



# Maintaining Safe and Trustworthy Services for People Endangered by Domestic Violence

## Part I: Confidentiality Statutes, Case Law and Codes

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New Mexico Coalition Against Domestic Violence

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This manual was created to provide helpful information for domestic violence service providers and those professionals who commonly interact with them. Nothing in this manual should be construed as legal advice. If you have any specific questions about any legal matter you should consult a licensed attorney.



# I. Introduction

## **Project Background**

In 2013 the New Mexico Coalition Against Domestic Violence (NMCADV) applied for and received a STOP Formula Grant for Priority 13, Best Practices and Training on Confidentiality. The stated purpose for this project was to address the lack of common understanding of confidentiality among advocates, law enforcement officers and prosecutors. To that end, the NMCADV convened a group of experts and stakeholders from the following disciplines to form a Confidentiality Taskforce: domestic violence, child and medical advocacy, law enforcement, funders, civil and criminal law, and the judiciary. In choosing the makeup of the taskforce, consideration was given to factors such as: diversity of professions; familiarity or involvement with confidentiality issues; and geographic representation.

The taskforce met three times in person; on December 10, 2013, March 6th, and May 7th, 2014. Their job was to review existing laws and practices relating to confidentiality, and to provide clarification and best practice recommendations. With the help of a group facilitator the taskforce was guided through a variety of processes to arrive at these recommendations, including: multidisciplinary small group discussions of common confidentiality scenarios, panel presentations by experts, legal questions and answers, and large group discussions identifying missing information and next steps. The NMCADV wishes to thank taskforce members for their time, effort and commitment to this project. [For a list of taskforce members and agencies represented, *see Part II of this Manual*]

## **Need for the Project**

Currently, even among very experienced, well-trained advocates and police, there is no uniform understanding of domestic violence program confidentiality. For example, law enforcement often do not understand why a domestic violence program is not forthcoming with information which the law enforcement officer reasonably believes can be used to help the victim or is otherwise needed to serve a legal mandate. Similarly, advocates do not understand why law enforcement remains seemingly unaware of the advocate's special, confidential relationship to a domestic violence victim and the laws that advocates believe clearly restrict the extent and type of information that can be revealed.

In order to serve victims more safely and effectively, relationships between domestic violence advocates and law enforcement need to be strengthened and a common understanding of respective roles, approaches and goals developed. However, a striking

lack of clarity about laws governing confidentiality, arguably one of the most important aspects of domestic violence intervention, contributes to an ongoing and often problematic divide between the groups. The goal of the project was to lessen this divide.

### **Lessons Learned from the Process**

As suspected, we learned that there is indeed a lack of understanding amongst well-meaning professionals as to confidentiality obligations; where they come from, whom they apply to, and whom they don't. And... this lack of understanding too often results in conflict between the same well-meaning professionals.

We learned three more very important lessons: 1) confidentiality issues are not limited solely to domestic violence advocates and police, but extend to all of the professional communities that interact closely with domestic violence agencies such as emergency medical, child welfare, and courts; 2) the importance of communication and relationship building cannot be overstated – for the purpose of preventing conflicts from arising at all (by designing policies and procedures cooperatively or by discussing differing agency policies “supervisor to supervisor”), and/or to resolve conflicts amicably when they do arise; and finally 3) we should trust in each other more; while advocates, funders, police officers, CYFD workers, lawyers and judges each have very different roles and responsibilities- most take their jobs seriously and want to perform them to the best of their ability.



## II. Confidentiality: What it is and why it is Important

### **Privacy, Privilege and Confidentiality: Some Helpful Definitions**

Though the concepts of privacy, confidentiality and privilege are inter-related, they differ in important ways. *Privacy* refers to a domestic violence victim/survivor's right to control his or her own personal information. *Privilege* refers to the right to prevent the disclosure of personal information that was shared in confidence. The New Mexico privilege applying to domestic violence advocates is called the Victim Counselor Confidentiality Act (NMSA sections 31-25-2 through 6, *for discussion see page 15*).

*Confidentiality* on the other hand, typically refers to rules prohibiting disclosure of a victim/survivor's personal information. Confidentiality obligations come from many sources including: state and federal law, regulations, grant conditions, agency policies, and/or codes of ethics. Regardless of the source of the obligation or duty, the effect of these provisions is to limit or totally prohibit disclosure by almost all community-based domestic violence victim service providers without the informed, written, time-limited release of the victim/survivor.

Alicia Aiken, Executive Director of The Confidentiality Institute explains the difference between these concepts this way: Privacy is, "I decide who knows my information"; Confidentiality is, "You commit to protect my information"; and Privilege is, "They can't make you share my information."

### **Why is Confidentiality Important?**

#### **Physical Safety**

Not only is confidentiality a duty imposed on domestic violence advocates by law, policy and ethics; it is also critical to a victim/survivor's safety and ability to seek justice. The physical safety of survivors is most at risk when they leave their abuser. Peer-reviewed research has shown that the risk of homicide by a controlling partner increases nine-fold upon separation.<sup>1</sup> Disclosing the identity and location of a survivor who has sought refuge in a domestic violence shelter or program can have potentially fatal consequences.

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<sup>1</sup> Campbell, J., Webster, D., & Laughon, K. (2002). The American Journal of Public Health. *American Journal of Public Health and the Nations Health*, 1-22. Retrieved August 28, 2014, from [http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/#\\_\\_ffn\\_sectitle](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447915/#__ffn_sectitle)

## **Emotional Safety**

Survivors who reach out to domestic violence programs have one thing in common – they have had their ability to keep themselves and/or their family’s safe overwhelmed. They may have suffered one incident or a lifetime of such incidents, and many have very little trust left to give advocates, programs, or institutions. Having people within our network of institutions who they can reach out to in total confidence is crucial. The protected advocate/survivor relationship can be the source of establishing physical and emotional safety; which leads to healing and accessing resources, such as law enforcement, the courts, and social services.

*“We know that for a person who is living with ongoing threats and intimidation, the experience of being treated with respect and feeling free to make choices without fear of judgment or retaliation, can be healing in itself. We also know that interactions with advocates can provide an opportunity for survivors to feel respected and valued, experience other people as trustworthy and safe, and to regain a sense of connection to themselves and other people.”<sup>2</sup>*

## **Empowerment**

The overall goal of domestic violence advocacy is to empower survivors to make their own decisions regarding their lives and the lives of their children. Empowerment requires that the survivor, not the advocate trying to help him or her, have the power to decide what information to share, to whom and for what purpose; and confidentiality policies embody this principle.

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<sup>2</sup> National Center on Domestic Violence, Trauma, and Mental Health, “Core Curriculum on Trauma-Informed Domestic Violence Services”, 2013

### III. Federal Authorities

Most community based domestic violence programs (as opposed to those based in police or district attorney's offices) as well as the State of New Mexico, Children Youth and Families Department receive grant funding from the federal Violence Against Women Act ("VAWA"), Family Violence Prevention and Services Act ("FVPSA"), and/or Victims of Crime Act ("VOCA"). All three of these federal laws contain confidentiality requirements applicable to domestic violence programs that receive funding from these sources and their employees. [For a copy of VAWA, FVPSA and VOCA confidentiality provisions, *see Appendix A, B, and C*]

#### **VAWA 2013 [42 US §13925]**

In 1994, Congress passed Title IV of the Violent Crime Control and Law Enforcement Act of 1994, better known as the Violence Against Women Act or (VAWA). VAWA was passed not only to stem the tide of ever-increasing violence against women but also to encourage societal change. VAWA created new programs to help law enforcement fight violence against women, provided grant money for the same purpose, strengthened penalties, and prohibited criminal activities that had not been previously recognized legally. It has been reauthorized three times; in 2000, 2005 and 2013. Its reauthorizations expanded VAWA to combat sex-trafficking, gave some tribal courts jurisdiction over non-Native perpetrators who committed violence against women on tribal lands, authorized money to address the rape-kit processing backlog, established a nondiscrimination requirement for programs receiving VAWA grant money, and created a 'rape shield' law. [National Coalition Against Domestic Violence Website, [www.ncadv.org/public-policy/legislation](http://www.ncadv.org/public-policy/legislation)] VAWA funds are administered in New Mexico, by the Crime Victim Compensation Commission (CVRC).

VAWA provides the most sweeping and specific confidentiality requirements applicable to all grantees and sub-grantees of VAWA funds. New VAWA grant conditions took effect October 1, 2013.

#### **Broad Confidentiality Obligations**

With few limited exceptions, all agencies receiving federal funds as VAWA grantees or sub-grantees have an obligation to protect the confidentiality and privacy of persons receiving services. The use of the word shall means that this obligation is mandatory because it is necessary to ensure the safety of adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking, and their families. Practically what this means is that the duty of confidentiality applies to most domestic violence service providers, since almost all receive VAWA funding. This duty may also apply to non-domestic violence agencies that provide domestic violence services with VAWA grant funds. [For questions

about whether or not a particular agency is or is not covered under VAWA please consult with a local attorney and/or [The Confidentiality Institute](#)] Violations of VAWA confidentiality provisions do not result in criminal or civil liability but may impact an agency's federal funding.

Confidentiality obligations under VAWA are extremely broad. VAWA grantees are forbidden ("shall not") from ***disclosing, revealing or releasing any personally identifying information or individual*** information collected in connection with providing services utilized, or denied through grantees' and sub-grantees' programs, regardless of whether the information has been encoded, encrypted, hashed or otherwise protected. This means that the duty to protect information extends even to those individuals who seek services but do not become clients of the program.

What is "personal and/or personally identifying" information that must be protected by domestic violence service providers? Again this is about as broad as it can be. According to VAWA these terms refer to ***individually identifying information for or about an individual including information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault, or stalking***, regardless of whether the information is encoded, encrypted, hashed or otherwise protected. Examples of personal and/or personally identifying information include the obvious, such as: first and last name; home or other physical address; contact information (including a postal, e-mail or Internet protocol address, or telephone or fax number); and social security, drivers license, passport or student identification numbers. However, it also includes other kinds of information that may not always be so obvious, such as: date of birth, racial or ethnic background, or religious affiliation, that in combination with any other information would serve to identify any individual. So for example, under VAWA, a domestic violence advocate working for a tribe with very few Hispanic residents, would probably not be able to disclose the racial or ethnic background of a Hispanic client, because doing so would likely identify that person.

### **Very Limited Information Sharing**

VAWA limits the information that grantees and sub-grantees may share without a release of information (discussed below) to:

- Non-personally identifying aggregate data regarding services to their clients (i.e. number of clients served in a year);
- Non-personally identifying demographic information (i.e. number of clients between ages of 40 and 50) in order to comply with Federal, State, tribal, or territorial reporting, evaluation, or data collection requirements;
- Court and law enforcement generated information contained in secure, governmental registries for protection order enforcement purposes; and
- Law enforcement- and prosecution-generated information necessary for law

enforcement and prosecution purposes.

**Important!** Without a release of information, the only program-generated information that domestic violence agencies can share with anyone in regards to the clients they serve - including funders, program auditors, law enforcement, and prosecution - is non-personally identifying aggregate data regarding services and demographics.

### **Release of Information Required for Further Sharing**

A domestic violence victim/survivor has the right to share any information about him or herself with anyone they choose. However, in order for a domestic violence agency or one of its employees to share client information other than that outlined above, VAWA confidentiality obligations require a release of information. A valid release of information must be **informed, written, reasonably time-limited and signed by the client**. [For a link to a Sample Release of Information, *see Part II of this Manual*]

#### ***Voluntary***

Survivors should be informed that releases are voluntary and can be changed or revoked. Informed consent also requires they be told which agencies/individuals will receive the information, what the risks are with each agency/individual receiving their information, how the information will be communicated, and the risks associated with each.

#### ***Written***

Written release forms should include:

- Notice to the survivor that the release of information is voluntary,
- Not required in order to receive services,
- That consent can be revoked at any time,
- A description of exactly what information will be shared,
- Which agency or agencies will receive the information,
- The way in which the information will be shared, and
- The timeframe in which the release is valid.

