

CONFIDENTIALITY AND IMMIGRANT VICTIMS: RESPONSIBILITIES OF SHELTERS, RAPE CRISIS CENTERS AND VICTIM SERVICES PROVIDERS¹

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Current as of 07/06/2012

A small number of states have passed and attempted to implement state laws designed to make it unlawful to harbor or to transport undocumented immigrants within the state.³ In July, 2010, a new law aimed at identifying undocumented immigrants existing within the State of Arizona went into effect. The passing of HB 1070 in Arizona has prompted other states to encourage similar immigration legislation. These bills often make it unlawful for individuals or entities to knowingly harbor or transport undocumented immigrants. Some of the bills require local and state law enforcement to ask about the immigration status of an individual if the officer has reasonable suspicion to believe that the individual is present in the United States without documentation.⁴ It is important for domestic violence shelters, rape crisis centers, and other programs and services that assist immigrant women, children and crime victims to understand how these bills may or may not affect domestic violence programs and shelters, and their ability to comply with confidentiality requirements under state and federal laws. It is also important for programs to understand that federal law can preempt several of the provisions of these state laws and how programs in states with immigration legislation can continue to operate in a manner that is consistent with federal grant funding and antidiscrimination laws. Equally important is to inform victims about their rights and to conduct safety planning for victims to help them stay safe in their environment.

¹ This project was supported by Grant No 2011-TA-AX-K002 awarded by the Office of Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author and do not necessarily reflect the views of the Department of Justice, Office Against Women. This training material was made possible by Grant Number #90EV0402 from the Administration on Children, Youth and Families, Family and Youth Services Bureau, U.S. Department of Health and Human Services awarded to the National Resource Center on Domestic Violence with the Women of Color Network as the author and distributor. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the U.S. Department of Health and Human Services. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the Health Resources and Services Administration or the U.S. Department of Health and Human Services.

² The authors wish to thank Aparna Bhattacharyya, Donna Irwin, Ho-Thanh Nguyen, and Maria Jose Fletcher for their assistance in developing this document.

³ See Appendix of State Laws

⁴ On July 6, 2010, the United States filed a lawsuit against the State of Arizona challenging the constitutionality of SB 1070 and arguing that the legislation interferes with matters that are constitutionally reserved for the federal government, conflicts with federal immigration laws and policy and impedes the implementation of Congressional objectives.⁴ On appeal, the U.S. Court of Appeals for the Ninth Circuit upheld a temporary district court injunction blocking the enforcement of SB 1070's provisions that: (i) require officers to make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if they possess "reasonable suspicion" that the person is unlawfully present in the United States; (ii) impose criminal penalties for the failure to apply for or carry alien registration papers; (iii) prevent undocumented persons from soliciting, applying for, or performing work; and (iv) authorize the warrantless arrest of immigrants where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States. *United States of America v. State of Arizona*, No. 10-01413 (D. Ariz. *prelim. injunction granted* July 28, 2010); *prelim. injunction aff'd*, No. 10-16645 (9th Cir. April 11, 2011).

State immigration legislation may contain provisions regarding harboring of undocumented immigrants, the transportation of such immigrants, and the requirement that law enforcement inquire about immigration status when an individual has been stopped and the officer believes that the person may be undocumented. There are differences between these state immigration bills, for example some provide greater protections for service providers than others, so it is important to know the specific laws that apply to victims of domestic violence, sexual assault, human trafficking, and other crimes, and the programs that serve such victims in your state.⁵

Federal law affords immigrant victims of domestic violence, sexual assault, human trafficking, and other crimes special protections to encourage them to report crimes and help bring cases against their abuser without fear of being deported.⁶ However, state immigration laws may undermine the ability of domestic violence shelters, rape crisis centers and other victim service providers to bring a victim to court, to meetings with prosecutors or to the hospital to receive critical treatment for injuries. Furthermore, because shelter employees are not specifically granted immunity from prosecution for harboring or shielding undocumented immigrants, under some of the new state laws there is nothing under these bills that would prevent law enforcement officials from stationing themselves outside of a domestic violence shelter, a rape crisis center despite the fact that under federal law immigration enforcement activities are prohibited by VAWA Confidentiality provisions.⁷

In light of the enactment of this type of state immigration legislation, it is imperative for shelter employees to understand the federal and state safeguards currently in place with respect to the protection of confidential victim information as well as what to do in the event a law enforcement officer arrives at a shelter and asks about an individual or requests to inspect the facility.

