
Court Rulings Confirm Federal VAWA Confidentiality Protections Bar Discovery of VAWA Confidentiality Protected Information in State Family Court Proceedings:¹
Hawke and Demaj²

By: Carly Erickson and Leslye E. Orloff
June 17, 2014

Introduction

The protections guaranteed to immigrant survivors of domestic violence, sexual assault, stalking, human trafficking and other U visa listed criminal activities under federal immigration law's VAWA confidentiality include nondisclosure of the existence of or any information contained in the survivor's VAWA related immigration case.³ VAWA cases include:⁴

- VAWA self-petition;
- VAWA cancellation of removal;
- VAWA suspension of deportation; and
- T visas;
- U visas.

VAWA confidentiality protections were designed to allow victims of domestic and sexual violence, human trafficking, and other U visa criminal activities to safely and confidentially file their immigration case based on crime victimization without the perpetrators knowledge, consent or ability to obtain any information about the case filed by the immigrant crime victim. Federal government officials are barred from releasing any information about VAWA confidentiality protected case to the perpetrator or any other person. Perpetrators seeking another way to obtain VAWA confidentiality protected information are in growing numbers filing discovery motions or using cross examination in state family courts where they hope to find judges that will order disclosure of the information despite federal VAWA confidentiality protections. When state courts properly deny perpetrators access to VAWA confidentiality protected information in state court proceedings, perpetrators typically appeal or file actions in federal courts to obtain VAWA confidentiality protected information from DHS.

Three state courts issued appropriate rulings on VAWA confidentiality in the following cases which were then appealed to the federal District Court by the perpetrators:

- *Hawke v. United States Department of Homeland Security*⁵(Federal District Court case arising out of a state family court proceeding);

¹ Copyright © The National Immigrant Women's Advocacy Project, American University, Washington College of Law 2014. This document was developed under grant number SJI-13-E-199 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute. This project was supported by Grant No. 2013-TA-AX-K009 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

² This fact sheet is an update to an earlier fact sheet LEGAL MOMENTUM COURT DECISION INTERPRETS VAWA CONFIDENTIALITY PROVISIONS, available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/case-law/VAWACONF_Hawke-Fact-Sheet.pdf/view.

³ For further guidance on VAWA confidentiality in criminal cases, please see LESLYE E. ORLOFF AND BENISH ANVER, FAMILY COURT BENCHCARD ON VIOLENCE AGAINST WOMEN ACT (VAWA) CONFIDENTIALITY at 5 (October 11, 2013), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/materials-for-adjudicators-and-judges/tools-for-courts/immigration-law/VAWA-Confidentiality-Bench-Card.pdf/view?searchterm=vawa%20confidentiality%20and%20criminal>.

⁴ 8 U.S.C. § 1367. The other protections include source and enforcement limitations; for further information on all of the VAWA confidentiality provisions, please see CONFIDENTIALITY UNDER THE VIOLENCE AGAINST WOMEN ACT (VAWA) BROCHURE, available at NIWAP's web library.

⁵ 2008 U.S. Dist. LEXIS 87693, at *1 (N.D. Cal. Sept. 29, 2008); No. C-07-03456 RMW, 2008 WL 4460241 at *1 (N.D. Cal. Sept. 29, 2008).

- *Demaj v. Sakaj*⁶ (Federal District Court case arising out of a state family court ruling); and
- *Romain v. Napolitano*⁷ (Federal District Court case arising out of a state criminal proceeding).

In each of these cases, on appeal, the federal courts have sustained VAWA confidentiality protections and have denied discovery requests or disclosure of VAWA confidentiality protected information in state court proceedings. The focus in this fact sheet is on the two cases that have arisen in recent years in federal district courts that have examined how VAWA confidentiality should be handled when the issue of disclosure arises in family court proceedings, and not criminal proceedings. In both cases, the Federal District Courts balanced the need and purpose behind the VAWA confidentiality provisions against the rights of the perpetrators seeking the confidential information. Both courts found VAWA confidentiality outweighed any claims made by the perpetrators who were seeking disclosure of VAWA confidentiality protected information. This fact sheet provides an overview of these Federal District Court decisions and can be used to educate state court judges and immigrant victims' attorneys on the proper application of VAWA confidentiality in contexts that do not involve an appeal of an immigration case adjudication by DHS or an appeal of an immigration judge's rulings.

