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Fatality Review and Surveillance Programs

MEMORANDUM

TO: Virginia Local Family and Intimate Partner Fatality Review Teams

FROM: Virginia Powell, Ph.D.

SUBJECT: Guidance on Access to Domestic and Sexual Violence Service Records

DATE: September 1, 2010

Several of you have asked the Office of the Chief Medical Examiner to clarify law and policy with regard to Virginia's Local Family and Intimate Partner Fatality Review Teams' review of service information for decedents who had accessed sexual and domestic violence services. This memorandum will provide information and guidance on use of these records.

Relevant Law and Policy

We started with the Office on Violence Against Women (OVW). We asked Marnie Shiels, Attorney Advisor, to counsel us on the OVW's thinking on access to domestic violence service records (1) when the victim of domestic violence is killed and (2) when someone other than the victim of domestic violence is killed as a result of domestic violence. Here is her response, verbatim:

'The confidentiality provision at 42 U.S.C. 13925(b)(2) protects confidentiality and privacy of victims receiving services with VAWA grant dollars "in order to ensure the safety of adult, youth, and child victims of domestic violence." Please note it only applies to grantees and subgrantees and victims served with OVW funding so if the program in question is not



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receiving VAWA funding or if the victim was not served with such funds, this provision would not apply. In addition, in your first scenario, the victim is already deceased so there is no longer any point to ensuring her safety and therefore the recipient of funds could release information about the victim. In the second scenario because the victim is still alive, the information would still be protected by this provision assuming she was served with VAWA funds” (e-mail correspondence, July 20, 2010).

At the same time, the Virginia Sexual and Domestic Violence Action Alliance (Action Alliance) has prepared a **Confidentiality Policy Template** for use by local programs and, in so doing, provides guidance on the interpretation of § 63.2-104.1 of the **Code of Virginia** regarding the confidentiality of records of persons receiving domestic and sexual violence services. A complete copy of this template is attached here as Appendix A. We want to highlight two relevant sections of that model policy here:

I. [Agency Name] shall not share personally identifying information or other personal information collected in connection with services requested, utilized, or denied without the fully informed, written, and reasonably time-limited consent of the person receiving services (or the parent or guardian of the person). Agency Name is not legally allowed to release information without the service participant’s consent except in very specific situations. These are limited to ...

5. When an Adult Family Violence Fatality Review Team established under Virginia Code section § 32.1-283.3 requests information after the death of a service participant for the purpose of preventing future incidents of family violence. The confidentiality of this information must be protected by the Fatality Review Team members, individually and collectively (Page 1).

II. Staff may share personally identifying information or individual information if the service participant gives them explicit, informed, written, reasonably time-limited consent to do so. When releasing information to another agency, staff must make sure that the service participant knows how sharing the information may be helpful and how it could potentially be harmful.

1. Before service participants authorize the release or disclosure of their information by [Agency Name], the service participant should review the information to be released and discuss the benefits and drawbacks of releasing that information.

2. *[Agency Name] will ensure that the service participant is informed of the specific information to be shared, the purpose for which the information is to be released, the duration for which the release is valid, and the ramifications of disclosure, including whether a partial disclosure of information might legally require full disclosure of all confidential information.*
3. *Releases must be in writing, signed, and dated in ink. The written release must —*
 - a. *Be specific as to the information being released.*
 - b. *Include the purpose for the information being released.*
 - c. *Designate the individual the information is going to.*
 - d. *Specify a time limit for the release (which typically should not exceed 15-30 days).*
 - e. *Include a statement that the release can be revoked at any time by the service participant (Pages 3-4).*

Guidance for Virginia Teams

In summary, the above language suggests two paths local teams should follow when seeking information about a victim's sexual and domestic violence service records.

- ◆ When the victim of domestic violence is dead and her/his case is being reviewed by a Team, federal policy and state law and policy permit the direct sharing of information about the decedent between the domestic violence program and the fatality review team. This is most practically accomplished through the team representative from the local program.
- ◆ When the victim of domestic violence is alive and the dynamics of her/his family or intimate partner relationship are important to understanding a case under review by a local team, teams should work through their team representative from the domestic violence program to obtain that person's consent to share information with the fatality review team. The process for seeking consent is clearly laid out in the Action Alliance's **Confidentiality Policy Template**. See Appendix A.
- ◆ In all proceedings, local teams should be mindful of § 63.2-104.1 of the **Code of Virginia**, which protects the identity and confidentiality of persons accessing domestic and sexual violence services, and of § 32.1-283.3 of the **Code of Virginia**, which requires that fatality review teams protect confidentiality in all cases under their review.