**Note:** VAWA requires releases to be written so if an emergency requires the use of a verbal release, best practice is to get written consent as soon as possible.

#### ***Time-Limited***

As a general rule, a release should remain valid for a reasonable time frame given the needs of the survivor and the purpose for the release. The best practice is to keep the timeframe as limited as possible (i.e. two weeks to one month versus indefinitely). A general, routine

and/or universal release of information given to all clients (such as at intake) is discouraged, as it may not meet the requirements outlined above.

### **Releases of Information - Children**

Generally, if the information being sought is about an unemancipated minor, the child and the parent or guardian must consent to disclose. However recent amendments to VAWA allow a minor who is permitted by law to receive services without the parent or guardian's consent, to release information without additional parental consent. A court appointed guardian can consent to disclose confidential information regarding a legally incapacitated person.

**Note:** VAWA forbids an abusive parent (abusive to the child and/or other parent) from signing a release for an unemancipated child's records and forbids programs from requiring a release of information as a condition of eligibility for services. Under VAWA, domestic violence victim service providers can determine who is an abusive parent for this purpose.

### **Exception for Mandated Disclosures**

Under VAWA there are two situations: 1) statutorily required reports of child abuse and neglect and 2) valid court orders, which might mandate disclosure of confidential information held by a grantee or sub-grantee. Programs are only required to disclose when it is mandated, not just permitted. For example, if a state statute required a domestic violence advocate to make a child abuse report, the advocate would be entitled to break confidentiality. If disclosure is mandated, VAWA requires that grantees make reasonable attempts to provide notice to the victims affected by the disclosure, and take steps necessary to protect the privacy and safety of persons affected by the disclosure. [For discussion of Child Abuse Reporting and Court Orders, *see Part II of this Manual.*]

## **Family Violence Prevention and Services Act (FVPSA) [42 USC 10401 et seq.]**

The Family Violence Prevention and Services Act (FVPSA) is the primary source of federal funding for domestic violence direct service providers. It was created by Congress as part of the Child Abuse Amendments of 1984 and is reauthorized every five years. The Family and Youth Services Bureau (part of the US Department of Health and Human Services' Administration for Children and Families) oversee FVPSA and administer grants to states/territories, tribes, state domestic violence coalitions, and resource centers. 70% of the funding goes to states/territories; the states/territories then allocate the money they receive to service providers, including shelters and non-residential programs. [National Coalition Against Domestic Violence Website, [www.ncadv.org/public-policy/legislation](http://www.ncadv.org/public-policy/legislation)]

The Department of Children Youth and Families (CYFD) is the administrator of FVPSA funds in New Mexico.

FVPSA contains the same strict confidentiality and non-disclosure requirements as VAWA and uses the same definition of personally identifying information. As in VAWA, there are no exceptions in FVPSA for disclosure of program-generated personally identifying information to funders, auditors, law enforcement or prosecution.

The language in FVPSA differs slightly regarding who can and cannot authorize a release of information. In the case of an unemancipated minor, FVPSA requires the consent of the minor **and** the minor's parent or guardian and does not allow an abuser **or suspected abuser** of the minor or other parent to consent to disclose information.

FVPSA permits confidentiality to be broken in the case of disclosures mandated by statute or court order, even allowing advocates to break confidentiality where a report of child abuse or neglect is "permitted" rather than required, by State Statute or Tribal Code.

### **Victims of Crime Act (VOCA) [42 USC §10601 et. seq.; 28 CFR Part 22]**

In 1984 the Victims Of Crime Act created a National Crime Victims Fund out of Federal criminal fines and penalties. VOCA funded state victim assistance grants support direct services, such as emergency shelter, crisis intervention, counseling and assistance in participating in the criminal justice system, through some 4,000 agencies to an average of 3.7 million victims of all types of crimes every year. [Victims of Crime Act (VOCA) Crime Victims Fund, Briefing Background 2013, Prepared by National Association of VOCA Assistance Administrators] VOCA funds are administered in New Mexico, by the Crime Victim Compensation Commission (CVRC).

VOCA and its supporting regulations require grantees to protect individually identifying information. As a condition of funding, VOCA requires grantees to certify that they will comply with confidentiality regulations set out in 28 CFR Part 22. VOCA regulations require advocates to notify clients that any identifying information will only be used or revealed for statistical or research purposes. [28 CFR 22.27] Agencies that fail to comply can have sanctions imposed, including the loss of VOCA funding. Persons found to violate VOCA confidentiality provisions can be fined up to \$11,000, plus any other penalty imposed by law. [42 USC 3789g(d); 28 CFR 22.29]

## **Other Confidentiality and Privacy-Related Federal Laws**

### **McKinney-Vento Homeless Assistance Act [42 USC section 11301 et seq.]**

The McKinney-Vento Homeless Assistance Act was amended by VAWA, and now prohibits domestic violence victim services providers from entering client level data into the Homeless Management Information System (HMIS); a database that collects data on the provision of housing and services to homeless individuals and families at risk of homelessness.

### **The Emergency Solutions Grants Program (HUD Program) [42 USC section 11375]**

As a condition of funding, HUD requires grantee programs to have confidentiality policies and procedures. Similar to VOCA, grant recipients must certify to the Secretary of HUD that, “it will develop and implement procedures to ensure the confidentiality of records pertaining to any individual provided family violence prevention or treatment services. [42 USC section 11375(c) (5)]

### **Health Insurance Portability and Accountability Act of 1996 (HIPAA Privacy Rule) [45 CFR Parts 160 and 164]**

HIPAA privacy rules are not nearly as restrictive as those under VAWA. Overall, these rules are intended to protect the privacy of patients, not restrict patient access to *their own* information. HIPAA does however give psychotherapists the discretion not to disclose psychotherapy notes to their patients.

The HIPAA Privacy Rule standards address the use and disclosure of individuals’ health information—called “protected health information” by organizations subject to the Privacy Rule — called “covered entities,” as well as standards for individuals’ privacy rights to understand and control how their health information is used.

This Privacy Rule protects all “individually identifiable health information” held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral. HIPAA leaves it up to the discretion of the covered entity whether or not to disclose confidential information without an individuals consent (“may” versus shall); where the information for example is required by law, in cases of abuse, neglect or domestic violence, when court ordered or subpoenaed, or for law enforcement purposes. [CFR 164.512] Failure to comply with, and knowing violations of, HIPAA Privacy Rule requirements may result in large monetary fines and even criminal penalties. [42 USC section 1320d-6]

Generally, HIPAA applies to health plans, health care providers, and clearinghouses. [US Department of Health and Human Services, [Summary of the HIPAA Privacy Rule](#)] It is unlikely that providers of domestic violence services would be considered covered entities.



However, it might be possible if the agency is multi-purpose and provides health in addition to domestic violence services, or if an agency provides mental health services by a licensed counselor subject to HIPAA privacy rules. [To determine whether or not a particular program would be considered a covered entity for HIPAA Privacy purposes, see [Covered Entity Chart](http://www.cms.gov/Regulations-and-Guidance) at [www.cms.gov/Regulations-and-Guidance](http://www.cms.gov/Regulations-and-Guidance)]

**Note:** According to Alicia Aiken, Director of [The Confidentiality Institute](http://www.confidentialityinstitute.org), HIPAA is intended to provide the minimum protection that must be applied to health records. Regardless of whether a program is covered by HIPAA, the program should follow the most protective applicable confidentiality rules. VAWA, FVPSA, New Mexico Stat. Ann. section 31-25-3 (victim counselor confidentiality) and New Mexico Stat. Ann. Section 61-9A-27 (counseling and therapy confidentiality) are likely all more protective than HIPAA regarding confidentiality.

## IV. State Authorities

In addition to Federal laws and rules there are a number of New Mexico laws relating to confidentiality, privilege and privacy that impact domestic violence agencies and other professionals they interact with. The most important of these state laws is the New Mexico privilege applicable to survivor records and advocate-survivor communications.

### **Victim Counselor Confidentiality Act [NMSA section 31-25-2 et seq.]**

#### **The Privilege**

The New Mexico privilege protects confidential communications between a domestic violence “victim” and a domestic violence “victim counselor”; neither the victim nor the counselor can be compelled to **provide testimony or produce records** concerning confidential communications in any criminal action or other judicial, legislative or administrative proceeding, no matter what the purpose.

The privilege also protects the identification of the domestic violence program. Neither the victim nor the counselor can be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location or telephone number of a safe house, abuse shelter or other facility that provided temporary emergency shelter to the victim of the offense or occurrence that is the subject of a judicial, legislative or administrative proceeding unless the facility is a party to the proceeding. [NMSA section 31-25-3]

#### **Confidential Communication**

The statute defines confidential communication as any information exchanged between a victim and counselor in private or in the presence of a third party who is necessary to facilitate communication (such as an interpreter) or further the counseling process and which is disclosed in the course of the counselor’s treatment of the victim for any emotional or psychological condition resulting from a sexual assault or family violence. [NMSA section 31-25-2A]

#### **Applicability of Privilege**

The privilege applies to a “victim”, defined as a person who consults a victim counselor for assistance in overcoming adverse emotional or psychological effects of a sexual assault or family violence [NMSA section 31-25-2 B] and to a “victim counselor”, defined as any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law

enforcement agency or the office of a district attorney, has successfully completed forty hours of academic or other formal victim counseling training or has had a minimum of one year of experience in providing victim counseling and whose duties include victim counseling. [NMSA section 31-25-2 E]

***Important!*** Communications with a victim advocate affiliated with a law enforcement agency or the office of a district attorney are not privileged. In this situation, clients should be made aware of this limitation before they disclose any personal information.

### **Exceptions to the Privilege**

There are three statutory exceptions to the privilege: 1) mandatory reporting of suspected child abuse or neglect [NMSA section 31-25-5]; 2) the victim counselor knows that victim is about to commit a crime [NMSA section 31-25-5]; and 3) where a victim brings a malpractice suit against a victim counselor or the organization in which the victim counselor worked or volunteered at the time of the counseling relationship. [NMSA section 31-25-4(B)]

### **Waiver of Privilege**

The privilege contained in the Victim Counselor Confidentiality Act (the right to keep communications confidential) belongs to the survivor. Only he or she, not the advocate or program, can waive its protections unless the survivor brings a malpractice suit against the program. If the survivor wishes to testify, provide records or have the advocate and/or program do so – he or she is legally entitled to do so.

***Note:*** Some domestic violence programs have policies providing that any and all requests by third parties for confidential client communications or data will be denied and if subpoenaed, will be defended with a Motion to Quash. In this case, the best practice (client ownership of their private information) requires that this policy be discussed with a survivor at intake and then revisited periodically.

### **Invoking the Privilege**

Ordinarily this privilege would be invoked in the following situation: there is a court case involving the survivor and one of the parties in the case subpoenas either the advocate working with the survivor to provide testimony in the case or the program to provide information contained in the client's file. In either case it is the duty of the domestic violence program to enforce the privilege on behalf of the survivor by objecting to the request for confidential information, usually by having a lawyer defend the subpoena in court with a Motion to Quash the subpoena on the grounds of privilege.