1. *Hawke v. United States Department of Homeland Security*

*Hawke v. United States Department of Homeland Security*⁸ established that information protected under federal VAWA confidentiality could not be released by the federal government to civil or criminal attorneys who sought such information. The protections offered by VAWA confidentiality do apply to all immigration case types covered by VAWA confidentiality and continue to apply unless the victim's immigration case is denied on its merits. DHS policies issued subsequent to the *Hawke* ruling confirm that VAWA confidentiality protections continue after the immigration case has been adjudicated and, if the immigration case is denied, continue to apply until all final rights of appeal are exhausted.⁹

The Federal District Court weighed the arguments presented by the abusive spouse of a VAWA self-petitioner that his Constitutional rights were being violated by the nondisclosure against the language and intent behind Congress' creation of VAWA confidentiality protections. In examining the need for confidentiality in the VAWA application process, the Court ruled that

[w]hile Mr. Hawke's Sixth Amendment right to Compulsory Process permits him access to some information held by the government, it does not permit him to receive absolutely privileged information like any records held by DHS here.¹⁰

The language used here is significant because it explicitly recognizes the privilege of VAWA confidentiality as "absolute."¹¹

The Court in *Hawke* also limited the ability of federal and state court judges who are not immigration judges to examine confidential VAWA confidentiality protected information under a statutory exception to VAWA confidentiality's non-disclosure requirements. The Court ruled that the exception for a "judicial review of a determination" was intended to mean only review of immigration case adjudications

⁶ 2012 U.S. Dist. LEXIS 18159 at *1 (D. Conn. Feb. 14, 2012); No. 3:09CV255(JGM), 2012 WL 476168 at *1 (D. Conn. Feb. 14, 2012).

⁷ Unpublished, sealed Federal District Court ruling in New York.

⁸ 2008 U.S. Dist. LEXIS 87693, at *1 (N.D. Cal. Sept. 29, 2008); No. C-07-03456 RMW, 2008 WL 4460241 at *1 (N.D. Cal. Sept. 29, 2008).

⁹ DHS Broadcast Message on New 384 Class of Admission Code (December 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf/view>

¹⁰ *Hawke* at *20.

¹¹ *Id.*

made by DHS or by immigration judges and the exception did not extend to civil or criminal court proceedings.¹²

The protection of VAWA confidentiality in the civil context established by *Hawke* extends to VAWA petitions that have been denied due to mootness. In *Hawke* the VAWA self-petition filed by the immigrant victim spouse was denied because ultimately the victim was granted lawful permanent residency based on an immigration case that the perpetrator had filed on the immigrant victim spouse's behalf. The *Hawke* court ruled "when an application is denied because it is moot, the petition may contain sensitive information that the policy behind VAWA still urges remain secret."¹³ The court goes on to say, "[t]o hold that a mooted petition is 'denied' would defeat one of the primary purposes of the VAWA confidentiality provision, namely to prohibit disclosure of confidential application materials to the accused batterer."¹⁴

The focus of the *Hawke* Court here was on the **policy and purpose** behind the VAWA confidentiality provisions. The purpose behind these provisions has been explicitly established in the preamble of the various VAWA iterations, as well as the lengthy Congressional record that extends from the time of VAWA confidentiality's creation through each of VAWA's reauthorizations.¹⁵ Such considerations should not be dismissed and do not end once the VAWA case has been completed, including when¹⁶

- The case has been approved;
- Through the time when victim is granted lawful permanent residency based on the approval;
- Through adjudication of any naturalization application the victim may file; and
- When the case has been denied because the victim has secured another path to lawful permanent residency which could include an application filed by the victim's perpetrator.

