA@victimrights.org if anything remains unclear or if you have questions that this assessment doesn’t answer.
Immediate Privacy Checklist

☐ Mandatory reporting obligations (if any)
☐ Privilege (if any)
☐ Confidentiality
☐ Campus security authority (CSA) reporting responsibilities (if any)
☐ Other institutional reporting responsibilities (if any)

When There Is Time

☐ Records and how a survivor can get them
☐ Other campus resources (e.g., mental health professionals, clergy, medical staff)
☐ Off campus resources (include hours, location, privilege, mandatory reporting)
Protecting Survivors’ Information in the Office

Office on Violence Against Women (OVW) grantees and subgrantees “may not disclose, reveal, or release personally identifying information or information collected in connection with services requested, utilized, or denied.” There are three specific circumstances in which OVW grantees may share personally identifying information. We address these circumstances in detail on pg. 23. In this section, we focus on how to create, manage, and maintain VAWA-compliant records.

Violence Against Women Act Confidentiality Requirements

Victim service providers funded by OVW are required by VAWA to follow particular confidentiality procedures. VAWA prohibits the release of a victim’s personally identifying information. You may not share this personally identifying information without the victim’s informed, written consent except in a handful of circumstances (pg. 23). Here, we focus on what makes information “personally identifying” and how to protect it.

What is Personally Identifying Information?

Under VAWA, personally identifying information includes any information that directly or indirectly identifies an individual. So, in addition to information like a person’s name, information about race, birth date, number of children, or unique circumstances about a victim could identify them in certain communities or circumstances.

The key is whether the information identifies the victim. If the location of the crime coincides with the location of a widely rumored sexual assault, then the location itself might identify the victim. Releasing this information would violate VAWA’s confidentiality requirements, even though it may sound like non-personally identifying data at first. If you are being asked for this information as part of your campus security authority (CSA) role, see pg. 25.

“VAWA uses “victim” so we use “victim” in this section to avoid confusion.
When Personally-Identifying Information Is Requested

If information about a specific victim or crime is requested from your OVW-funded program, first consider whether or not the information identifies, or could be used to identify, a specific victim. If the requested information does not identify a victim, and could not be used to identify a victim, your program may release it. VAWA allows programs to release aggregate information that is not personally identifying. Your program should have a policy about how non-personally identifying information can be shared.

If the requested information identifies or could be used to identify a victim, there are only three times that VAWA allows funded programs to share this information: when the victim has authorized release; when a statute compels the release; or when a court compels the release. We cover these on pg. 23.

VAWA requires that you take reasonable measures to notify the survivor of any release of personally identifying information. Survivor safety may impact the reasonableness of notification and should be considered before making contact. Finally, VAWA requires that you take “steps necessary to protect the privacy and safety of persons affected” by the release of information.
Records

As you meet with victims for intake, and over the course of their visit(s), you will inevitably create and keep written records. These can be formal records, notes scribbled on a notepad, or both. Some advocates go to great lengths to encode their records, using abbreviations known only to them. But even when the information is encoded, it needs to be protected from disclosure.

Records can stay with a program long after individual survivors and advocates have moved on. That’s one reason why it’s important to have polices about recordkeeping and records access, including record purging. Consider who makes records and whether that person has privilege or confidentiality obligations. Consider where the records are kept and in what format they are kept (i.e., paper, electronic). What happens to the records when someone leaves their position as an advocate? How will records be released?

Because the legal requirements, styles, and policies for recordkeeping vary, there is no one-size-fits-all recordkeeping practice. We can’t tell you what you should or should not include, but thinking through these considerations will help you develop your personal or organizational recordkeeping policies.
If you can’t protect, don’t collect!

As you can tell, recordkeeping raises complicated, fact-specific issues that are best discussed with a lawyer in your jurisdiction, or with the VRLC’s privacy team at TA@victimrights.org.
In this section, we will consider the referrals you might make for a survivor to another professional, and the privacy concerns and protections survivors should consider.