For the safety reasons discussed earlier it is very important to uphold confidentiality and not just comply with requests for private information. Sometimes just making parties

aware of the Victim Counselor Confidentiality Privilege will be enough to prevent disclosure, without having to appear in court. If this does not work and finding counsel to defend a subpoena is difficult, expensive or impossible there is a new resource called the New Mexico Subpoena Defense Project. The project is a partnership between the New Mexico Volunteer Attorney Program and the New Mexico Coalition Against Domestic Violence providing pro bono subpoena defense lawyers for domestic violence programs. [For flyer describing this project, *see Part II of this Manual*]

### **Counselor/Therapist Privilege [NMSA section 61-9A-27]**

In addition to the privilege for confidential communications between domestic violence advocates and survivors, New Mexico law also contains a similar privilege for counselors/therapists and their clients. This privilege may apply to domestic violence programs providing counseling/therapy services. It applies not only to counselors and therapists but also to their secretary's and clerks as well as the persons participating in therapy:

1. No counselor or therapist can be examined in non-judicial proceedings (those outside of court) without the consent of his/her client concerning any communication made by the client to him/her or any advice given to the client in the course of professional employment;
2. No secretary or clerk of a counselor or therapist can be examined without the consent of the counselor or therapist practitioner concerning any fact, the knowledge of which he acquired in that capacity;
3. No person who has participated in any counseling practice, including group therapy sessions, be examined concerning any knowledge gained during the course of the practice without the consent of the person to whom the testimony sought relates. [NMSA section 61-9A-27 A]

Similar to the Victim Counselor privilege there are exceptions permitting a counselor/therapist to disclose confidential information about a client: he/she has the written consent of the client; the communication reveals the contemplation of a crime or act harmful to the person's self or others; the information indicates the person was the victim of a crime required to be reported by law; the person, family, or legal guardian waives the privilege by bringing charges against the counselor or therapist. [NMSA section 61-9A-27 B] and court hearings concerning matters of adoption, child abuse, child neglect or other matters pertaining to the welfare of children, or to those matters pertaining Adult Protective Services. [NMSA section 61-9A-27 C]

## **Child Abuse and Neglect [NMSA section 32A-4-3]**

### **Duty to Report**

The issues surrounding legal duties to report child abuse and neglect are complex and affect not only domestic violence workers, but allied professionals such as law enforcement and child welfare workers as well. This scenario and some best practice guidance relating to it can be found in Part II of this Manual.

### **Mandatory Reporters**

The New Mexico statute pertaining to child abuse and neglect reporting provides that ***every person*** (including a licensed physician, resident or intern examining attending or treating a child; a law enforcement officer; a judge presiding during a proceeding; a registered nurse; a visiting nurse; a schoolteacher; a school official; a social worker acting in an official capacity; or a member of the clergy who has information that is not privileged) ***who knows or has a reasonable suspicion that a child is an abused or neglected child must report the matter immediately.*** [NMSA section 32A-4-3 A]

There was some question as to whether “every person” or just those professionals specifically mentioned in the statute were mandatory reporters. However, the recent New Mexico Supreme Court opinion in State of New Mexico v. Jason Strauch, (Opinion Number: 2015-NMSC-009 Filing Date: March 9, 2015 Docket No. 34,435) upheld the statute’s universal reporting requirement. [For summary of this case, *see Appendix D*]

### **Trigger for Duty to Report**

A person must report if a person “knows or has a reasonable suspicion that a child is an abused or a neglected child.” The Child Abuse and Neglect Act define “abused child” as a child:

- (1) Who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian;
- (2) Who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian or custodian;
- (3) Who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian;
- (4) Whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health; or
- (5) Whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child. [NMSA section 32A-4-2 B; for definitions of “physical abuse, sexual abuse, sexual exploitation see NMSA section 32A-4-2 F-H]

The same act defines “neglected child” as a child:

- (1) Who has been abandoned by the child's parent, guardian or custodian;
- (2) Who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, guardian or custodian or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them;
- (3) Who has been physically or sexually abused, when the child's parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;
- (4) Whose parent, guardian or custodian is unable to discharge that person's responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity; or
- (5) Who has been placed for care or adoption in violation of the law. [NMSA section 32A-4-2 E; for definition of abandonment, see NMSA section 32A-4-2 A]

**Note:** It appears from the above definitions that child abuse and neglect allegations are limited to persons responsible for the child: a parent, guardian or custodian. If this is true then sexual assault by peers and dating violence impacting minors would not be a “mandatory reportable” event for CYFD purposes, but still would be reportable to law enforcement. In these situations it would be wise to confirm with an attorney whether this interpretation of New Mexico law is current and correct.

### **Where to Make Reports**

New Mexico law allows confidential reports of child abuse and/or neglect to be made to a local law enforcement agency, the Department of Children, Youth and Families (CYFD) Statewide Central Intake (855-333-7233) or a tribal law enforcement or social services agency for and Indian child residing in Indian Country. [NMSA section 32A-4-3 A]

### **Access to Records Pertaining to Child Abuse and Neglect Report**

New Mexico law gives law enforcement officers and CYFD access to all of the records pertaining to a child abuse or neglect case maintained by the person who reported. [NMSA section 32A-4-3 E]

Alicia Aiken, Executive Director of The Confidentiality Institute, offers the following advice if law enforcement or CYFD ask to see records of a victim within a domestic violence victim service provider setting:

- Domestic violence advocates should ask them to disclose in writing: 1) who made the report, 2) what is the child abuse/neglect case that arose from the report, and 3) how they believe records maintained by the person who reported pertain to the

abuse/neglect case.

- Upon receipt of the above information, programs should assess (ideally with the assistance of a local attorney) 1) whether it possesses records maintained by the person who reported and 2) whether any of those records pertain to the abuse/neglect case. If the answer is yes to both those questions, then prepare to disclose the minimum amount of records that fit that description and take appropriate measures to notify and protect the privacy of the victim affected by the disclosure. If you have records not maintained by the reporting person or that do not pertain to the abuse/neglect case, then you may want assistance from your legal counsel to negotiate your response to law enforcement/CYFD.

### **Penalty for Failure to Make a Mandatory Report**

A person who fails to make a mandatory report of child abuse or neglect is guilty of a criminal misdemeanor. [NMSA section 32A-4-3 F]

### **Duty to Investigate**

New Mexico law contains mandatory requirements for investigators regarding transmission of reports, and prompt investigation of reports. [NMSA section 32A-4-3 B, C] The law makes clear it is the duty of CYFD and law enforcement to investigate allegations of child abuse and neglect, not of the reporter.

### **Confidentiality of Records**

While New Mexico statutes say that records and information concerning a party to a neglect or abuse proceeding are confidential, they also contain 16 different exceptions. The Children's Code Confidentiality statute, NMSA section 32A-4-33 allows for the disclosure of all records and information to: the parties; court personnel; court appointed special advocates (CASA's); the child's guardian ad litem; the attorney representing the child in an abuse or neglect, delinquency or any other action; CYFD personnel; any local substitute care review board; law enforcement officials; district attorneys; any state government social services agency in any state or country; tribal persons or entities pursuant to the Indian Child Welfare Act; a foster parent; school personnel; health care or mental health professionals; protection and advocacy representatives; children's safe house organizations; and any other person or entity by order of the court, having a legitimate interest in the case or the work of the court.

Parents, guardians or legal custodians of a child who is the subject of a child abuse or neglect investigation where no petition has been filed have the right to inspect medical reports, psychological evaluations and law enforcement reports...with any identifying information about the reporter deleted. They also have the right to the results of the

investigation and can petition the court for full access to CYFD records. [NMSA section 32A-4-33 C; for text of NMSA section 32A-4-33, *see Appendix E*]

Confidentiality provisions binding CYFD Protective Service staff and CYFD contractors are contained in the New Mexico Administrative Code section 8.8.2.15. This section provides as follows:

- All Protective Services staff and CFYD contractors shall maintain confidentiality of records and information in accordance with the laws and regulations that apply to specific services.
- Abuse and neglect records are confidential pursuant to the New Mexico Children's Code 32A-4-33(A) NMSA. CYFD may release the identity of a reporting party only with the reporting party's consent or with a court order (See Protective Services Legal Policies, Subsection A of 8.10.7.10 NMAC).

## **Laws Related to Law Enforcement and Domestic Violence Agencies**

### **Warrants and Shelters [NMSA section 30-22-2.1]**

New Mexico law permits domestic violence shelter employees to request that an officer show a valid search warrant before they allow him or her to enter the shelter. [NMSA section 30-22-2.1 A] More importantly, ***New Mexico law requires law enforcement to get a valid search warrant before attempting to serve an arrest warrant within a shelter.*** The one exception to this requirement is if exigent circumstances (i.e. the destruction of critical evidence) exist necessitating immediate entry. [NMSA section 30-22-2.1 B]

**Note:** The fact that a search warrant is required by New Mexico law does not seem to be widely known amongst the domestic violence or law enforcement communities and the situation often leads to a significant amount of conflict. This scenario and some guidance relating to it can be found in Part II of this Manual.

### **Missing Person Reports [NMSA section 29-15-7]**

Missing person reports and the duties they impose on law enforcement can present challenges in cases where domestic violence is involved. Is someone missing when they do not wish to be found? Is an officer who provides information about a "missing person" to an abusive family member doing his or her job or endangering the safety of the missing person?

Current New Mexico law requires police officers to do the following within two hours of receiving a missing person report:



1. Start an appropriate investigation to determine the present location of the missing person and to determine whether the missing person is an endangered person;
2. Provide to the clearinghouse all information the law enforcement agency has relating to an investigation regarding or the location or identification of a missing person;
3. Enter the name of the missing person into the clearinghouse and the national crime information center missing person file; and
4. If the missing person is determined to be an endangered person, notify the department of public safety in accordance with procedures prescribed by the department. [NMSA section 29-15-7 A]

New Mexico law also currently requires that when police have gotten a written or oral request by an immediate family member, they 1) immediately request information concerning the missing person from the clearinghouse that may aid the family member in the identification or location of the missing person; and 2) they report to the family member the results of the inquiry to the clearinghouse within seven days after the request is received. [NMSA section 29-15-5]

**Note:** A legislative fix that would have added an exception in the case of domestic violence has been introduced but was not successful. This scenario and a best practice recommendation relating to it can be found in Part II of this Manual.

#### **Attorney General “Opinion”**

A 2008 letter from the New Mexico Attorney General’s Office (versus a formal Attorney General Opinion) contains legal advice from an Assistant Attorney General on the question of whether, when a conflict arises between domestic violence shelters and police agencies attempting to investigate a possible crime involving a child who may be residing at a domestic violence shelter, the child abuse reporting provision of the Children’s Code takes precedence over the confidentiality provisions of VAWA? In that letter Assistant Attorney General Andrea Buzzard concluded that “based on her examination of the relevant New Mexico statutes, federal statutes, opinions and case law authorities, and on the information available to her at this time, ...the child abuse reporting provision of the Children’s Code (NMSA section 32A-4-3) takes precedence over the confidentiality provisions of VAWA .” [For full text of Attorney General letter, *see Appendix F*]

**Note:** As to what legal effect this letter has regarding confidentiality this is the opinion of Alicia Aiken, the Executive Director of The Confidentiality Institute. “Typically, formal Attorney General Opinions are characterized as “highly persuasive” interpretations of the

law, but not binding on courts considering the issue. Informal Attorney General Opinions carry even less weight and should be viewed with great skepticism. Sometimes, a written statement from staff at the Attorney General's office may be cited as the basis for a community understanding of "the rules" even though few have read it or even know what it says. No victim service provider should turn over victim information solely because an Attorney General letter allegedly authorizes the disclosure. The issue should be brought before a court where a full argument regarding law and public policy can be considered."

## V. Case Law

### Confidentiality

Below is a summary of significant State Supreme Court cases protecting victim confidentiality with victim advocates.

#### **In Re Crisis Connection, Inc.**, 949 N.E.2d 789 (Ind. 2011):

Facts: Defendant was charged with child molestation, and he made a pre-trial demand to review the records of communications between the victim children, their mother and a non-governmental sexual assault crisis center. The records were explicitly protected by Indiana's absolute privilege statute for domestic violence and sexual assault victim advocate records. The Indiana Court of Appeals denied Defendant's request to see the records, but it also ordered an in camera review by the trial court to determine which records Defendant should receive. The program sought and obtained review by the Indiana Supreme Court.

Holding:

(1) The courts are bound by the legislature's decision that the interest in confidentiality insufficient to justify creation of the privilege codified at Ind.Code § 35-37-6-9(a).