Federal and State Victim Confidentiality Safeguards

Under the federal Family Violence Prevention and Services Act (FVPSA),⁸ the Violence Against Women Act (VAWA),⁹ and the Victims of a Crime Act (VOCA),¹⁰ any shelter, rape crisis center, domestic violence program or similar victim services program that receives either FVPSA, VAWA, VOCA, or Office of Violence Against Women (OVW) funding is barred from disclosing to anyone any information about a victim receiving services, including any information regarding the victim's location or the fact that the victim is currently or has ever received services from the shelter. Compliance with FVPSA, VAWA, state confidentiality laws, and VAWA special immigration confidentiality provisions is a requirement of all entities receiving funding. Release of confidentially

⁵ See State Confidentiality Chart. Available at: <http://iwp.legalmomentum.org/reference/additional-materials/vawa-confidentiality/state-confidentiality-laws>

⁶ The U.S. Department of Homeland Security has issued a series of policy memoranda designed to prevent the arrest, detention, and removal of non-citizen crime victims and witnesses. For more information on these memos go to <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents>.

⁷ LESLYE E. ORLOFF ET AL., *VAWA Confidentiality: History, Purpose, and Violations VAWA Confidentiality Protections*, in EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT, Ch. 6, available at <http://iwp.legalmomentum.org/reference/additional-materials/vawa-confidentiality/training-materials/Ch3-SA-Man--Confidentiality.pdf>, See also, NIWAP, VAWA Confidentiality Statutes, Legislative History and Implementing Policy (2.23.17), available at <http://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history/>

⁸ The Family Violence Prevention and Services Act of 1984, Pub. L. No. 98-457 (codified in 42 U.S.C. Section 10401, et seq.); Child Abuse Prevention and Treatment Act of 2010, Pub. L. No. 111-320 (codified in 42 U.S.C. 5101, et seq.)(amending and reauthorizing the FVPSA)..

⁹ The Violence Against Women Act of 1994, Pub. L. No. 103-222, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C. and 42 U.S.C.) (hereinafter, *VAWA*); Victims of Trafficking and Violence Protection Act of 2000 ("VAWA 2000"), Pub. L. No. 106-386, Div B, Title V, §1513(d) (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005 ("VAWA 2005"), Pub. L. No. 109-162, Title VIII, Subtitle B, §817 (2006).

¹⁰ Victims of a Crime Act, 42 USC 10601 *et seq.* (grantees must certify that they will comply with regulations set forth by 28 CFR Part 22 which prohibits the disclosure of personal identifying information of crime victims).

protected information places the programs' funding in jeopardy.

The VAWA immigration confidentiality protections have three prongs:

1. **Nondisclosure Provisions:** The Department of Homeland Security, the Department of Justice and the Department of State cannot disclose any information contained in or about the existence of an immigration case filed by a crime victim seeking VAWA, T-Visa or U-Visa immigration relief.¹¹ This protection ends only when the application for the immigration benefit is denied based on the substance of the application and all opportunities to appeal have been exhausted.
2. **Prohibited Source Limitations:** Stops immigration enforcement agencies from using information provided solely by an abuser, trafficker or U visa crime perpetrator, a relative, or a member of their family,¹² to take an adverse action regarding admissibility or deportability against an immigrant victim, without regard to whether a victim has ever filed or qualifies to file for VAWA related immigration relief.¹³ The victim does not need to have filed an immigration case based upon victimization to be eligible.
3. **Location Prohibitions:** Prohibits enforcement actions at any of the following locations: domestic violence shelter; victim services program; family justice center; supervised visitation center; or courthouse if the victim is appearing in connection with a protection order case, a child custody case or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking. If any part of an enforcement action took place at any of these locations, DHS must disclose this fact in immigration court proceedings, and must prove that such action did not violate VAWA confidentiality. The victim does not need to have filed an immigration case based upon victimization to be eligible.