With any referral, remember your obligations to protect survivors’ personally identifying information and know how your privilege (if you have one) operates. In some circumstances privileged professionals can speak to each other about a shared client without waiving their privilege. In others, this conversation would destroy both privileges. You also need to know if you are referring a survivor to someone who may be legally required to report abuse, neglect, etc., especially if you are not a mandatory reporter. Before sharing any information with a third party, make sure the survivor signs a VAWA-compliant release of information. For details on that process, turn to pg. 23.
On Campus

Survivors may wish to speak to the Title IX Coordinator, a chaplain or campus minister, a trusted professor, or an academic advisor. In this section, you will consider the people on your campus, what roles they can play in supporting survivors, and what privacy issues may be raised.

**Title IX Coordinator**
Title IX Coordinators oversee and, on some campuses, investigate, complaints of discrimination on campus. If a survivor wishes to initiate a Title IX complaint, they will need to speak with their campus Title IX Coordinator or someone in that office. Because of the changing legal landscape around Title IX, you may want to contact an education law attorney or the VRLC Privacy Team at TA@victimrights.org for information about the privacy implications of speaking with the Title IX Coordinator.

**Clery Coordinator**
The Clery Coordinator serves as a cross-departmental ambassador of Clery Act requirements and implementation. Ideally, the Clery Coordinator is a campus leader with access to top-level administrators. Sometimes housed in the campus law enforcement office, the Clery Coordinator is not a confidential resource for survivors but may help survivors communicate with campus law enforcement.

**Campus Counselors**
Campuses use various models to provide counseling to their communities. There may be licensed professionals, advocates, peer counselors, or some combination available to student survivors. The extent to which on-campus counselors can promise confidentiality may depend on their licensing, and legal and ethical requirements. Professional counselors are exempt from CSA reporting under the Clery Act. Find out what privacy protections are available from the counselors and advisors on your campus. VRLC has developed summaries of jurisdiction-specific research on privacy laws, available by contacting us directly. Note what you find here:⁵

⁵Remember that you can capture all of your notes on the worksheet on page 30.
Chaplains, Campus Ministers, or Other Clergy

Most campuses do not expect chaplains, campus ministers, or other clergy to report to the Title IX office. “Pastoral counselors” are also exempt from CSA reporting under the Clery Act. These protections make clergy possible privacy-protective options for survivors who want to have confidential and privileged conversations. Look at your campus handbook or reporting policies for details specific to your institution. Note what you find here:

In addition, most jurisdictions recognize some version of clergy-penitent privilege. VRLC created summaries of jurisdiction-specific research on clergy-penitent privilege, available by contacting us directly. Note what you find here:

Faculty and Staff

What privacy protections a survivor can expect when talking with campus faculty, staff, or other employees will vary. Campus employees often have third party reporting responsibilities either mandated by laws or campus policies. To give a survivor accurate information, you may have to research these specific institutional policies and laws. Note what you find here:

Campus-Based Sexual Assault Nurse Examiners

Sexual assault nurse examiners (SANEs) offer confidential sexual assault exams to survivors. The information SANEs collect is protected by privilege in many jurisdictions, as well as either HIPPA, pg. 35 or FERPA, pg. 37. For assistance in determining the confidentiality of your campus SANEs, ask them directly, review their privacy policies, and/or contact the VRLC. Note what you find here:
**Campus Advocates**

**Questions to Consider When Asked to Share Information about a Survivor.**

We recommend thinking through and discussing these questions before you are asked to provide information to anyone.