(2) An in camera review in this case would not reveal any unprivileged material, and the privilege statute does not give the court authority to review the records.

(3) In line with the plurality holding in Pennsylvania v. Ritchie, 480 U.S. 39, 53, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (plurality opinion), the 6th Amendment Confrontation Clause only requires that the court allow cross-examination of the accusers at trial, and does not include a right to pre-trial investigation or confrontation of the witnesses.

#### **Albuquerque Rape Crisis Center vs. Blackmer**, 120 P.3d 820 (N.M. 2005)

Facts: Defendant was charged with criminal sexual penetration against the alleged victim. The victim was seen at a rape crisis center shortly after the assault. Defendant filed a motion to compel the rape crisis counselors to participate in pre-trial interviews with defense counsel. The rape crisis program argued that the communications were privileged under New Mexico's Victim Counselor Confidentiality Act, NMSA §§ 31-25-1 to 6. The trial court ordered disclosure of the records because the privilege was not found in the Supreme Court Rules of Evidence. Thereafter, the rape crisis center took out a writ to the New Mexico Supreme Court, which issued a decision.

Holding:

(1) Victim counselor privilege is given effect because it is consistent with New Mexico's psychotherapist-patient privilege.

(2) With approving reference to Jaffe v. Redmond, 518 U.S. 1 (1996), the Court cited the necessity of protecting communications to specialized counseling providers who can facilitate treatment of emotional conditions free of charge of victims.

(3) The case was reversed and remanded for the lower court to determine whether the sought statements were made "in the course of the counselor's treatment of the victim for any emotional or psychological condition resulting from a sexual assault."

**People v. Turner**, 109 P.3d 639 (Colo. 2005):

Facts: Defendant was charged with assault and harassment of his girlfriend. During pretrial discovery, his attorney issued two subpoenas duces tecum to a domestic abuse advocacy program with which the victim had contact. The program refused to comply because the records were protected by Colorado's victim advocate privilege, C.R.S. 13-90-107. Defendant argued that records of assistance were not protected because the privilege statute references "communications made to such victim's advocate by a victim of domestic violence." The trial court agreed with Defendant, ordering the program to "provide a broad outline as to the type of assistance." The program petitioned the Colorado Supreme Court, which accepted original jurisdiction.

Holding:

(1) The plain language of the statute must be construed in a manner designed to serve the underlying objective of the privilege, which is to protect victims of domestic violence from further abuse.

(2) "The mere disclosure that the individual received any services violates confidentiality because it implicitly reveals statements made by the victim to the victim's advocate."

(3) The defendant may not obtain any records of assistance, advice or other communication by the victim advocate unless he proves that the victim has waived the privilege.

(4) Neither the Confrontation Clause nor the Compulsory Process Clause are violated by the withholding of files held by non-governmental agencies and protected by an unqualified privilege.

**State v. Gomez, 63 P.3d 72 (Utah 2002)**

Facts:

Defendant was charged with rape of his girlfriend's sister. Prior to trial, his attorney subpoenaed the records of the rape crisis center and the center moved to quash the records. The trial court quashed the subpoena and found that the statutory privilege prohibited the court from conducting an in camera review.

Holding:

(1) The statutory privilege is an absolute privilege with narrow exceptions applying to minors and consent of the victim, neither of which applies in this case.

(2) The sexual assault counselor privilege does not contain an exception for communication about a condition, which is an element of the claim or defense, and thus is distinguishable from the mental health therapist privilege, which does contain such an exception.

(3) The constitutional issues were not properly briefed by the defendant and therefore were not addressed by the Utah Supreme Court.

**People v. Stanaway, 521 N.W.2d 557 (Mich. 1994):**

Facts: Defendant was charged with criminal sexual conduct with a 14-year old. Before trial, defendant sought access to the records of a sexual assault counselor (and other records covered by similar privileges), claiming that the records might contain exculpatory information or inconsistent statements. The trial court denied the access.

Holding:

(1) Through Michigan's sexual assault counselor-victim privilege statute, MCL 600.2157a(2), the legislature "intends to preclude defendants from having any access to communications made in these counseling settings."

(2) "[I]n an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense."

(3) Defendants do not have a right to discover any potentially exculpatory evidence, and general fishing for evidence is not sufficient justification to overcome the privilege.

**State v. Kalakosky, 852 P.2d 1064 (Wash 1993):**

Facts: Defendant was tried and convicted on multiple counts of rape. Defendant asked the court to conduct an in camera review of the rape crisis center counselor records of one of the victims. That request was denied, and defendant challenged the denial on appeal.

Holding:

(1) The federal Victims of Crime Act did not preempt Washington state law on access to rape crisis counselor records.

(2) Washington has a qualified, not absolute, privilege for sexual assault counselor records.

(3) "In order to make an adequate threshold showing to justify an in camera inspection, a defendant must make a particularized factual showing that information useful to the defense is likely to be found in the records."

**Commonwealth v. Wilson, 602 A.2d 1290 (Pa. 1992):**

Facts: This appeal joins two cases where Defendants were charged with rape and issued pre-trial subpoenas duces tecum to rape crisis centers for records related to their victims. In both cases, the trial court quashed the subpoena based on Pennsylvania's privilege for sexual assault counselors codified at 42 Pa.C.S. § 5945.1. On appeal, the Superior Court reversed in both cases, allowing defense review of "statements of the complainant in the file, which bear on the facts of the alleged offense." The Superior Court reasoned that the defense was not seeking to question the counselors, and the privilege statute only protected testimony, not records.

Holding:

(1) The privilege is intended to be absolute and to prevent disclosure of all confidential communications, whether through testimony or records.

(2) The state has a significant interest in extending the same confidentiality to those of "lesser economic means who are forced to seek counseling from a public center rather than a private therapist."

(3) In accordance with *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S.Ct. 989, 94L.Ed.2d 40 (1987) (plurality opinion), "the right to confront one's witnesses is satisfied if defense counsel receives wide latitude at trial to question witnesses."

(4) Unlike the statute at issue in *Ritchie*, the legislature has granted an absolute privilege that is narrowly tailored and indicates a compelling interest in confidentiality therefore it will not be trumped by Defendant's constitutional interests.

**State v. Vincent, 591 A.2d 65 (Vt. 1991):**

Facts: Defendant broke into the home of his estranged wife, and repeatedly sexually assaulted her while threatening her with a knife. When the victim reported the crime to the police, the police contacted a rape crisis program as part of standard procedure and a worker was dispatched to the hospital. Defendant filed a motion to compel disclosure of the rape crisis worker's identity so that he could determine whether she had any information helpful in his defense. The trial court denied the request as a "fishing expedition." (At the time, Vermont had no statutory privilege for communications between sexual assault crisis workers and victims.)

Holding:

- (1) The court declined to create a common law privilege.
- (2) The trial court exercised proper discretion to control discovery given that defendant offered no alternative other than deposition of the worker, the worker was not a witness to the crime, and the defendant presented no particular reason why he needed discovery from the worker.

**People v. Foggy, 512 N.E.2d 86 (Mich. 1988):**

Facts: Defendant was tried and convicted of aggravated criminal sexual assault.

Defendant had filed a pre-trial subpoena duces tecum seeking records of a sexual assault counseling program. Upon Motion to Quash, the trial court quashed the subpoena because the records were privileged under the rape crisis counselor privilege at 735 ILCS 5/8-802.1. After conviction, Defendant filed an appeal challenging the constitutionality of the privilege statute.

Holding:

- (1) The court found it significant that rape crisis counselors are not engaged in investigation of incidents so in camera inspection is unlikely to result in disclosure of material useful to the accused.
- (2) Where there is no specific indication by the defendant that disclosure of victim-crisis counselor communications would assist impeachment, there is no constitutional requirement to breach the privilege.
- (3) A system of in camera review by the court in every case would seriously undermine the value of the rape crisis services sought to be protected by the privilege.

## **Liability for Confidentiality Violations**

New Mexico does recognize the tort of “wrongful disclosure” and “breach of confidence”. In Eckhardt v. Charter Hospital, 953 P.2d 72, 124 N.M. 549 (1997), a woman was receiving mental health services and had confidentiality with the mental health provider (similar to the confidentiality New Mexico survivors have with DV victim counselors). The provider told her husband that the patient had said he was an abusive alcoholic. The provider was sued for violating confidentiality and committing a wrongful disclosure. The woman testified that her husband was angry about the disclosure, the physical violence increased, and her sense of betrayal caused her to stop seeking mental health services. The court held that it did not matter that the provider was not trying to cause harm when she made the disclosure.

## **Child Abuse Reporting**

Note: Appendix D is a summary of the decision of the New Mexico Supreme Court in State of New Mexico v. Jason Strauch (Opinion Number: 2015-NMSC-009 Filing Date: March 9, 2015 Docket No. 34,435).



## VI. New Mexico Counseling and Therapy Board Disciplinary Actions Cases

### Violation of Confidentiality is Grounds for Suspension or Revocation of a Counselor's License

**Bell, Robert (9/20/2008)**– A complaint received by the NM Counseling and Therapy Practice Board alleged that the licensee requested a client for to church with him and his wife. Later that day the licensee call the client at 11:00 p.m. and requested the client go to the movies with him. Licensee was found in violation of NMAC 16.27.18.16 (B)(2) f. Licensee was required to enter and complete a course of therapy by a Board approved therapist and payment of an administrative fine of \$500.00.

**Kohn, John (9/24/2008)**– A complaint received by the NM Counseling and Therapy Practice Board alleged that the Respondent destroyed the Complainants records prior to 2004. The Licensee wrote to the Complainant indicating the records were required to be destroyed upon the ending of a therapeutic relationship to protect client confidentiality. Licensee also stated that destroying the records was a requirement of the ethical guidelines of the Board. Licensee was found in violation of NMAC 16.27.18.17. (H)(2). Licensee was required to complete a 6 hour continuing education course on Ethics and pay an administrative fee of \$250.00.

**Ortiz, Denise (9/4/2008)**– A complaint received by the NM Counseling and Therapy Board alleged the Licensee suggested the Complainant give the name of her ex-husband to the Complainant friend who recently obtained a DWI. The Licensee gave the business card of her ex-husband and indicated he charged \$1500.00 and had a 90% dismissal rate. Respondent also insisted on cash payments from the Complainant or the Respondent would have to charge tax. Respondent stated it was more economical that she receive cash. Licensee was found in violation of NMAC 16.27.18.18. (K). Licensee was required to take a six hour college continuing education course based on the Code of Ethics and pay an administrative fine of \$500.00.

**Bard, Caroline (2/19/2009)**– A complaint received by the NM Counseling and Therapy Practice Board alleged that the Licensee entered into a professional relationship with the Complainant who was a personal friend. The Licensee advanced a considerable amount of money to the client. Respondent stated that she is moving out of state and will not renew her license. Licensee was found in violation of NMAC 16.27.18.18. (F) and (P), 16.27.18.19(E), NMSA 1978 61-9A-5(B)(E); NMSA 1978 61-9A-12(E); and NMSA 1978 61-9A-26(A)(7), (9). Licensee shall never practice in New Mexico again, Licensee shall pay an

administrative fine of \$2500.00 within 90 days and a letter of reprimand shall remain on file and this action will be reported to the Health Portability and Accountability database. Respondent has failed to pay the administrative fine at this time.

## VII. Codes of Ethics

In addition to federal and state laws, confidentiality obligations can also be found within a number of Professional Codes of Ethics.

The following Codes of Ethics can be found in the noted Appendices:

- Victim Assistance Providers Code of Ethics, Appendix G
- Counselors and Therapists Code of Ethics, Appendix H
- Social Workers Code of Ethics, Appendix I

## Appendix A: VAWA 2013

### **RELEVANT CONFIDENTIALITY PROVISIONS [42 USC §13925(b)(2)]**

(A) **IN GENERAL.** In order to ensure the safety of adult, youth, and child victims of domestic violence, dating violence, sexual assault, or stalking, and their families, grantees and sub-grantees under this title shall protect the confidentiality and privacy of persons receiving services.