I hope that this information is helpful to you. Please don't hesitate to contact me if you have additional questions or concerns. Virginia.Powell@vdh.virginia.gov or 804.205.3854.

Appendix A: Confidentiality Policy Template

Statement of Agency Commitment to Confidentiality

[Agency Name] is committed and required by state and federal law to protect the confidentiality of persons accessing services. The purpose of providing confidential services is to respect the privacy and self-determination of persons who have experienced sexual and domestic violence.

[Agency Name] prioritizes the safety and well-being of persons accessing services and will make every effort to ensure that it implements its confidentiality policy, including the release of any information to a third party, in a manner that considers the safety and dignity of persons accessing services.

[Agency Name] shall not share personally identifying information or other personal information collected in connection with services requested, utilized, or denied without the fully informed, written, and reasonably time-limited consent of the person receiving services (or the parent or guardian of the person). [Agency Name] is not legally allowed to release information without the service participant's consent except in very specific situations. These are limited to:

1. When a crime occurs on [Agency Name]'s property and it has been determined that law enforcement should be involved;
2. Emergencies which are life threatening or could result in serious bodily harm to an identified person;
3. When a mandatory reporter, as defined in the Virginia Code, is employed by [Agency Name] and has been given reason to suspect child abuse or neglect;
4. When a mandatory reporter, as defined in the Virginia Code, is employed by [Agency Name] and has been given reason to suspect the abuse, neglect and/or exploitation of an incapacitated adult over 18 years or an adult aged 60 and over;
5. When an Adult Family Violence Fatality Review Team established under Virginia Code section § 32.1-283.3 requests information after the death of a service participant for the purpose of preventing future incidents of family violence. The confidentiality of this information must be protected by the Fatality Review Team members, individually and collectively.

When [Agency Name] releases any information, whether it is with the service participant's permission or because it is allowed by law for one of the above reasons, [Agency Name] shall make every effort to release the information in a respectful and responsible manner and with concerns for the safety, privacy, and dignity of those impacted by the release of the information.

Definitions

Confidential information includes any written or spoken information shared in confidence between [Agency Name] and a service participant in the course of that relationship, which includes all knowledge, records, logs, or working papers relating to the service participant. Confidentiality shall also apply to any information received from a third party regarding the service participant

Service participant is any person, including any adult, youth, or child who contacts [Agency Name] or receives any services from [Agency Name], whether those services are received by telephone, fax, electronically, or in person and whether those services are sought for themselves or for someone else.

Staff includes all paid and unpaid staff, including, but not limited to, volunteers, student interns, and board members of [Agency Name]

Personally identifying information is individually identifying information about an individual and includes information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault, or stalking. This can include—

- a) a first and last name;
- b) a home or other physical address;
- c) contact information (including a postal, e-mail or Internet protocol address, or telephone or facsimile number);
- d) a social security number; and
- e) any other information, including date of birth, racial or ethnic background, or religious affiliation that, in combination with any other non-personally identifying information would serve to identify any individual.

Guidelines for Protecting Confidential Information

Even when sharing information among its own staff, [Agency Name] shall respect the privacy of service participants and their right to decide who has access to personal information. Paid staff should only share a service participant's confidential information with other staff when the information is necessary for the delivery of Agency services and with the consent of service participants. Even though all staff, including volunteers, are required to protect the confidentiality of service participants, paid staff shall make every effort to limit unpaid staff and/or volunteer access to confidential information.

Staff must not share any information about a service participant to anyone outside of [Agency Name] without informed, written, reasonably time-limited consent of the service participant.

1. This includes the following:
 - a. Staff should not share any personally identifying information or personal information, including the location or identity of any person who is receiving or has received services. This includes information that, by itself or in addition to other information, could identify or provide the location of a service participant.
 - b. Similarly, disclosing the identity of any person who contacted or was referred to the agency, but did NOT receive services is also a breach of confidentiality. An appropriate response to an inquiry would be, "I have no information for you."
 - c. Staff should not share whether or not a person has sought, has received, or is receiving services. For example, staff must not confirm or deny the presence of an individual or family at the shelter. An appropriate response would be, "I have no information for you."