<table>
<thead>
<tr>
<th>Question</th>
<th>Y</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who is asking for this information?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Has the person who sought, received, or was denied services, agreed that you can share this information?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>Have they signed a VAWA compliant written consent to release it?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>If so, you must release the information.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question</th>
<th>Y</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>What information is being requested?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the requested information personally identifying?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>If so, it may not be shared without a statutory or court mandate, or the survivor’s VAWA compliant written consent. More about VAWA and personally identifying information on page 13.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question</th>
<th>Y</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Can a survivor have privileged communications with you?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>For help determining this, refer to your jurisdiction’s privilege laws. VRLC has developed a jurisdiction-specific resource that can help you answer this question, available by contacting us directly.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question</th>
<th>Y</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are you a mandatory reporter of child abuse, elder abuse, abuse of people with disabilities, or other people?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>If yes, is the survivor the kind of person whose abuse must be reported?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>Does the situation meet the definition of abuse in your jurisdiction?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>Is there an exception in your mandatory reporting laws for privileged communications?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>For help determining this, refer to your jurisdiction’s mandatory reporting laws. VRLC has developed a jurisdiction-specific resource that can help you answer this question, available by contacting us directly.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question</th>
<th>Y</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are you a campus security authority (CSA) being asked to provide data for an annual security report?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>Would this information be likely to initiate a timely warning?</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>If so, how will the information be shared?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>When will it be shared?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Can the timely warning be written to avoid releasing PII?</td>
<td>Y</td>
<td>N</td>
</tr>
</tbody>
</table>

These are complex questions whose answers may raise more questions. The VRLC provides free legal support to OVW-funded organizations, and can help you figure out the answers. Email TA@victimrights.org
Off Campus

The benefits of referring survivors to off-campus resources include increased anonymity and privacy protections. Off-campus resources do not always have campus reporting obligations and may have jurisdiction-specific privileges. Off-campus medical treatment records are likely HIPAA-protected. However, just like on-campus professionals, off-campus counselors, advocates, and others may have mandatory reporting obligations. Professionals need to know not only their own mandatory reporting obligations and privileges, but also those of other professionals to whom they might make referrals. You can track this information on pgs. 18-20.

Consider the “Ripple Effect” of each option on the next page.
The Ripple Effect

Campus survivors can seek guidance, support, and other services from a variety of on and off-campus options. Think of each option as a stone tossed into a river; each has its own outcome and potential privacy “ripple effect.” On this page, you’ll find a number of options and their (potential) outcomes.
Sharing Personally Identifying Information

VAWA recognizes three situations when a provider can release a victim’s personally identifying information: with the survivor’s written, informed consent; when a statute requires it; or when a court requires it (including through case law). If your campus receives OVW funding and your position is covered by this grant, you must follow VAWA’s confidentiality provisions. Even if your campus is not a grantee, these provisions are considered best practice for survivor privacy.

✔ I Agree

Written, Informed Consent

A victim may want you to release their information for any number of reasons. If so, the victim must request the release in writing. The victim and advocates are required to discuss in detail which information the victim wants to release, why, and to whom. This conversation should include reviewing the implications of releasing the information, such as waiving a privilege or triggering mandatory reporting obligations. Once the advocate and victim have agreed about what information to release and to whom, VAWA requires them to record their agreement in writing. The victim must sign the release. The release should have an end date that is reasonable for what they want to accomplish. Your program might already have a form to record the release of information, although forms are not required by VAWA. A victim may revoke their release at any time. The revocation does not need to be in writing, but it is a good idea to note the date of any revocation on the release.

When Consent Is Not Required

VAWA allows for release of a victim’s personally identifying information without the victim’s consent when a statute or court mandates the disclosure, rather than allows, encourages, or permits it. When you’re looking at a statute, court order, or case law to decide if it’s a mandate, look for words like “must” or “shall”; if the statute, court, or case law uses words like “may” or “can” it is not a mandate.

FERPA Requests

The Family Educational Rights and Privacy Act (FERPA) allows schools to release an educational record under a number of circumstances without a student’s consent. The key word is allows. Regardless of your campus’ policies on releasing students’ educational records, FERPA does not mandate releasing a student’s educational record without the student’s written consent under any circumstance; it merely permits the release. For more information on FERPA, see pg. 37.
Mandatory Reporting
The most common statutory mandate that VAWA-compliant victim service providers might have is mandatory reporting. Every jurisdiction has designated at least some people who are required to report certain kinds of abuse or neglect. The specifics of who must report, what must be reported, and how, vary widely. In some places, every adult has this obligation. In others, only certain professionals do. VRLC has compiled research on each jurisdiction's mandatory reporting laws, available by contacting us directly. Record what you find on the form below.6

FILL IN THE BLANK:
In my jurisdiction, ________________________________ (professions, employees, or adults) are mandatory reporters7 of abuse of these people (e.g., children, elders, adults with certain disabilities):
__________________________________________________________________________.
This abuse includes the following behaviors or injuries:
__________________________________________________________________________
__________________________________________________________________________
I am/am not a mandatory reporter of ________________________________ (types of abuse).