(B) **NONDISCLOSURE.**—Subject to subparagraphs (C) and (D), grantees and sub grantees shall not —

(i) disclose, reveal, or release any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees' and sub grantees' programs, regardless of whether the information has been encoded, encrypted, hashed or otherwise protected; or

(ii) disclose, reveal, or release individual client information without the informed, written, reasonably time-limited consent of the person (or in the case of an unemancipated minor, the minor and the parent or guardian or in the case of legal incapacity, a court-appointed guardian) about whom information is sought, whether for this program or any other Federal, State, tribal, or territorial grant program, except that consent for release may not be given by the abuser of the minor, incapacitated person, or the abuser of the other parent of the minor.

If a minor or a person with a legally appointed guardian is permitted by law to receive services without the parent or guardian's consent, the minor or person with a guardian may release information without additional consent.

(C) **RELEASE-** If release of information described in subparagraph (B) is compelled by statutory or court mandate—

(i) grantees and sub grantees shall make reasonable attempts to provide notice to victims affected by the disclosure of information; and

(ii) grantees and sub grantees shall take steps necessary to protect the privacy and safety of the persons affected by the release of the information.

(D) **INFORMATION SHARING -**

(i) Grantees and sub grantees may share—

*(I)* nonpersonally identifying data in the aggregate regarding services to their clients and nonpersonally identifying demographic information in order to comply with Federal, State, tribal, or territorial reporting, evaluation, or data collection requirements;

*(II)* court-generated information and law-enforcement generated information contained in secure, governmental registries for protection order enforcement purposes; and

*(III)* law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.

(ii) In no circumstances may –

(I) an adult, youth, or child victim of domestic violence, dating violence, sexual assault, or stalking be required to provide a consent to release his or her personally identifying information as a condition of eligibility for the services provided by the grantee or sub grantee;

(II) any personally identifying information be shared in order to comply with Federal, tribal, or State reporting, evaluation, or data collection requirements, whether for this program or any other Federal, tribal, or State grant program.

**(E) STATUTORILY MANDATED REPORTS OF ABUSE OR NEGLECT** – Nothing in this section prohibits a grantee or sub grantee from reporting suspected abuse or neglect, as those terms are defined and specifically mandated by the State or tribe involved...

**(G) CONFIDENTIALITY ASSESSMENT AND ASSURANCES** – Grantees and sub grantees must document their compliance with the confidentiality and privacy provisions required under this section.

## Appendix B: FVPSA

### **RELEVANT CONFIDENTIALITY PROVISIONS [42 USC SECTION 10401 et seq.]**

#### **DECLARATION OF PURPOSE [42 USC SECTION 10401]**

It is the purpose of this chapter to

(1) assist States in efforts to increase public awareness about and prevent family violence and to provide immediate shelter and related assistance for victims of family violence and their dependents; and

(2) provide for technical assistance and training relating to family violence programs to States, local public agencies (including law enforcement agencies, courts, legal, social service, and health care professionals), nonprofit private organizations, and other persons seeking such assistance.

#### **STATE GRANTS AUTHORIZED [42 USC SECTION 10402]**

(a) Authority of Secretary; application; requirements; approval

(1) In order to assist in supporting the establishment, maintenance, and expansion of programs and projects to prevent incidents of family violence and to provide immediate shelter and related assistance for victims of family violence and their dependents, the Secretary is authorized, in accordance with the provisions of this chapter, to make grants to States.

(2) No grant may be made under this subsection unless the chief executive officer of the State seeking such grant submits an application to the Secretary at such time and in such manner as the Secretary may reasonably require. Each such application shall

(A) provide that funds provided under this subsection will be distributed in grants to local public agencies and nonprofit private organizations (including religious and charitable organizations, and voluntary associations) for programs and projects within such State to prevent incidents of family violence and to provide immediate shelter and related assistance for victims of family violence and their dependents in order to prevent future violent incidents;

(B) provide, with respect to funds provided to a State under this subsection for any fiscal year, that

(i) not more than 5 percent of such funds will be used for State administrative costs; and

(ii) in the distribution of funds by the State under this subsection, the State will give special emphasis to the support of community-based projects of demonstrated effectiveness carried out by nonprofit private organizations, the primary purpose of which is to operate shelters for victims of family violence and their dependents, and those which provide counseling, advocacy, and self-help services to victims and their children.

(C) set forth procedures designed to involve State domestic violence coalitions, knowledgeable individuals, and interested organizations and assure an equitable distribution of grants and grant funds within the State and between urban and rural areas within such State and a plan to address the needs of underserved populations, as defined in section 3796gg-2 of this title;

(D) specify the State agency to be designated as responsible for the administration of programs and activities relating to family violence which are carried out by the State under this chapter and for coordination of related programs within the State;

(E) provide documentation that procedures have been developed, and implemented including copies of the policies and procedure, to assure the confidentiality of records pertaining to any individual provided family violence prevention or treatment services by any program assisted under this chapter and provide assurances that the address or location of any shelter-facility assisted under this chapter will, except with written authorization of the person or persons responsible for the operation of such shelter, not be made public;

(F) Statutorily permitted reports of abuse or neglect

Nothing in this paragraph shall prohibit a grantee or sub grantee from reporting abuse and neglect, as those terms are defined by law, where mandated or expressly permitted by the State or Indian tribe involved

**NONDISCLOSURE OF CONFIDENTIAL OR PRIVATE INFORMATION [42 USC SECTION 10406(c)(5)]**

(A) IN GENERAL. In order to ensure the safety of adult, youth, and child victims of family violence, domestic violence, or dating violence, and their families, grantees and sub grantees under this title shall protect the confidentiality and privacy of such victims and their families.

“(B) NONDISCLOSURE. —Subject to subparagraphs (C), (D) and (E), grantees and sub grantees shall not —

“(i) disclose any personally identifying information collected in connection with services requested (including services utilized or denied), through grantees’ and sub grantees’ programs; or “(ii) reveal personally identifying information without informed, written, reasonably time-limited consent by the person about whom information is sought, whether for this program or any other Federal or State grant program, which consent –

(I) shall be given by –

(aa) the person, except as provided in item (bb) or (cc);

(bb) in the case of an unemancipated minor, the minor and the minor’s parent or guardian; or (cc) in the case of an individual with a guardian, the individual’s guardian; and

(II) may not be given by the abuser or suspected abuser of the minor of individual with a guardian, or the abuser or suspected abuser of the other parent of the minor.

“(C) RELEASE.—If release of information described in subparagraph (B) is compelled by statutory or court mandate—

“(i) grantees and subgrantees shall make reasonable attempts to provide notice to victims affected by the release of the information; and “(ii) grantees and sub grantees shall take steps necessary to protect the privacy and safety of the persons affected by the release of the information.

“(D) INFORMATION SHARING.—Grantees and sub grantees may share “(i) nonpersonally identifying data, in the aggregate, regarding services to their clients and demographic nonpersonally identifying information in order to comply with Federal, State, or tribal reporting, evaluation, or data collection requirements (ii) court-generated information and law enforcement-generated information contained in secure, governmental registries for protective order enforcement purposes; and

“(iii) law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.



## Appendix C: VOCA

### **RELEVANT CONFIDENTIALITY PROVISIONS [28 CFR PARTS 22; 42 USC SECTION 3789g]**

#### **CONFIDENTIALITY OF IDENTIFIABLE RESEARCH AND STATISTICAL INFORMATION [28 CFR PART 22]**

##### § 22.1 Purpose.

The purpose of these regulations is to:

(a) Protect privacy of individuals by requiring that information identifiable to a private person obtained in a research or statistical program may only be used and/or revealed for the purpose for which obtained;

(b) Insure that copies of such information shall not, without the consent of the person to whom the information pertains, be admitted as evidence or used for any purpose in any judicial or administrative proceedings;

(c) Increase the credibility and reliability of federally supported research and statistical findings by minimizing subject concern over subsequent uses of identifiable information;

(d) Provide needed guidance to persons engaged in research and statistical activities by clarifying the purposes for which identifiable information may be used or revealed; and

(e) Insure appropriate balance between individual privacy and essential needs of the research community for data to advance the state of knowledge in the area of criminal justice.

(f) Insure the confidentiality of information provided by crime victims to crisis intervention counselors working for victim services programs receiving funds provided under the Crime Control Act, and Juvenile Justice Act, and the Victims of Crime Act.

##### § 22.2 Definitions.

(a) *Person* means any individual, partnership, corporation, association, public or private organization or governmental entity, or combination thereof.

(b) *Private person* means any person defined in § [22.2\(a\)](#) other than an agency, or department of Federal, State, or local government, or any component or combination thereof. Included as a private person is an individual acting in his or her official capacity.

(c) *Research or statistical project* means any program, project, or component thereof which is supported in whole or in part with funds appropriated under the Act and whose purpose is to develop, measure, evaluate, or otherwise advance the state of knowledge in a particular area. The term does not include “intelligence” or other information-gathering activities in which information pertaining to specific individuals is obtained for purposes directly related to enforcement of the criminal laws.

(d) *Research or statistical information* means any information which is collected during the conduct of a research or statistical project and which is intended to be utilized for research or statistical purposes. The term includes information, which is collected directly from the individual or obtained from any agency or individual having possession, knowledge, or control thereof.

(e) *Information identifiable to a private person* means information which either—

(1) Is labeled by name or other personal identifiers, or

(2) Can, by virtue of sample size or other factors, be reasonably interpreted as referring to a particular private person.

(f) *Recipient of assistance* means any recipient of a grant, contract, interagency agreement, sub grant, or subcontract under the Act and any person, including subcontractors, employed by such recipient in connection with performances of the grant, contract, or interagency agreement.

(g) *Officer or employee of the Federal Government* means any person employed as a regular or special employee of the U.S. (including experts, consultants, and advisory board members) as of July 1, 1973, or at any time thereafter.

(h) *The act* means the Omnibus Crime Control and Safe Streets Act of 1968, as amended.

(i) *Applicant* means any person who applies for a grant, contract, or sub grant to be funded pursuant to the Act.

(j) *The Juvenile Justice Act* means the “Juvenile Justice and Delinquency Prevention Act of 1974, as amended.”

(k) *The Victims of Crime Act* means the Victims of Crime Act of 1984.

#### § 22.21 Use of identifiable data.

Research or statistical information identifiable to a private person may be used only for research or statistical purposes.

§ 22.22 Revelation of identifiable data.

(a) Except as noted in paragraph (b) of this section, research and statistical information relating to a private person may be revealed in identifiable form on a need-to-know basis only to—

(1) Officers, employees, and subcontractors of the recipient of assistance;

(2) Such individuals as needed to implement sections 202(c)(3), 801, and 811(b) of the Act; and sections 223(a)(12)(A), 223(a)(13), 223(a)(14), and 243 of the Juvenile Justice and Delinquency Prevention Act.

(3) Persons or organizations for research or statistical purposes. Information may only be transferred for such purposes upon a clear demonstration that the standards of § 22.26 have been met and that, except where information is transferred under paragraphs (a) (1) and (2) of this section, such transfers shall be conditioned on compliance with a § 22.24 agreement.

(b) Information may be revealed in identifiable form where prior consent is obtained from an individual or where the individual has agreed to participate in a project with knowledge that the findings cannot, by virtue of sample size, or uniqueness of subject, be expected to totally conceal subject identity.

§ 22.23 Privacy certification.

(a) Each applicant for BJA, OJJDP, BJS, NIJ, or OJP support either directly or under a State plan shall submit a Privacy Certificate as a condition of approval of a grant application or contract proposal which has a research or statistical project component under which information identifiable to a private person will be collected.

(b) The Privacy Certificate shall briefly describe the project and shall contain assurance by the applicant that:

(1) Data identifiable to a private person will not be used or revealed, except as authorized under §§ 22.21, 22.22.