The prohibited source and locational prohibitions protect all crime victims regardless of immigration status. The non-disclosure VAWA confidentiality provision protects individuals who are eligible for a VAWA self-petition, battered spouse waiver, VAWA Cuban adjustment, VAWA HRIFA, VAWA NACARA, VAWA cancellation of removal and VAWA Suspension of deportation.¹⁴ VAWA Confidentiality protects all immigrant victims of domestic violence, sexual assault, human trafficking, and all U visa covered crimes whether or not the victim ever qualifies for or files a VAWA, T or U visa immigration case.

Additionally, most states have their own confidentiality requirements enacted by statute.¹⁵ These state and federal confidentiality and non-disclosure rules and laws, remain unchanged by the enactment of new state immigration legislation. Confidentiality protections were designed to prevent batterers and other crime perpetrators from using the immigration system as a tool of power and control over, or to retaliate against victims. Violations of confidentiality rules create serious, and sometimes life-threatening, dangers to victims of domestic violence, sexual assault, and human

¹¹ IIRAIRA Section 384 (a)(2); 8 U.S.C. 1367(a)(2).

¹² *Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRAIRA Section 384.* May 5, 1997, Office of Programs, /s/ Paul W. Virtue, Acting Executive Associate Commissioner. ("Virtue memo"). Available at: http://iwp.legalmomentum.org/vawa-confidentiality/government-memoranda-and-factsheets/c_VAWAConf_DHSGuidanceSec%20384_05.05.97_FIN.pdf

¹³ IIRAIRA Section 384 (a)(1); 8 U.S.C. 1367(a)(1).

¹⁴ For a description of each of these forms of immigration relief see LESLYE E. ORLOFF ET AL., *Introduction to Immigration Relief for Immigrant Victims of Sexual Assault and Glossary of Terms*, in EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT, Ch. 6, available at <http://iwp.legalmomentum.org/immigration/introduction-to-immigration-relief-for-immigrant-victims>

¹⁵ See State Confidentiality Chart. Available at: <http://iwp.legalmomentum.org/reference/additional-materials/vawa-confidentiality/state-confidentiality-laws>

trafficking, and compromise the trust that immigrant victims have in the effectiveness of services and legal protection developed to help crime victims. Violations of confidentiality restrictions lead federal and state officials to unknowingly help crime perpetrators to harm, manipulate or retaliate against their victims or otherwise undermine criminal prosecutions. Accordingly, it is important for shelter personnel to continue to abide by these confidentiality safeguards even after a state local immigration enforcement legislation.

How to Respond to Law Enforcement Requests for Confidential Victim Information

Notwithstanding the confidentiality safeguards set forth above, it is conceivable that state or local law enforcement officials or the federal Department of Homeland Security officials may physically arrive at a domestic violence shelter or other program asserting to see crime victims. These federal, state, or local law enforcement officials may cite provisions of recent state immigration legislation or allege that they are given power under federal to seek out and arrest undocumented immigrants, in an attempt to ask about a specific victim or request to inspect the facility. In furtherance of their request, law enforcement officials may present shelter employees with (i) a subpoena, (ii) a court order, (iii) a search warrant or (iv) an arrest warrant.

It is important for programs to understand the difference between these documents and how a domestic violence or victims services program should respond to each in a manner that best protects victims and protects the programs from being at risk to lose funding for violating confidentiality laws or discriminating among program participants or applicants for services.

A *subpoena* is an order that can be requested by an attorney for any reason and is issued by a court clerk requiring a person to appear at a certain date, time, and place to testify as a witness about a case. A subpoena also may require the production of documents.

A *court order* is a legal document issued by a court ordering a person to perform a specific act, prohibiting a person from performing an act, setting a court date, or otherwise legally establishing something.

A *search warrant* is an order signed by a judge, which gives the authorities the limited right to search a specific place for a specific object or materials. A search warrant is issued after the District Attorney or a law enforcement official conveys to a judge that there is “probable cause” to believe that the use of a search warrant will produce evidence. The search must generally be limited to what the search warrant states can be searched.

An *arrest warrant* is a judge’s order to law enforcement officers to arrest and bring to jail a person charged with a crime. An arrest warrant founded on probable cause gives the arresting officer the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. Before entering an establishment to execute an arrest warrant, an officer must have a reasonable belief that the suspect resides at that location and have reason to believe that the suspect is present at the time the warrant is executed.