Duties to Warn or Protect
Some jurisdictions have laws that require certain professionals to report when a person poses a threat of harm to themselves or others. These laws are often permissive, rather than mandatory. If your law is permissive, it is not what VAWA defines as a statutory or court mandate. You may want to check with a lawyer or contact VRLC for help with this determination.

FILL IN THE BLANK:
In my area, ________________________________ (professions, employees)
have a duty to protect against ________________________________ (threats of harm to self, others, both).
I do/do not have a duty to protect against ________________________________ (threats of harm to self, others, both).

6Reminder that you can capture all of your notes on the worksheet on page 30.
7Please note that VAWA allows a release of PII without victim consent only when the reporting is imposed by statute or a court mandate. Other reporting responsibilities imposed by institutions or their polices do not fall within this exception.
Clery Reporting
Each campus has policies about who is required to report incidents of sexual violence in order to meet the institution’s obligations under the Clery Act. While VAWA allows reporting of aggregated statistical data, even basic data can be personally identifying. If your position is OVW-funded, you may not share personally identifying information without a release. Think about whether a location could identify either party involved. Remember: you understand your institution and are in the best position to assess how identifying a piece of information is. If you are concerned that a location might reveal the identity of the survivor, think about asking for the survivor’s consent to release the information. The survivor should have already heard about your CSA reporting obligations during intake. To revisit the definition of personally identifying information, see pg. 13.

Timely Warnings: Timely warnings alert the community to crimes that present an ongoing safety threat for students or employees (like an active shooter). Each institution will have their own policies for when to issue a timely warning or emergency notification. These determinations should be made on a case-by-case basis. Not every crime requires a timely warning.

Considerations for Issuing a Timely Warning:
• The nature of the crime;
• The continuing danger to the community;
• Whether the issuance could compromise a law enforcement investigation;
• How to issue the warning without identifying the survivor; and
• The safety implications for the survivor.

This checklist is adapted with permission from the Campus Technical Assistance and Resource Project’s “Campus Victim Advocates and the Clery Act” materials.
**Communication Tip:** Discuss these issues with your coordinated community response team, campus counsel, and/or those responsible for collecting Clery data before a conflict arises. Discuss your VAWA obligations, confidentiality, and jurisdiction-specific privileges (if you have them). Find your institution’s Clery CSA policies and make sure they accurately reflect your obligations.

**Intake Tip:** Make sure that survivors know if you must report Clery data, even if this data is technically “unidentifying.” Let them know what data you will report, how the institution shares it, and where and when the information will appear. Absent a timely warning, the information should only appear in an annual security report. Know your institution’s timely warning policy and discuss it with survivors so they know what to expect. Develop a list of resources that have no reporting obligations, or at least different ones than you have.

Remember that everyone is best served if your institution addresses certain questions well in advance of anyone making timely warning and reporting determinations. These questions include:

- When is a CSA unable to share details about a case reported to them?
- What if a survivor requests that certain information not be shared?
- What are the criteria for issuing timely warnings? How are they issued?
- Will a timely warning go out after every report?
- What role do advocates play in timely warnings?  

---

**CAPTURE YOUR NOTES**

I am/am not a campus security authority according to my campus policies.

(Roles, titles) ____________________________________________

are not campus security authorities according to campus policies.