(2) Access to data will be limited to those employees having a need therefore and that such persons shall be advised of and agree in writing to comply with these regulations.

(3) All subcontracts which require access to identifiable data will contain conditions meeting the requirements of § 22.24.

(4) To the extent required by § 22.27 any private persons from whom identifiable data are collected or obtained, either orally or by means of written questionnaire, shall be advised that the data will only be used or revealed for research or statistical purposes and that compliance with requests for information is not mandatory. Where the notification requirement is to be waived, pursuant to § 22.27(c), a justification must be included in the Privacy Certificate.

(5) Adequate precautions will be taken to insure administrative and physical security of identifiable data.

(6) A log will be maintained indicating that identifiable data have been transmitted to persons other than BJA, OJJDP, BJS, NIJ, or OJP or grantee/contractor staff or subcontractors, that such data have been returned, or that alternative arrangements have been agreed upon for future maintenance of such data.

(7) Project plans will be designed to preserve anonymity of private persons to whom information relates, including, where appropriate, name stripping, coding of data, or other similar procedures.

(8) Project findings and reports prepared for dissemination will not contain information which can reasonably be expected to be identifiable to a private person except as authorized under § 22.22.

(c) The applicant shall attach to the Privacy Certification a description of physical and/or administrative procedures to be followed to insure the security of the data to meet the requirements of § 22.25.

#### § 22.27 Notification.

(a) Any person from whom information identifiable to a private person is to be obtained directly, either orally, by questionnaire, or other written documents, shall be advised:

(1) That the information will only be used or revealed for research or statistical purposes; and

(2) That compliance with the request for information is entirely voluntary and may be terminated at any time.

(b) Except as noted in paragraph (c) of this section, where information is to be obtained through observation of individual activity or performance, such individuals shall be advised:

(1) Of the particular types of information to be collected;

(2) That the data will only be utilized or revealed for research or statistical purposes; and

(3) That participation in the project in question is voluntary and may be terminated at any time.

(c) Notification, as described in paragraph (b) of this section, may be eliminated where information is obtained through field observation of individual activity or performance and in the judgment of the researcher such notification is impractical or may seriously impede the progress of the research.

(d) Where findings in a project cannot, by virtue of sample size, or uniqueness of subject, be expected to totally conceal subject identity, an individual shall be so advised.

§ 22.28 Use of data identifiable to a private person for judicial, legislative or administrative purposes.

(a) Research or statistical information identifiable to a private person shall be immune from legal process and shall only be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative or administrative proceeding with the written consent of the individual to whom the data pertains.

(b) Where consent is obtained, such consent shall:

(1) Be obtained at the time that information is sought for use in judicial, legislative or administrative proceedings;

(2) Set out specific purposes in connection with which information will be used;

(3) Limit, where appropriate, the scope of the information subject to such consent.

§ 22.29 Sanctions.

Where BJA, OJJDP, BJS, NIJ, or OJP believes that a violation of section 812(a) of the Act or section 1407(d) of the Victims of Crime Act, these regulations, or any grant or contract conditions entered into thereunder has occurred, it may initiate administrative actions leading to termination of a grant or contract, commence appropriate personnel and/or other procedures in cases involving Federal employees, and/or initiate appropriate legal actions leading to imposition of a civil penalty not to exceed \$10,000 for a violation occurring before September 29, 1999, and not to exceed \$11,000 for a violation occurring on or after September 29, 1999 against any person responsible for such violation

## **CONFIDENTIALITY OF INFORMATION [42 USC SECTION 3789g]**

(a) Research or statistical information; immunity from process; prohibition against admission as evidence or use in any proceedings

No officer or employee of the Federal Government, and no recipient of assistance under the provisions of this chapter shall use or reveal any research or statistical information furnished under this chapter by any person and identifiable to any specific private person for any purpose other than the purpose for which it was obtained in accordance with this chapter. Such information and copies thereof shall be immune from legal process, and shall not, without the consent of the person furnishing such information, be admitted as evidence or used for any purpose in any action, suit, or other judicial, legislative, or administrative proceedings.

(b) Criminal history information; disposition and arrest data; procedures for collection, storage, dissemination, and current status; security and privacy; availability for law enforcement, criminal justice, and other lawful purposes; automated systems: review, challenge, and correction of information

All criminal history information collected, stored, or disseminated through support under this chapter shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Office of Justice Programs shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of this chapter, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

(c) Criminal intelligence systems and information; prohibition against violation of privacy and constitutional rights of individuals

All criminal intelligence systems operating through support under this chapter shall collect, maintain, and disseminate criminal intelligence information in conformance with policy standards which are prescribed by the Office of Justice Programs and which are written to assure that the funding and operation of these systems furthers the purpose of this chapter and to assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals.

(d) Violations; fine as additional penalty

Any person violating the provisions of this section, or of any rule, regulation, or order issued thereunder, shall be fined not to exceed \$10,000, in addition to any other penalty imposed by law.

## Appendix D: State of New Mexico v. Strauch

State of New Mexico v Strauch, New Mexico Supreme Court Opinion Number: 2015-NMSC-009 (Filing Date: March 9, 2015)

Facts: Defendant Jason Strauch allegedly revealed to his wife that he had been sexually abusing their minor daughter. Defendant moved out of the family home and began attending counseling sessions as a patient of a private-practice social worker licensed by the State of New Mexico. The couple reconciled and Defendant moved back home after several months of counseling. Defendant continued to see the social worker, and

Defendant's wife attended several of these counseling sessions each year over the next few years. When Defendant's daughter revealed to her mother that the sexual abuse had never stopped, his wife separated from Defendant and reported the abuse.

Defendant was charged with four counts of criminal sexual contact of a minor. After the State filed a notice of intent to call the social worker as a prosecution witness and attempted to obtain records of the counseling sessions, Defendant filed a motion in the district court for a protective order, arguing that the communications with the social worker were protected from disclosure both by statute, and by evidentiary privilege.

The State argued that the statutes and evidentiary rules mandated disclosure, pointing to the broadly inclusive term "[e]very person" in the Abuse and Neglect Act reporting requirement, § 32A-4-3(A); to the Social Work Practice Act confidentiality exception, § 61-31-24(C).

Holding: In light of the statutory history and the broadly inclusive terms of the Abuse and Neglect Act (requiring that every person... who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter to specified authorities) both privately and publicly employed social workers are mandatory child abuse reporters. Consequently, statements made to a social worker by an alleged child abuser in private counseling sessions were not protected from disclosure in a court proceeding.

The court found that the Legislature did not intend to make an unannounced policy change from the universal reporting requirement that has existed in New Mexico for thirty years.



## APPENDIX E: Children's Code Confidentiality Provisions

### **NMSA 32A-4-33. Confidentiality; records; penalty.**

A. All records or information concerning a party to a neglect or abuse proceeding, including social records, diagnostic evaluations, psychiatric or psychological reports, videotapes, transcripts and audio recordings of a child's statement of abuse or medical reports incident to or obtained as a result of a neglect or abuse proceeding or that were produced or obtained during an investigation in anticipation of or incident to a neglect or abuse proceeding shall be confidential and closed to the public.

B. The records described in Subsection A of this section shall be disclosed only to the parties and:

- (1) court personnel;
- (2) court-appointed special advocates;
- (3) the child's guardian ad litem;
- (4) the attorney representing the child in an abuse or neglect action, a delinquency action or any other action under the Children's Code [32A-1-1 NMSA 1978];
- (5) department personnel;
- (6) any local substitute care review board or any agency contracted to implement local substitute care review boards;
- (7) law enforcement officials, except when use immunity is granted pursuant to Section 32A-4-11 NMSA 1978;
- (8) district attorneys, except when use immunity is granted pursuant to Section 32A-4-11 NMSA 1978;
- (9) any state government social services agency in any state or when, in the opinion of the department it is in the best interest of the child, a governmental social services agency of another country;
- (10) those persons or entities of an Indian tribe specifically authorized to inspect the records pursuant to the federal Indian Child Welfare Act of 1978 or any regulations promulgated thereunder;

(11) a foster parent, if the records are those of a child currently placed with that foster parent or of a child being considered for placement with that foster parent and the records concern the social, medical, psychological or educational needs of the child;

(12) school personnel involved with the child if the records concern the child's social or educational needs;

(13) health care or mental health professionals involved in the evaluation or treatment of the child, the child's parents, guardian, custodian or other family members;

(14) protection and advocacy representatives pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act and the federal Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991;

(15) children's safe house organizations conducting investigatory interviews of children on behalf of a law enforcement agency or the department; and

(16) any other person or entity, by order of the court, having a legitimate interest in the case or the work of the court.

C. A parent, guardian or legal custodian whose child has been the subject of an investigation of abuse or neglect where no petition has been filed shall have the right to inspect any medical report, psychological evaluation, law enforcement reports or other investigative or diagnostic evaluation; provided that any identifying information related to the reporting party or any other party providing information shall be deleted. The parent, guardian or legal custodian shall also have the right to the results of the investigation and the right to petition the court for full access to all department records and information except those records and information the department finds would be likely to endanger the life or safety of any person providing information to the department.

D. Whoever intentionally and unlawfully releases any information or records closed to the public pursuant to the Abuse and Neglect Act or releases or makes other unlawful use of records in violation of that act is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

E. The department shall promulgate rules for implementing disclosure of records pursuant to this section and in compliance with state and federal law and the Children's Court Rules [10-101 NMRA].

## APPENDIX F: New Mexico Attorney General Letter



### Attorney General of New Mexico

**GARY K. KING**  
Attorney General

**ALBERT J. LAMA**  
Chief Deputy Attorney General

May 28, 2008

Kari E. Brandenburg  
Second Judicial District Attorney  
520 Lomas Blvd. NW  
Albuquerque, NM 87102-2118

Re: Opinion Request--Violence Against Women Act

Dear Ms. Brandenburg:

You have requested our opinion regarding whether, when a conflict arises between domestic violence shelters and police agencies attempting to investigate a possible crime involving a child who may be residing at a domestic violence shelter, the child abuse reporting provision of the Children's Code, NMSA 1978, § 32A-4-3 (2005) takes precedence over the confidentiality provisions of the federal Violence Against Women Act ("VAWA").

Based on our examination of the relevant New Mexico statutes, federal statutes, opinions and case law authorities, and on the information available to us at this time, we conclude that, generally, and subject to any specific requirements applicable to a specific program under which a shelter presumably operates, the child abuse reporting provision of the Children's Code, NMSA 1978, § 32A-4-3 (2005), takes precedence over the confidentiality provisions of the VAWA. This is because federal law permits the release of this information pursuant to New Mexico's statutory requirements.

Your correspondence indicates that situations have arisen in which the police are called upon to investigate a possible child abuse case and have reason to believe that the child in question may be residing with a parent at a domestic violence shelter. When the police attempt to confirm the location of the child or gain access to the child, they are sometimes refused that information or access by the domestic violence shelter. The shelters are concerned that to give out any information or assistance would violate the provisions of the Violence Against Women Act. The police, however, believe that investigation of possible child abuse takes precedence over confidentiality issues in the Violence Against Women Act.