- d. Staff should never acknowledge that someone is receiving services without a specific, informed, time-limited release by the service participant. If asked to take a message, the advocate should respond with the agency’s standard phrase: “It is our policy to neither confirm nor deny that “X” is here, but I’d be happy to post a message on our bulletin board.”
 - e. Staff should not share information when ordered to do so by a court mandate. If this occurs, staff must immediately contact the Executive Director at [provide information to direct your staff on how to contact you].
 - f. Staff should not share information when required to do so by a statutory mandate. If this occurs, staff must immediately contact the Executive Director at [provide information to direct your staff on how to contact you].
2. Staff shall ensure that records remain confidential. To avoid the inadvertent disclosure of confidential communication, staff should contact [insert the appropriate staff person/position for your agency] when they receive a request for information regarding a client.
 3. Service participants’ should not be identified in any materials used for teaching, public announcements, community education, or in written or verbal reports given to someone outside [Agency Name] The only exception to this is when the service participant asks [Agency Name] to identify her/him and gives permission in writing.
 4. Funders or auditors who must monitor service records must sign a confidentiality agreement before viewing any records that may contain protected information. Personally identifying information will be covered, redacted, or removed from records before they are viewed by auditors/funders.

Guidelines Regarding Release of Information w/ Consent

Staff may share personally identifying information or individual information if the service participant gives them explicit, informed, written, reasonably time-limited consent to do so. When releasing information to another agency, staff must make sure that the service participant knows how sharing the information may be helpful and how it could potentially be harmful.

4. Before service participants authorize the release or disclosure of their information by [Agency Name], the service participant should review the information to be released and discuss the benefits and drawbacks of releasing that information.
5. [Agency Name] will ensure that the service participant is informed of the specific information to be shared, the purpose for which the information is to be released, the duration for which the release is valid, and the ramifications of disclosure, including whether a partial disclosure of information might legally require full disclosure of all confidential information.
6. Releases must be in writing, signed, and dated in ink. The written release must —
 - a. Be specific as to the information being released.
 - b. Include the purpose for the information being released.

- c. Designate the individual the information is going to.
 - d. Specify a time limit for the release (which typically should not exceed 15-30 days).
 - e. Include a statement that the release can be revoked at any time by the service participant.
7. After the release is signed, it becomes part of the service participant's confidential record and shall be placed in the service participant's file. When it is necessary for a release to be signed off-site (not [Agency Name]'s facility), staff shall make every effort to take the release immediately to the office (within 24 hours) so that it can be placed in the service participant's confidential file.
 8. [Agency Name] does not require a service participant to provide a release of information in order to receive services. Services will never be denied because the service participant chooses not to sign a release of information.
 9. Limited releases: If the service participant gives informed, written, reasonably time-limited consent for release of confidential information, the staff person shall release the specific, limited information per the service participant's request. Under no circumstances should a staff person release more information than authorized by the service participant in the limited release.
 10. If a service participant verbally revokes an authorization to release information or records, staff should attempt to get that revocation in writing. However, even without written revocation, staff must honor the verbal revocation immediately and not release any information. Staff should document the date and time of the verbal revocation on the release.
 11. In cases involving unemancipated minors, the minor's non-offending parent or legal guardian must sign the release as well as the minor.

(NOTE: An agency can provide services to a child without the signature of a parent but cannot release personally identifying or confidential information regarding the minor without a release signed by the minor AND the parent.)
 12. Unless a minor has given permission to share information with their non-offending parent, staff shall make every effort to protect the minor's privacy and confidentiality, which includes limiting the release of information to the minor's non-offending parent unless there are concerns about the child's well being or the well being of someone else.

(NOTE: It is important that the parent and the minor understand what will and will not be shared.)
 13. If a service participant has been legally adjudicated as unable to sign legal documents and a legal guardian has been court appointed, then the guardian has the right to consent to disclosure of confidential information maintained by [Agency Name]. The legal guardian must provide a certified copy of her/his order of appointment. The service participant shall still be advised that disclosure is anticipated.

14. Blank release forms or release of information forms created by another agency, even if signed by the service participant, are not effective to release confidential information from [Agency Name].