The campus policy for timely warnings is: ____________________________________________

__________________________________________

Timely warnings are issued by: [method] ____________________________________________

__________________________________________

---

*These questions are adapted with permission from the Campus Technical Assistance and Resource Project’s “Campus Victim Advocates and the Clery Act” materials.*
Orders
Privileges are laws that protect the communications and records being used as part of legal processes. When a jurisdiction recognizes privilege for a type of record, courts, law enforcement, and immigration officials generally cannot force a survivor, counselor, or advocate to reveal the information. For more on privileges in your jurisdiction, contact VRLC at TA@victimrights.org.

But even where privileges exist, most jurisdictions permit courts to order release of a survivor’s protected information under particular circumstances. The precise requirements vary by jurisdiction, but some examples are:

- The court finds that the information in the survivor’s records is so important as evidence that using it outweighs the harm to the survivors’ privacy;
- The information in the records exonerates a criminal defendant;
- The record is, or contains, a report of child neglect or abuse; or
- When the survivor sues their advocate or counselor.

Case Law
Case law is law that is established by court opinions (i.e., “cases”). In some jurisdictions the duty of certain mental health professionals to warn third parties or protect patients from themselves (in this case, survivors) was established in case law. For example, in California, the Tarasoff case established that psychologists have a duty to protect a third party (thereby breaking confidentiality and waiving privilege) if a specific threat is made by the patient against an identifiable person. In such a jurisdiction, the case law is a “court mandate.” Please note that the case law must mandate the disclosure of information and cannot merely permit disclosure.

Figuring out your jurisdiction’s case law mandates to disclose records will probably require legal research and analysis. Consult with a lawyer or contact VRLC at TA@victimrights.org.
Subpoenas
If you receive a subpoena, do not ignore it and pay close attention to the response time.

A subpoena is a written document that demands that an individual testify, turn over records, or provide other things to be used as evidence in a specific case. When parties are involved in a court action, they commonly seek information by using a subpoena. Subpoenas have different jurisdictional requirements, forms, and processes. A subpoena can be issued by a court or by an attorney, depending on the rules in your jurisdiction. VAWA permits victim service providers to release a victim’s personally identifying information in response to a lawfully issued subpoena requiring the release. Closely review the request and then contact an attorney to confirm the subpoena’s validity and determine next steps.

The program or the survivor may be able to file a motion to quash or contest a subpoena. Check with the survivor before challenging it; the survivor might want to share the information that is being requested. Failure to respond to a subpoena might be contempt of court in most jurisdictions.
Responding to Requests

No matter how the information in your records is requested via subpoena, if you are going to release it, VAWA requires that you make a reasonable attempt to notify the survivor. VAWA also requires that you take steps “necessary to protect the privacy and safety of the persons affected by the release of the information.”

This worksheet will help you capture the details about your requests for records policies, including subpoenas. Filling this out may help you solidify the procedure or identify areas where procedure or policies need to be developed.

FILL IN THE BLANK:

i. Our policy for responding to subpoenas is:

ii. We will notify survivors when their information is requested, after we consider how safe it would be to do so, by (email, mail, phone, other):

iii. We will attempt to provide notice to victims affected by a disclosure, after we consider how safe it would be to do so, by:

iv. We will take the following steps to protect the privacy and safety of people affected by the release of information:

v. When we receive a request for records or testimony about a survivor, our procedure is:

vi. The person at our program responsible for records and their release is:

10 34 USC 12291(b)(2)(C).
**Putting It All Together**

This section will help you gather relevant information for your jurisdiction, institution, and program and will point you to the resources you need to answer privacy, confidentiality, and mandatory reporting questions.

In our jurisdiction, we do/do not have an advocate-victim privilege for victims served by advocates.

In our jurisdiction, we do/do not have psychotherapist-patient privilege.

Applies to these licenses/professions:

Scope of the privilege:

In our jurisdiction we do/do not have clergy-penitent privilege.

Who is clergy?

Scope of the privilege:

In our jurisdiction, these circumstances trigger mandatory reporting:

See pg. 39 to find out how to get VRLC resources that can help you answer this question.
In our jurisdiction, these roles are mandatory reporters of these circumstances:

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

See pg. 39 to find out how to get VRLC resources that can help you answer this question.