The Children's Code requires reporting and investigation of suspected child abuse or neglect. Specifically, Section 32A-4-3 provides, in part:

- A. Every person ... who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately to:
  - (1) a local law enforcement agency,....
  - ....
- C. The recipient of a report under Subsection A of this section shall take immediate steps to ensure prompt investigation of the report. The investigation shall ensure that immediate steps are taken to protect the health or welfare of the alleged abused or neglected child, as well as that of any other child under the same care who may be in danger of abuse or neglect. A local law enforcement officer trained in the investigation of child abuse and neglect is responsible for investigating reports of alleged child abuse and neglect at schools, daycare facilities or child care facilities.
  - ....
- E. A law enforcement agency ... shall have access to any of the records pertaining to a child abuse or neglect case maintained by any of the persons enumerated in Subsection A of this section, except as otherwise provided in the Abuse and Neglect Act.
- F. A person who violates the provisions of Subsection A of this section is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

In addition to the required reporting to law enforcement of suspected child abuse, law enforcement is excepted from confidentiality provisions of the Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -34 (1993, as amended). See NMSA 1978, § 32A-4-3 (E) (2005). The Act's provisions generally accord privacy with respect to information about persons who report suspected abuse and about the parties involved. See NMSA 1978, § 32A-4-4 (A) (2005) (name and information regarding the person reporting suspected abuse shall not be disclosed absent the consent of the informant or a court order); NMSA 1978, § 32A-4-4 (B) (2005) (CYFD must advise a party that is the subject of an investigation of the reports or allegations made "in a manner that is consistent with laws protecting the rights of the informant"); NMSA 1978, § 32A-4-5 (D) (2005) (investigations must be conducted in a manner that will protect the privacy of the child and the family, with the paramount consideration being the safety of the child"); NMSA 1978, § 32A-4-33 (A) (2005) (providing for confidentiality of all records and information concerning a party to a neglect or abuse proceeding). However, the Act allows disclosure of otherwise confidential records to law enforcement officials, except in circumstances involving use immunity. NMSA 1978, § 32A-4-33 (B) (2005).

Additionally, the Victim Counselor Confidentiality Act, NMSA 1978, §§ 31-25-1 to -6 (1987) establishes, as a paramount state interest, the required reporting of suspected child abuse and neglect. Section 31-25-5 of that Act provides, in part: "The Victim Counselor Confidentiality Act shall not be construed to relieve a victim counselor of a duty to report suspected child abuse or neglect pursuant to Section 32-1-15 NMSA 1978 [now Section 32A-4-3]...."

VAWA, Pub.L. 103-322, Title IV, includes several federal grant programs designed to provide assistance to adult and child victims of domestic violence, which may have differing confidentiality requirements pursuant to those specific authorizing statutes and grant application requirements. We assume that the shelters involved in your question are grantees under one or more of those federal grant programs. Our answer to your question, therefore, necessarily involves a general description of some of the statutes that may apply. To the extent that those shelters operate under programs that are governed by different laws, an examination of those other laws would be necessary.

One federal statute that may apply is 42 USC Section 13925, which provides for federal grants under VAWA. Under that statute, law enforcement takes precedence over confidentiality. That precedence is reflected in the grant conditions of paragraph C, which acknowledge that grantees may be obliged by statute to release otherwise confidential information. 42 USC Section 13925 (b)(2) provides, in part:

- (A) In general. In order to ensure the safety of adult, youth, and child victims of domestic violence ... grantees and subgrantees under this title [VAWA] shall protect the confidentiality and privacy of persons receiving services.
- (B) Nondisclosure. Subject to subparagraphs (C) and (D), grantees and subgrantees shall not--
  - (i) disclose any personally identifying information or individual information collected in connection with services requested, utilized or denied through grantees' and subgrantees' programs; or
  - (ii) reveal individual client information without the informed, written, reasonably time-limited consent of the person....
- (C) Release. If release of information described in (B) is compelled by statutory or court mandate--
  - (i) grantees and subgrantees shall make reasonable attempts to provide notice to victims affected by the disclosure of information; and

District Attorney Kari E. Brandenburg  
May 28, 2008  
Page 4

(ii) grantees and subgrantees shall take steps necessary to protect the privacy and safety of the persons affected by the release of the information.


(D) Information sharing. Grantees and subgrantees may share ... law enforcement- and prosecution-generated information necessary for law enforcement and prosecution purposes.

The information sharing provision of paragraph D reflects the important interest of law enforcement. Under paragraph C of 42 USC Section 13925 (b)(2), release of information may be compelled by statutory mandate. State law, specifically, the Child Abuse and Neglect Act and the reporting requirements imposed by that Act would, therefore, take precedence in the context of your question.<sup>1</sup>

The state law exception is found in other federal provisions. In the area of public housing, grants to eligible entities may be made to combat violence against women. Grant application requirements include a provision that “[a]ll information provided to any housing agency ... including the fact that an individual is a victim of domestic violence ... shall be retained in confidence ... except to the extent that disclosure is ... otherwise required by applicable law.” 42 USC § 14043e-4 (e)(4). This statute would except from confidentiality disclosure that is required by the Child Abuse and Neglect Act.

Your request to us was for a formal Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

  
ANDREA R. BUZZARD  
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

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<sup>1</sup> A grant program to combat domestic violence, dating violence, sexual assault and stalking in the middle and high schools contains a similarly worded provision that permits the release of confidential information in circumstances where the release is compelled by statute or court mandate. See 42 USC § 14043e-3 (c).

## APPENDIX G: Victim Assistance Providers Code of Ethics

(National Organization for Victim Assistance, Adopted by the NOVA Board of Directors, April 22, 1995)

Victims of crime and the criminal justice system expect every Victim Assistance Provider, paid or volunteer to act with integrity, to treat all victims and survivors of crime—their clients—with dignity and compassion, and to uphold principles of justice for accused and accuser alike. To these ends, this Code will govern the conduct of Victim Assistance Providers:

I. In relationships with every client, the Victim Assistance Provider shall:

- (1) Recognize the interests of the client as a primary responsibility.
- (2) Respect and protect the client's civil and legal rights.
- (3) Respect the client's rights to privacy and confidentiality, subject only to laws or regulations requiring disclosure of information to appropriate other sources.
- (4) Respond compassionately to each client with personalized services.
- (5) Accept the client's statement of events as it is told, withholding opinion or judgment, whether or not a suspected offender has been identified, arrested, convicted, or acquitted.
- (6) Provide services to every client without attributing blame, no matter what the client's conduct was at the time of the victimization or at another stage of the client's life.
- (7) Foster maximum self-determination on the part of the client.
- (8) Serve as a victim advocate when requested and, in that capacity, act on behalf of the client's stated needs without regard to personal convictions and within the rules of the advocate's host agency.
- (9) Should one client's needs conflict with another's, act with regard to one client only after promptly referring the other to another qualified Victim Assistance Provider.
- (10) Observe the ethical imperative to have no sexual relations with clients, current or past, in recognition that to do so risks exploitation of the knowledge and trust derived from the professional relationship.
- (11) Make client referrals to other resources or services only in the client's best interest, avoiding any conflict of interest in the process.
- (12) Provide opportunities for colleague Victim Assistance Providers to seek appropriate services when traumatized by a criminal event or a client.

II. In relationships with colleagues, other professionals, and the public, the Victim Assistance Provider shall:

- (1) Conduct relationships with colleagues in such a way as to promote mutual respect, public respect, and improvement of service.
- (2) Make statements that are critical of colleagues only if they are verifiable and constructive in purpose.
- (3) Conduct relationships with allied professionals such that they are given equal respect and dignity as professionals in the victim assistance field.
- (4) Take steps to quell negative, insubstantial rumors about colleagues and allied professionals.



## APPENDIX H: Counselors and Therapists Code of Ethics (New Mexico Administrative Code Title 16 Chapter 27)

**16.27.18.2 SCOPE:** All professional clinical mental health counselors, marriage and family therapists, professional art therapists, professional mental health counselors, registered independent mental health counselors, licensed mental health counselors, associate marriage and family therapists, alcohol and drug abuse counselors, alcohol abuse counselors, drug abuse counselors, and substance abuse associates.

**16.27.18.6 OBJECTIVE:** The objective of Part 18 is to outline the code of ethics all applicants and licensed professional clinical mental health counselors, marriage and family therapists, professional art therapists, professional mental health counselors, registered independent mental health counselors, associate marriage and family therapists, licensed mental health counselors, alcohol and drug abuse counselors, alcohol abuse counselors, drug abuse counselors, and substance abuse associates must adhere to as licensed professionals. Failure to adhere to the code of ethics may result in disciplinary action by the board.

**16.27.18.8 WHO MUST ADHERE TO THE CODE OF ETHICS:** The counseling & therapy practice board code of ethics for professional mental health counselor, professional clinical mental health counselor, marriage and family therapist, professional art therapist, associate marriage and family therapist, registered independent mental health counselor, licensed mental health counselor, alcohol and drug abuse counselor, alcohol abuse counselor, drug abuse counselor, and substance abuse associate and approved supervisors. Licensure/registration is binding to all individuals holding licensure in the state of New Mexico.

**16.27.18.9 SCOPE:** This code of ethics regulates the ethical and professional conduct of:

- A. all licensed and registered individuals;
- B. all applicants for licensure;
- C. licensed mental health counselors, licensed associate marriage and family therapists and substance abuse associates and supervisors during their education, practicum and postgraduate training; and
- D. expert witnesses: it applies to all licensed or registered individuals, in direct contact with clients, as well as during education, training, and research endeavors.

**16.27.18.11 VIOLATIONS:**

A. A violation of a code of ethics is referred to as "unprofessional" or "unethical" conduct. It constitutes sufficient grounds for disciplinary action by the board.

B. Costs of disciplinary proceedings: Licensees or applicants shall bear all costs of disciplinary proceedings unless they are excused by the board from paying all or part of the fees, or if they prevail at the hearing and an action in section 61-1-3 of the Uniform Licensing Act is not taken by the board.

**16.27.18.14 CLIENT:** Means a recipient of counseling or therapy services. A corporate entity or other organization can be a client when the professional contract is to provide services of benefit primarily to the organization rather than individuals. In the case of individuals with legal guardians, including persons under the age of consent and legally incompetent adults, the legal guardian shall be the client for decision-making purposes, except that the individual receiving services shall be the client for:

A. issues directly affecting the physical or emotional safety of the individual, such a sexual or other exploitive dual relationships, and

B. issues specifically reserved to the individual, and agreed to by the guardian prior to the rendering of services, such as confidential communication in a therapy relationship.

**16.27.18.15 CONFIDENTIAL INFORMATION:** Means information revealed by a client(s) or otherwise obtained by a counselor or therapist, within the therapeutic context. The information shall not be disclosed by the counselor or therapist without the informed written consent of the client(s). When the client is a corporation or organization, the confidential relationship is between the counselor or therapist and the corporation/organization and not between the counselor or therapist and the employee/individual. Information obtained from the employee by the counselor or therapist shall be available to the organization unless such information was obtained in a separate therapeutic context which is subject to confidentiality requirements.

**16.27.18.17 CONFIDENTIALITY AND DATA PRIVACY:**

A. The counselor or therapist shall safeguard the confidential information obtained in the course of practice, teaching, research or other professional services. This includes a counselor or therapist's employees and professional associates as defined by law. The counselor or therapist shall disclose confidential information to others only with the informed written consent of the client.

B. A licensed or registered individual shall inform a client of limitations of confidentiality. These limitations include, but are not limited to:

(1) Limitations mandated by the law.

(2) When the counselor or therapist judges that disclosure is necessary to protect against a clear and substantial risk of imminent serious harm being inflicted by the client on the client or another person(s).

(3) When the counselor or therapist is a defendant in a civil, criminal, or disciplinary action arising from the therapy, in which case, client confidences may be disclosed in the course of that action.

(4) When a written waiver has been obtained, all information revealed must be in accordance with the terms of the waiver. If there is more than one party involved in the therapy, the waiver must be signed by all members legally competent to execute such a waiver (i.e., couples, marital couples, family, group).

(5) When release of information pertaining to a client under the age of consent is requested, it must be signed by a parent or guardian. The counselor or therapist, to the extent the client can understand, shall inform the minor client of the limit the law imposes on his/her right of confidentiality.

(6) Reporting of abuse of children and vulnerable adults. The counselor or therapist shall be familiar with any relevant law, and shall comply with such laws.

(7) Limitations mandated by employing agencies.

C. A licensed or registered individual shall ensure that all records and written data are stored using reasonable security measures that prevent access to records by unauthorized persons.

D. A licensed or registered individual shall ensure that the content and disposition of all records is in compliance with the relevant state laws and parts.

E. A licensed or registered individual shall continue to treat information regarding a client as confidential after the professional relationship between the counselor or therapist and the client has ceased.