Shelter Confidentiality Step by Step Guide

If Police, Sheriffs, or Department of Homeland Security Enforcement Officials Come to a Shelter or Service Provider...

1. Ask for the officer's name, badge number, and what department they work for. Do this first because you may not be able to obtain this information at a later point.
 - a. Name _____
 - b. Badge Number _____
 - c. Department _____
2. State that you can not confirm or deny whether anyone is in your facility or has received services from your program. This statement protects your program from putting your federal and possibly state funding in jeopardy. (State confidentiality laws vary. Please see the attached chart).¹⁶
3. If the officer is a federal agent, direct them to the attached Department of Homeland Security memorandums.¹⁷ Particularly point out the memo that describes "victims of domestic violence, trafficking or other serious crimes," as a certain class of individual that warrants particular care when exercising prosecutorial discretion.¹⁸ Also give them a copy of the one page notice from the Department of Homeland Security describing how complaints for violations of VAWA confidentiality are filed.¹⁹
4. Inform your supervisor that the police or DHS enforcement officials are on the premises and have requested to enter or have requested information.
5. Ask the police how you might be able to get in touch with them in the future.

¹⁶ The State Confidentiality Law Chart is attached in this packet. It is current through June 2011. Please make sure to independently confirm your state laws if this chart is used significantly after the above date. Federal Laws that put victim service program funding in jeopardy include the Violence Against Women Act (VAWA) and the Family Violence Prevention and Services Act (FVPSA). 8 U.S.C. § 1367; 42 U.S.C. § 10402. State Confidentiality Chart available at: <http://iwp.legalmomentum.org/reference/additional-materials/vawa-confidentiality/state-confidentiality-laws>

¹⁷ DHS Broadcast Message on New 384 Class of Admission Code; Available at: <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message%20to%20DHS%20384%20COA%20Final%2012.21.10.pdf/view> (This DHS memo directs DHS officials to identify victims with pending or approved VAWA confidentiality protected cases and to not initiate enforcement, detention or removal actions against these victims); *Memorandum of John P. Torres, Director of the Office of Detention and Removal Operations, Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005*, Jan. 22, 2007. (VAWA confidentiality provisions prohibit the government from relying on information given by the abuser, from disclosing information relating to any immigrant that has filed for a VAWA self-petition, U-Visa, or T-visa, and from enforcing actions at shelters, rape crisis centers, victim services programs, community based organizations, courthouses, supervised visitation centers, or family justice centers without certification under oath that the other provisions have not been violated.) Available at: http://iwp.legalmomentum.org/vawa-confidentiality/government-memoranda-and-factsheets/VAWA%20CONF_Torres%20ICE%20VAWA%20Confidentiality%20Memo_1.22.07.pdf *Memorandum of John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, June 17, 2011. Available at: <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton-CertainVictimsWitnessesandPlaintiffs-Memo-06-17-2011.pdf/view>; *Memorandum of John Morton, Director, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, June 17, 2011. Available at: <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/Morton%206.17.11prosecutorial-discretion-memo.pdf/view>; *Memorandum of John Morton, Assistant Secretary, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions*, Aug. 20, 2010. Available at: <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/aliens-pending-applications.pdf/view>; U.S. Citizenship and Immigration Services, *Guidance for Coordinating the Adjudication of Applications and Petitions Involving Individuals in Removal Proceedings; Revisions to the Adjudicator's Field Manual (AFM) New Chapter 10.3(i): AFM Update AD 11-16 (PM-602-0029) (February 4, 2011)*, available at: <http://www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/coordination-adjud-removal-proceedings.pdf>.

¹⁸ You should consider printing a packet of these materials so that they are readily available to give to any officer that arrives at your program.