Our faculty and staff handbook (if relevant) says ____________________________ (roles)
are required to report ____________________________
to ____________________________ (include any policy-based reporting here).

Who Offers Confidential Services?

Name ________________________________________________________________

Role ________________________________________________________________

Service _____________________________________________________________

Contact/location ____________________________________________________

Type of confidentiality ________________________________________________

Mandatory reporter? Of what? __________________________________________

Title IX reporter under campus policies? _________________________________

Clery CSA under campus policies? _____________________________________

Think about how to share what you know with other important members of your campus community, including Title IX Coordinators, school attorneys, deans, faculty, campus ministers and chaplains, other administrative and educational personnel, and community-based advocates.
Getting the Word Out: Ideas for Sharing

You may be eager to share what you’ve learned about privacy with other members of your campus community. Some advocates make postcards about the privilege and confidentiality of different roles and distribute them. Some have added pages to websites or information to student or employee handbooks.

What ideas do you have?
Whose permission do you need to accomplish them?
What steps do you need to take?
Can you bring your ideas or questions to a coordinated community response meeting?
Definitions

i. **Case law:** law established by the outcome of legal cases (or precedent).

ii. **Confidential:** a legal, ethical, or licensing requirement that information shared within the professional relationship will not be shared outside of it. Often necessary for people to feel comfortable talking about private information, it is common in fields such as social work or psychology.

iii. **Dating violence:** violence or abuse by one person against another in a dating relationship.

iv. **Domestic violence:** violence or abuse by one person against another in a domestic relationship, such as marriage or cohabitation.

v. **Mandated reporter:** a person who is legally required to report when certain types of abuse or neglect are known or reasonably suspected.

vi. **Personally identifying information (PII):** identifying information about an individual including information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault, or stalking including:
   a. a first and/or last name;
   b. a home or other physical address;
   c. contact information (including a postal, e-mail or Internet protocol address, or telephone or facsimile number);
   d. a social security number, driver’s license number, passport number, or student identification number; and
   e. any other information, including date of birth, racial or ethnic identity, or religious affiliation that would serve to identify an individual (VAWA definition).

vii. **Private:** on campus, private typically means information that will only be shared with the community members who need to know and/or respond.

viii. **Privileged:** a legal protection in court and administrative proceedings for information shared in certain relationships. Privilege can be waived if the information is shared with anyone outside of that relationship.

ix. **Sex trafficking:** the use of force, fraud, or coercion to obtain sexual labor from a person.

x. **Sexual assault:** sexual contact or behavior that occurs without explicit consent of the victim. Some forms of sexual assault include attempted rape, fondling or unwanted sexual touching, and forced sexual acts such as rape.

xi. **Stalking:** repeated surveillance, following, or harassment that makes the victim feel afraid or unsafe.

xii. **Subpoena:** a request to produce documents or physical evidence, or to testify in legal proceedings. Literally translates to “under penalty” because people can be penalized for failing to comply with subpoenas.
Additional Resources

This section contains additional information on why privacy matters, HIPAA, FERPA, and additional VRLC resources you may want to request.

Why Privacy Matters:
Sometimes survivors say they don’t care what happens to their information or who you tell about it. Other times they may not have a frame for thinking about why privacy is important or may be too traumatized by the violence they’ve experienced to be thinking about privacy. This list of reasons why privacy matters might help you explain what’s at stake.

Increase Access to Services
Concerns about privacy remain some of the biggest barriers to survivors who are seeking services. For many survivors, silence is a means of controlling what has happened to them. But silence can lead to isolation, lack of mental health services, and increased shame. Providing confidential services to survivors is one of the most important things a community can do to help survivors heal and recover.

Safety
Survivors often fear for their safety. Information about their location, institution, schedule, or even that they have sought help can compromise their safety, bringing the abuser to their door.