Additional Guidelines Regarding Release of Information

1. Emergencies which are life threatening or could result in serious bodily harm

To the extent possible, emergency services should be contacted without revealing any confidential information about any program participant. In many cases, the survivor should be conscious and able to speak with Emergency Medical Technicians (EMT). It is important to remember that even if it is appropriate to call 911, it is never appropriate to share a service participant's whole case history or file. In addition, it is not appropriate to specifically comment on why s/he was receiving assistance from your organization.

Staff may share confidential information when there is a clear and imminent danger that is life threatening or could result in serious bodily harm to an individual. When appropriate and possible, this determination should be made by the [insert the appropriate staff person/position for your agency]. If time is of the essence, staff should first call 911 and notify the [insert the appropriate staff person/position for your agency] as soon as is reasonable.

In cases involving service participants with Limited English Proficiency (LEP) or who are deaf and/or hard of hearing, staff should work with 911 and [Agency Name]'s service protocol to ensure translation services are available.

2. Mandatory reporting of child abuse & neglect and mandatory reporting of abuse, neglect and/or exploitation of an incapacitated adult over 18 years or an adult aged 60 or over.

Staff of [Agency Name] are not subject to mandatory reporting laws simply by being employed by [Agency Name]. Staff must address concerns for a service participant's safety and the safety of other family members and plans to prevent or reduce harm without releasing personally identifying information unless the service participant has given their consent. Releasing information without the service participant's consent would be in direct violation of state and federal law.

The Virginia Code §63.2-1509 & §63.2-1606 clearly define which professionals are mandatory reporters of child abuse & neglect and abuse and neglect of incapacitated adults or adults aged 60 or over. Staff who are mandatory reports must inform the Executive Director at the time of hire or immediately after gaining the specialized training or credentials that make them a mandatory reporter by statute. The Executive Director will ensure that mandatory reporting obligations of any staff are appropriately documented in their personnel file.

Staff who are mandatory reporters shall notify [insert the appropriate staff person/position for your agency] when they may need to report the abuse and neglect of a child, incapacitated adult, or adult aged 60 or over due to suspicions of abuse. When a mandatory reporter on staff suspects the abuse and neglect of a child, incapacitated adult, or adult aged 60 or over, [Agency Name] will report the suspected abuse to the appropriate authority per Virginia Code (Virginia Code §63.2-1509 & §63.2-1606).

[Agency Name] shall make every effort to release required information in a respectful and responsible manner and with concerns for the safety and dignity of those impacted by the report.

3. Responding to court orders/subpoenas

Request for release of records and/or confidential information from an outside agency (subpoena/court order) shall be sent to the Director and/or designee. No other staff member, without authorization from the Director, shall release records or information in response to an outside request.

[Agency Name] shall make every effort to release the information in a respectful and responsible manner and with concerns for the safety, privacy, and dignity of those impacted by the release of the information

4. “Duty to protect third parties from violent behavior or other serious harm”

Staff of [Agency Name] are not subject to “duty to protect” laws simply by being employed by [Agency Name]. Staff must address safety concerns regarding explicit threats to an identified third party and plans to prevent or reduce harm without releasing personally identifying information unless the service participant has given their consent. Releasing information without the service participant’s consent would be in direct violation of state and federal law.

The Virginia Code § 54.1-2400 clearly defines mental health professionals who have a “duty to protect.” Staff who have a “duty to protect” must inform the Executive Director at the time of hire or immediately after gaining the credentials that require them to protect third parties from violent behavior or serious harm. The Executive Director will ensure that the “duty to protect” obligations of any staff are appropriately documented in their personnel file.

Staff who have a “duty to protect” shall notify [insert the appropriate staff person/position for your agency] when a service participant has communicated a specific and immediate threat that the staff person believes requires action per Virginia Code § 54.1-2400. Any subsequent action to prevent harm will be taken in accordance with Virginia Code § 54.1-2400.

[Agency Name] shall make every effort to release required information in a respectful and responsible manner and with concerns for the safety and dignity of those impacted by the report.

Created by the Virginia Sexual and Domestic Violence Action Alliance, March 2010. (Adapted from Template Policy: Confidentiality, Privacy, and VAWA 2005 created by Julie Field, Esq. in partnership with the National Network to End Domestic Violence).