¹⁹ See Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security at http://iwp.legalmomentum.org/reference/additional-materials/vawa-confidentiality/government-memoranda-and-factsheets/VAWA%20CONF_DHS%20Complaint%20Instructions_2008.pdf/view

6. Inform the client and her attorney that the police have been requesting to see her so that she may adjust her safety planning accordingly. This ensures that you maintain confidentiality.
7. Use screening tools to help determine whether the client is eligible for a VAWA self-petition, U visa, or T visa.
 - a. If the victim is eligible but has not filed, help her get assistance filing her VAWA, T or U visa case.
 - b. Any time law enforcement or DHS is seeking a client help the victim locate an attorney with experience representing immigrant victims.
 - c. Let the client and attorney determine the next course of action.
 - d. If the victim has already filed for VAWA, T or U visa relief, contact the officer and inform him or her that under DHS policies the officer is required to check the victim's case against the DHS VAWA 384 computer system. This system was designed to protect crime victims against immigration enforcement action taken against victims and witnesses. Provide the officer with the victim's immigration case "A" number to facilitate locating the case. It can be a violation of DHS policies to pursue enforcement actions against a client after she has filed a VAWA self-petition, U-Visa, or T-Visa.²⁰

8. If you are handed a subpoena...

9. You do not need to let law enforcement enter.
10. State that you cannot let them in without a warrant.²¹
11. Read the subpoena carefully. It will tell you the names of the parties, the date, time, and place to appear, and/or the documents sought, and the location and type of court in which the lawsuit will take place.
12. Contact your supervisor if you have not done so already.
13. If the subpoena requires testimony or documents covered by the confidentiality provisions discussed earlier in this brochure, your program should object to the subpoena in writing. In addition to invoking the confidentiality provisions, you can list any other reasons it would be unfair or unjust to have to appear in court or produce documents. Objections should be filed with the court immediately, not on the date appearance or production is required. It is highly recommended that you program consult with an attorney to ensure that objections are made properly and in a timely manner.²²

14. If you are handed a search warrant...

15. You must obey the warrant.²³
16. Contact your supervisor if you have not done so already.

²⁰ *DHS Broadcast Message on New 384 Class of Admission Code.* (The Department of Homeland Security has started a program that requires DHS officers to discontinue enforcement actions against immigrants that have filed for VAWA self-petition, U-Visa, or T-Visa. The information on these petitioners is red flagged in the Central Index System database with a special code by DHS so that officials know not to take action. "Information about the location, status, or other identifying information of any individual with the code "384" may not be released.")

²¹ 8 U.S.C. § 1229 (e)(1). (It is unlikely that law enforcement will be able to obtain this warrant because under VAWA confidentiality, for an enforcement action to take place at a victim services program or shelter, the law enforcement agency must include certification under oath confirming that none of the VAWA confidentiality provisions have been violated.)

²² If your program does not have an attorney or wants pro bono assistance in opposing the subpoena many larger law firms have programs that will represent your agency free of charge.

²³ 8 U.S.C. § 1229 (e)(1). (It is unlikely that law enforcement will be able to obtain this warrant because under VAWA confidentiality, for an enforcement action to take place at a victim services program or shelter, the law enforcement agency must include certification under oath confirming that none of the VAWA confidentiality provisions have been violated.)

- a. Supervisor should contact legal counsel
 - b. Supervisor should inform the client so that he or she can contact personal legal counsel. This should be done after law enforcement leaves the premises or in a private location in order to maintain victim confidentiality.
17. Ask to see the officer's identification, the search warrant, and the affidavit accompanying the search warrant. Note the scope of the search identified in the warrant.
 18. Make sure the search conducted does not exceed the terms of the search as listed in the warrant. You do not need to grant requests that go beyond the scope of the search warrant.
 19. Take notes of the search so that if there is any impropriety it can be used later to challenge any documents or materials obtained improperly during the search. Be calm, however, and do not do anything that may be interpreted as obstruction.
 20. You are not required to provide the officer executing the warrant any information written or oral that is not specifically listed in the document.
- 21. If you are handed an arrest warrant...**
22. You must obey the warrant.²⁴
 23. Contact your supervisor if you have not done so already.
 24. Ask to see the police officer's identification, and the arrest warrant.
 25. Do not offer identifying information about anyone who has stayed at the shelter, or their current location.
 26. While responding to the arrest warrant and locating the client, call the client's counsel to inform them of the arrest.
 27. Ask police where they are taking the client, the name of the jail or detention center, and any other pertinent information so that it can be immediately relayed to the client's counsel.
 28. If possible, counsel for the service provider, counsel for the victim, and the law enforcement agency should work out the details related to the arrest warrant. Some programs will ask to arrange to meet the officer at another location the next day. This gives the client time to make arrangements for safety, for care of her children, and to talk to her attorney.

²⁴ *Id.*