Control and Narrative Autonomy
Protecting survivors’ privacy gives them as much control as possible over their next steps and who gets to know their story. One of the most healing processes for many survivors is reclaiming their autonomy through sharing their narrative. Often, survivors had no choice in their victimization. They may have a voice in what happens with the rest of their story. Advocates’ confidentiality keeps the narrative in survivors’ hands.

Privacy Freethink
There are many more reasons why privacy is important. You might think of them while you’re working or hear of them from survivors. Capture your additional reasons here:
HIPAA (Health Insurance Portability and Accountability Act) and FERPA (Family Educational Rights and Privacy Act) are mutually exclusive. Although many people think that the HIPAA applies to all health- or medical-related data, HIPAA only applies to certain types of information handled by certain types of entities. HIPAA does not apply to education or treatment records under FERPA. For information on FERPA, see pg. 37.

HIPAA is unlikely to apply to an education record unless all of the following are true: (1) the institution does not receive federal funding (and thus is not subject to FERPA); (2) the record contains protected health information (PHI); and (3) that PHI is created or received by a covered entity acting on behalf of the institution. Most public primary and secondary institutions, and most postsecondary institutions, whether public or private, receive federal funding. However, many private elementary and secondary institutions do not receive federal funding. If you are unsure if HIPAA applies to your records, consult a lawyer or contact VRLC at TA@victimrights.org.

**Who Must Comply with HIPAA?**

HIPAA applies to covered entities and their business associates. A covered entity means: (1) health care providers (which includes doctors, psychologists, health clinics, hospitals, and pharmacies) who (2) transmit health information in electronic form in connection with (3) certain administrative and financial transactions (referred to as “covered transactions”) like submitting a health insurance claim and paying that claim. Non-federally funded campus health care providers, such as campus health clinics and mental health counseling centers, may be covered entities subject to HIPAA if they handle data electronically as part of a covered transaction.

Generally, health care providers at elementary and secondary institutions do not engage in covered transactions or electronic transmissions and thus are not covered entities. Health care providers on college and university campuses are more likely to engage in electronic transmissions of health data in connection with a covered transaction and to be considered covered entities. But if information is subject to FERPA, then HIPAA does not apply.
To What Information Does HIPAA Apply?
HIPAA applies to protected health information (PHI). PHI is health data that (1) identifies, or reasonably could identify, an individual; (2) is created, received, stored, or transmitted by a covered entity; and (3) is related to the provision of individual healthcare or payment for healthcare.

Nevertheless, PHI excludes “education records” and “treatment records” under FERPA, as discussed below. Information in a record controlled by an educational institution subject to FERPA is not PHI—even the health-related information.

When Can a Covered Entity Use or Disclose Protected Health Information?
The Department of Health and Human Services has issued several privacy-related rules under HIPAA, including the Privacy Rule. The HIPAA Privacy Rule requires covered entities to protect individuals’ health records and other identifiable health information. Under the Privacy Rule, a covered entity cannot use or disclose an individual’s PHI unless the use or disclosure is specifically permitted under HIPAA or the individual authorizes the use or disclosure. HIPAA permits (but does not require) a covered entity to disclose PHI without an individual’s authorization for purposes of treatment, payment for healthcare services, or operations of a healthcare business. For example, a physician in a health center that qualifies as a covered entity may discuss a student’s health care needs with school nurses who will care for the student. HIPAA also permits disclosure of PHI for certain public interest and benefit activities. For example, a counselor may disclose PHI to prevent or lessen harm to another individual or the public, to report abuse or domestic violence to the government, or to comply with legal orders.

If a use or disclosure of PHI is not specifically permitted by HIPAA, a covered entity may disclose the PHI only if the individual completes a written authorization. An authorization must be written in specific terms that comply with HIPAA requirements. The authorization must be dated and signed by the individual and include the name of the covered entity being authorized, what PHI is being used or disclosed, the purpose of the use or disclosure, the expiration of the use or disclosure, and certain statements of rights and warnings.
The Family Educational Rights and Privacy Act (FERPA) is a federal law that governs when a student’s education records can be disclosed or accessed. FERPA generally prohibits institutions from disclosing a student’s education records or treatment records without written authorization from the student and/or the student’s parent. When a record is created by or controlled by an institution (or a person or entity working on behalf of the institution), that record is likely to be an education record or treatment record subject to FERPA.