2. *Demaj v. Sakaj*

In *Demaj v. Sakaj*,¹⁷ the Federal District Court ruled that VAWA Confidentiality protected documents cannot be released even if the person seeking release of the documents intends to use them for impeachment and not to re-adjudicate the respondent's immigration case. *Demaj*, decided by a Federal District Court in Connecticut, follows the same reasoning that the California Federal District Court used in *Hawke*. The court balanced the rights of the abuser against the protections guaranteed to the survivor by the VAWA confidentiality provisions. In *Demaj*, the court found the protections promised by federal VAWA Confidentiality to be absolute.

[W]hile it would appear that claims of abuse made in Respondent's U-Visa application are relevant to Respondent's credibility as a witness and may be used to impeach Respondent's testimony at trial, disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. 1367.¹⁸

The court also recognized that releasing such documents would interfere with the respondent's immigration case in an improper manner:

¹² *Id.* at *16.

¹³ *Hawke* at *18.

¹⁴ *Id.* at *19.

¹⁵ For a multitude of sources regarding the policy and purpose beyond VAWA, please see NIWAP's web library, available at: <http://niwaplibrary.wcl.american.edu/>.

¹⁶ DHS Broadcast Message on New 384 Class of Admission Code (December 21, 2010), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/message-to-DHS-384-COA-Final-12.21.10.pdf/view>

¹⁷ 2012 U.S. Dist. LEXIS 18159 at *1 (D. Conn. Feb. 14, 2012); No. 3:09CV255(JGM), 2012 WL 476168 at *1 (D. Conn. Feb. 14, 2012).

¹⁸ *Demaj* at *18-19.

[t]hus, while Petitioner may need the documents underlying and related to Respondent's U-Visa application as they may be relevant to her credibility and may be used to impeach her, in order to use these documents in that manner, Petitioner must seek to undermine the decision of DHS by challenging the veracity of Respondent's statements, upon which both DHS and law enforcement relied, thereby, interfering with Respondent's immigration case.¹⁹

Implications of *Hawke* and *Demaj* in State Family Court Cases

The findings in *Hawke* and *Demaj* should be used, together with DHS VAWA confidentiality policies,²⁰ VAWA confidentiality legislative history,²¹ and NIWAP's training materials referenced within this document's footnotes on VAWA confidentiality²² to support victims' assertions of the protections guaranteed by VAWA in state family courts. Victims and their attorneys can file motions *in limine*, and motions to quash requests for the information either to prevent discovery or in anticipation of cross examination in order to ensure VAWA confidentiality protections.²³

NIWAP's web library contains multiple DHS memorandums on how VAWA confidentiality should be implemented by all DHS employees and each of its subordinate agencies. The most recent DHS memorandum, issued November 1, 2013, clarifies that VAWA confidentiality is to be followed by all agencies under its purview, including U.S. Citizenship and Immigration Services, Immigration and Customs Enforcement and Customs and Border Protection.²⁴

The U.S. Department of Homeland Security has established a process for receiving complaints and investigating VAWA Confidentiality violations by DHS officials. Violations include release of VAWA confidentiality protected information, immigration enforcement actions at protected locations, and reliance by DHS on perpetrator provided information to initiate or undertake any part of an enforcement action, or to make any adverse determination in any immigration case. Complaints regarding VAWA Confidentiality violations should be filed with the Office of Civil Rights and Civil Liberties at the U.S. Department of Homeland Security.²⁵

¹⁹ *Demaj* at *21.

²⁰ DHS policies on VAWA confidentiality are available at: <http://niwaplibrary.wcl.american.edu/vawa-confidentiality/government-memoranda-and-factsheets>

²¹ VAWA confidentiality legislative history is available at: <http://niwaplibrary.wcl.american.edu/vawa-confidentiality/legislative-history>

²² Resources and training materials on VAWA confidentiality are available at <http://niwaplibrary.wcl.american.edu/vawa-confidentiality/tools>

²³ Sample motions and briefs on VAWA confidentiality are available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-confidentiality/sample-motions>

²⁴ Department of Homeland Security, Directive No. 002-02 Revision Number 00, Implementation of Section 1367 Information Provisions (November 1, 2013), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/implementation-of-section-%201367-%20information-provisions-directive-002-02.pdf/view>

²⁵ Information on how to file a claim can be found on OCRCL's website is available at: <http://www.dhs.gov/office-civil-rights-and-civil-liberties>.