F. A licensed or registered individual shall exercise reasonable care to ensure that confidential information is appropriately disguised to prevent client identification when used as a basis of supervision, teaching, research or other published reports.

G. A licensed or registered individual shall, clarify to the client the limitations and foreseeable uses of confidential information.

H. Record retention

(1) A licensed or registered individual rendering professional services to an individual client or billed to a third party payor, shall maintain professional records that include:

(a) the presenting problem(s) or purpose or diagnosis,

(b) the fee arrangement,

(c) the date and substance of each billed service,

(d) any test results or other evaluative results obtained and any basis test data from which they were derived,

(e) notation and results of formal consultations with other providers,

(f) a copy of all tests or other evaluative reports prepared as part of the professional relationship.

(2) A licensed or registered individual shall assure that all client professional records are maintained for a period of not less than six years after the last date that professional services was rendered.

(3) A licensed or registered individual shall store and dispose of written, electronic data and other recorded information in such a manner as to ensure their confidentiality.

(4) A licensed or registered individual may not withhold records under their control that are requested for a client's treatment solely because payment has not been received, except as otherwise provided by law.

**16.27.18.18 RESPONSIBILITY TO CLIENTS:**

A. A licensee shall inform clients before or at the time of the initial counseling session with the licensee of the following:

(1) professional education, training and experience of the licensee;

(2) fees and arrangements for payment;

- (3) counseling purposes, goals, and techniques;
  - (4) any restrictions placed on the license by the board;
  - (5) the limits on confidentiality;
  - (6) any intent of the licensee to use another individual to provide counseling services to the client; and
  - (7) supervision of the licensee by another licensed health care professional, including the name and qualifications of the supervisor.
  - (8) A licensee shall inform the client of any changes to the items above prior to initiating the change.
- B. A licensed or registered individual shall not discriminate against or refuse professional services to anyone on the basis of race, color, gender, religion, national origin, ancestry, disability, socioeconomic status, sexual orientation, or any basis proscribed by law.
- C. A licensed or registered individual shall not impose on the client any stereotypes of behavior, values, or roles related to age, gender, religion, race, disability, nationality, sexual orientation, or diagnosis which would interfere with the objective provision of counseling or therapy services.
- D. A licensed or registered individual shall not enter into a sexual or other dual relationship with a client, as specified in Section 16.27.18.16 D of this code of ethics.
- E. A licensed or registered individual shall continue therapeutic relationships only so long as it is reasonably clear that a therapeutic context exists.
- F. A licensed or registered individual shall give a truthful, understandable, and appropriate account of the nature of the client's condition to the client or to those responsible for the care of the client.
- G. A licensed or registered individual shall not mislead or withhold information about the cost of his/her professional services.
- H. A licensed or registered individual shall keep the client fully informed as to the purpose and nature of any evaluation, treatment, or other procedures, and of the client's right to freedom of choice regarding services provided.

I. A licensed or registered individual providing services to a client shall make an appropriate referral of the client to another professional when requested to do so by the client or in the best interest of the client.

J. A licensed or registered individual shall not abandon or neglect clients in treatment without making reasonable arrangements for the continuation of such treatment. Counselors or therapists shall assist persons in obtaining other therapeutic services if the counselor or therapist is unable or unwilling, for appropriate reasons, to provide professional help.

K. A licensed or registered individual providing services to an individual client shall not induce that client to solicit business on behalf of the counselor or therapist.

L. When consulting with colleagues,

(1) a licensed or registered individual shall not share confidential information that reasonably could lead to the identification of a patient, client, research participant, or other person or organization with whom they have a confidential relationship unless they have obtained the prior consent of the person or organization or the disclosure cannot be avoided, and

(2) they share information only to the extent necessary to achieve the purposes of the consultation.

M. A licensed or registered individual shall obtain written informed consent from clients before videotaping, audio recording, or permitting third party observation.

N. A licensed or registered individual who uses the designation of "Doctor" in their title shall disclose to their client the area of education.

O. A licensee shall not knowingly offer or provide counseling or therapy to an individual concurrently receiving counseling from another mental health services provider except with that provider's knowledge. If a licensee learns of such concurrent therapy, the licensee shall take immediate and reasonable action to resolve the situation.

P. A licensee shall not enter into a professional therapeutic relationship with immediate family members, personal friends, or business associates.

Q. A licensee shall bill clients or third parties for only those services actually rendered or as agreed to by mutual understanding at the beginning of services or as later modified by mutual agreement.

(1) Actual provider of services must be reflected on billing documents.

(2) On the written request of a client, or a client's legal guardian, a licensee shall provide, in plain language, a written explanation of the charges for counseling services previously made on a bill or statement for the client. This requirement applies even if the charges are to be paid by a third party.

(3) A licensee may not overcharge a client.

(4) A licensee may not submit to a client or third payer a bill for counseling or therapy that the licensee knows were not provided or knows were improper, unreasonable, or medically or clinically unnecessary.

**16.27.18.19 RESPONSIBILITY TO THE PROFESSION:**

A. A licensed or registered individual shall not aid or abet another person in misrepresenting his/her professional credentials or illegally engaging in the practice of counseling or therapy.

B. A licensed or registered individual shall not delegate professional responsibilities to a person not appropriately qualified to provide such services.

C. A licensed or registered individual shall exercise appropriate supervision over supervisees, as set forth in the Parts and regulations of the board.

D. Licensed or registered individuals who have substantial reason to believe that there has been a violation of the statutes or parts of the board which presents eminent danger to the licensee, client or the public shall so inform the board in writing. If this information is obtained in a professional relationship with a client, the written permission of the client will be needed before reporting it. Counselors or therapists shall not file or encourage the filing of ethical complaints that are frivolous or are intended to harm the licensee rather than protect the public.

E. Licensed or registered individuals shall be familiar with this code of ethics, and its application to counselors or therapists' work. Lack of awareness or misunderstanding of the conduct standards is not itself a defense to a charge of unethical conduct.

F. When licensed or registered individuals are uncertain whether a particular situation or course of action would violate this code of ethics, the counselor or therapist shall consult with the board's ethics committees.

G. Licensed or registered individuals shall cooperate in ethics investigations, proceedings, and resulting requirements of this code. Release of confidential information in

an investigation by the board does not constitute a violation of confidentiality. Failure to cooperate in an investigation is itself an ethics violation.



## APPENDIX I: SOCIAL WORKERS CODE OF ETHICS

(Approved by the 1996 NASW Delegate Assembly and revised by the 2008 NASW Delegate Assembly)

### 1. SOCIAL WORKERS' ETHICAL RESPONSIBILITIES TO CLIENTS

#### 1.07 Privacy and Confidentiality

(a) Social workers should respect clients' right to privacy. Social workers should not solicit private information from clients unless it is essential to providing services or conducting social work evaluation or research. Once private information is shared, standards of confidentiality apply.

(b) Social workers may disclose confidential information when appropriate with valid consent from a client or a person legally authorized to consent on behalf of a client.

(c) Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person. In all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed.

(d) Social workers should inform clients, to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is made. This applies whether social workers disclose confidential information on the basis of a legal requirement or client consent.

(e) Social workers should discuss with clients and other interested parties the nature of confidentiality and limitations of clients' right to confidentiality. Social workers should review with clients circumstances where confidential information may be requested and where disclosure of confidential information may be legally required. This discussion should occur as soon as possible in the social worker-client relationship and as needed throughout the course of the relationship.

(f) When social workers provide counseling services to families, couples, or groups, social workers should seek agreement among the parties involved concerning each individual's right to confidentiality and obligation to preserve the confidentiality of information shared by others. Social workers should inform participants in family, couples, or group counseling that social workers cannot guarantee that all participants will honor such agreements.

(g) Social workers should inform clients involved in family, couples, marital, or group counseling of the social worker's, employer's, and agency's policy concerning the social worker's disclosure of confidential information among the parties involved in the counseling.

(h) Social workers should not disclose confidential information to third-party payers unless clients have authorized such disclosure.

(i) Social workers should not discuss confidential information in any setting unless privacy can be ensured. Social workers should not discuss confidential information in public or semipublic areas such as hallways, waiting rooms, elevators, and restaurants.

(j) Social workers should protect the confidentiality of clients during legal proceedings to the extent permitted by law. When a court of law or other legally authorized body orders social workers to disclose confidential or privileged information without a client's consent and such disclosure could cause harm to the client, social workers should request that the court withdraw the order or limit the order as narrowly as possible or maintain the records under seal, unavailable for public inspection.

(k) Social workers should protect the confidentiality of clients when responding to requests from members of the media.

(l) Social workers should protect the confidentiality of clients' written and electronic records and other sensitive information. Social workers should take reasonable steps to ensure that clients' records are stored in a secure location and that clients' records are not available to others who are not authorized to have access.

(m) Social workers should take precautions to ensure and maintain the confidentiality of information transmitted to other parties through the use of computers, electronic mail, facsimile machines, telephones and telephone answering machines, and other electronic or computer technology. Disclosure of identifying information should be avoided whenever possible.

(n) Social workers should transfer or dispose of clients' records in a manner that protects clients' confidentiality and is consistent with state statutes governing records and social work licensure.

(o) Social workers should take reasonable precautions to protect client confidentiality in the event of the social worker's termination of practice, incapacitation, or death.

(p) Social workers should not disclose identifying information when discussing clients for teaching or training purposes unless the client has consented to disclosure of confidential information.

(q) Social workers should not disclose identifying information when discussing clients with consultants unless the client has consented to disclosure of confidential information or there is a compelling need for such disclosure.

(r) Social workers should protect the confidentiality of deceased clients consistent with the preceding standards.

#### 1.08 Access to Records

(a) Social workers should provide clients with reasonable access to records concerning the clients. Social workers who are concerned that clients' access to their records could cause serious misunderstanding or harm to the client should provide assistance in interpreting the records and consultation with the client regarding the records. Social workers should limit clients' access to their records, or portions of their records, only in exceptional circumstances when there is compelling evidence that such access would cause serious harm to the client. Both clients' requests and the rationale for withholding some or all of the record should be documented in clients' files.

(b) When providing clients with access to their records, social workers should take steps to protect the confidentiality of other individuals identified or discussed in such records.

## 2. SOCIAL WORKERS' ETHICAL RESPONSIBILITIES TO COLLEAGUES

### *2.02 Confidentiality*

Social workers should respect confidential information shared by colleagues in the course of their professional relationships and transactions. Social workers should ensure that such colleagues understand social workers' obligation to respect confidentiality and any exceptions related to it.

## 3. SOCIAL WORKERS' ETHICAL RESPONSIBILITIES IN PRACTICE SETTINGS

### *3.04 Client Records*

(a) Social workers should take reasonable steps to ensure that documentation in records is accurate and reflects the services provided.

(b) Social workers should include sufficient and timely documentation in records to facilitate the delivery of services and to ensure continuity of services provided to clients in the future.

(c) Social workers' documentation should protect clients' privacy to the extent that is possible and appropriate and should include only information that is directly relevant to the delivery of services.

(d) Social workers should store records following the termination of services to ensure reasonable future access. Records should be maintained for the number of years required by state statutes or relevant contracts.

(a) When an individual who is receiving services from another agency or colleague contacts a social worker for services, the social worker should carefully consider the client's needs before agreeing to provide services. To minimize possible confusion and conflict, social workers should discuss with potential clients the nature of the clients' current relationship with other service providers and the implications, including possible benefits or risks, of entering into a relationship with a new service provider.

(b) If a new client has been served by another agency or colleague, social workers should discuss with the client whether consultation with the previous service provider is in the client's best interest.

National Association of Social Workers, 750 First Street, NE • Suite 700, Washington, DC 20002-4241.

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New Mexico Coalition Against Domestic Violence  
1000 Cordova Place, #52, Santa Fe, NM 87505  
(505) 246-9240 • [www.nmcadv.org](http://www.nmcadv.org)