To Which Institutions Does FERPA Apply?
FERPA applies to all educational institutions that receive funds under any program administered by the U.S. Department of Education. This means that FERPA can apply to both public and private institutions, and to primary and secondary institutions. The test is simple: if an institution receives federal funding, then FERPA applies to its student records.

However, FERPA generally does not apply to university hospital records because university hospitals typically do not provide their services exclusively on behalf of an institution. Rather, they provide services to both students and non-students. Assuming the university hospital is a covered entity, the records of university hospitals are subject to HIPAA (and not FERPA). That said, when a hospital runs a campus health clinic, the clinic’s student records are probably subject to FERPA.

The key to remember is that an institution’s ability to disclose education records under FERPA is permissive, not mandatory. In other words, except under certain circumstances, an institution may—but is not required to—disclose education records without the student’s consent as permitted by FERPA. Therefore, FERPA is not a statutory mandate that allows OVW funded victim service providers to release survivors’ personally identifying information.

To What Information Does FERPA Apply?
FERPA applies to “education records” and “treatment records,” and the rules for use and disclosure differ between the two types of records.

What Is a FERPA Education Record?
Education records are (1) all records, files, and documents directly related to a student that are (2) maintained by the institution or by a party on behalf of the institution. This includes things like schedules, email addresses, grades, financial aid records, and disciplinary records—as well as immunization records and records maintained by a school nurse. Education records are protected regardless of whether they are in paper or digital form.
What Is a FERPA Treatment Record?
Treatment records are medical or psychological records of a student eighteen years or older who is being treated by a physician, psychiatrist, psychologist, or other professional or paraprofessional—but only if they are made, maintained, and used in connection with treatment of the student and disclosed only to individuals providing the treatment. Because the definition of “treatment record” requires that students be over eighteen, these kinds of records typically exist only for postsecondary institutions. A treatment record becomes an education record once it is shared with others (including students) for purposes other than for treatment.

When Can an Institution Use or Disclose Education Records?
Institutions may disclose education records without the student’s consent if FERPA permits the disclosure. For example, disclosure to appropriate parties is permitted. “Appropriate parties” includes law enforcement or parents of a student, in connection with an emergency, “if the information is necessary to protect the health or safety of the student or others.”

Students have a right to access education records about them. However, institutions are not required to provide students with copies of their education records unless it would be unreasonably difficult for the student to review the records (e.g., the student does not live within commuting distance of the campus).

When Can an Institution Use or Disclose Treatment Records?
On the other hand, treatment records are, by definition, not available to anyone other than the professionals providing treatment to the student or to physicians or other appropriate professionals of the student’s choice. An institution may use or disclose treatment records for other purposes or with other parties (1) with the prior written consent from the eligible student or (2) as permitted by FERPA. But if it discloses a treatment record to someone other than for treatment purposes (including if the record is disclosed to a student), then, as noted above, the treatment record becomes an education record.

Finally, an institution is not required to give a student access to treatment records, though students may request to have their records reviewed by a physician or treatment professional of their choice.

---

VRLC Resources

The Victim Rights Law Center is a national training and technical assistance expert on survivor privacy. If you would like to have a one-to-one consultation or to access the resources referenced throughout this workbook (and listed below), please contact us at TA@victimrights.org

Minors’ Privacy Toolkit (English and Spanish available\(^1\))
Jurisdiction-Specific Privacy FAQs
Mandatory reporting charts and tools
Safety Planning Guide for Campus Sexual Assault Survivors
Minors’ Privacy FAQs (releasing 2020)
Clergy Privacy FAQs (releasing 2020)

Thank you for the incredible work you do.

\(^1\) Some sections also available in Arabic, Hindi, Hmong, and Vietnamese.