MODEL PROTOCOL

On Record-Keeping
When Working with Battered Women

Washington State Coalition
Against Domestic Violence

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The Washington State Coalition Against Domestic Violence is a statewide non-profit organization committed to ending domestic violence through advocacy and action for social change.

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Model Protocol On Record-Keeping When Working With Battered Women

Introduction[1]

So, why do we keep records of our work? Especially when so many of us who excel at advocacy are not so excellent at record-keeping? First, to provide good service. As we develop a relationship with the person we are advocating for, our notes remind us of who she is, what her concerns and immediate needs are. If she calls a day, a week or a month later, we can pick up where we left off. Our notes and forms can also remind us of what we've discussed and what still needs to be conveyed. Beyond helping us to offer good service, our notes provide important feedback to us: Do the people we serve represent the whole community? Are we receiving more calls or fewer calls? Are there more children at the shelter? Do some people stay longer than others? In other words, how are we doing? Sometimes the documentation is for funders (which is another topic).

However, there are dangers to record-keeping—dangers such as prying into people's lives and being intrusive. As the battered women's movement matures, we are getting better at avoiding this, but there is a temptation to collect data to justify our existence, to establish "professional" status or to satisfy our curiosity.

This prying can be hurtful to the individual in many ways. When someone's personal boundaries have been violated, it is especially important to be respectful of private information. Requiring information as a condition of service is especially demeaning.

Our relationship and agency reputation with the community is integral to our ability to provide good service. Ideally, our reputation is that we are effective and trustworthy. Part of being trustworthy is that we are respectful in what we ask and vigilant in safeguarding what has been entrusted to us. If we share information without carefully crafted, limited releases of information, we damage our own integrity as well as the privacy and safety of the woman and children we are serving.

Even with privileged communication for victim advocates under state law, there may be times when we are required to turn over records in some judicial proceedings. Our records can then be used against the person we are serving—and against our reputation as agencies that can be trusted. We all have examples of how our records could do damage: the abuser's attorney using chemical dependency concerns in a custody hearing; a woman's worry about her anger toward her child being used to establish the child's dependency. Carefully constructed records (and a rigorous record destruction schedule) can reduce the likelihood of damage.

With good policies and procedures, we can avoid harming the battered women and children we serve. The goal is to have only the specific information needed, for the length of time required. This model policy and recommended procedures provide a guideline.

[1] Introduction written by Lois Loontjens, Executive Director of New Beginnings (Seattle).

FEDERAL AND STATE LEGAL OBLIGATIONS

Federal and State Funding Statutes Require Domestic Violence Program Confidentiality

Federal Statutes

- **Programs that release records or information concerning battered women without the battered women's express consent may be violating federal law.**

Funding programs from the U.S. Department of Health and Human Services (HHS), the U.S. Department of Justice (DOJ) and the U.S. Department of Housing and Urban Development (HUD) attach statutory and regulatory requirements to recipients of funding which compel domestic violence programs to maintain confidentiality of program participants.

For example, some grant programs authorized by federal law—the Family Violence Prevention and Services Act (FVPSA), the Victim Compensation and Assistance Program (part of the Victims of Crime Act of 1984) (VOCA) and the Emergency Shelter Grants Program (ESP)—include statutory or regulatory language which require a domestic violence program, as a condition of funding, to have policies and procedures which will assure that confidentiality of served individuals will be maintained.

Violence Against Women Act (VAWA) 2005 [42 U.S.C. §13925; Public Law 109-162, Section 3(a)(18)]

The federal Violence Against Women Act was reauthorized by Congress in 2005. The legislation contains new language to protect the confidentiality of data pertaining to victims of domestic violence, dating violence, sexual assault or stalking. All recipients of VAWA grants (including STOP, GTEA and LAV) are prohibited from disclosing "personally identifying information" (see definition below) about program participants. The same language applies to recipients of funds under the Family Violence Prevention and Services Act (FVPSA) and McKinney-Vento Homeless Assistance Program.

> (18) PERSONALLY IDENTIFYING INFORMATION OR PERSONAL INFORMATION.
>
> The term "personally identifying information" or "personal information" means 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, including—
>
> (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 of subparagraphs (A) through (D), would serve to identify any individual.

Victim of Crime Act (VOCA) (42 U.S.C. 10601-10604)

Domestic violence programs which are granted funds under VOCA are required to follow 42 U.S.C. 10604(d) and (e), which specifically prohibit recipients of money under VOCA from revealing any information about a program participant that could be identified as any specific private person. Also, this information is immune from legal process in all proceedings. Violations of these provisions can result in suspension of funding.

State Statutes

- **Washington state law protects communication between a domestic violence advocate and program participant.**

RCW 5.60.060:

(8) A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.

- **State law prohibits domestic violence programs from releasing records about a program participant without their written permission.**

RCW 70.123.076:

A domestic violence program, an individual who assists a domestic violence program in the delivery of services, or an agent, employee, or volunteer of a domestic violence program shall not disclose information about a recipient of shelter, advocacy, or counseling services without the informed authorization of the recipient.

- **State law protects domestic violence program records about program participants as confidential (with some exceptions for judicial review).**

RCW 70.123.075:

(1) Program participant records maintained by domestic violence programs shall not be subject to discovery in any judicial proceeding unless:

(a) A written pretrial motion is made to a court stating that discovery is requested of the program participant's domestic violence records;

(b) The written motion is accompanied by an affidavit or affidavits setting forth specifically the reasons why discovery is requested of the domestic violence program's records;

(c) The court reviews the domestic violence program's records *in camera* to determine whether the domestic violence program's records are relevant and whether the probative value of the records is outweighed by the victim's privacy interest in the confidentiality of such records, taking into account the further trauma that may be inflicted upon the victim by the disclosure of the records; and

(d) The court enters an order stating whether the records or any part of the records are discoverable and setting forth the basis for the court's findings.

(2) For purposes of this section "domestic violence program" means a program that provides shelter, advocacy, or counseling services for domestic violence victims.

Records cannot be directly handed over to the requestor or attorney when a domestic violence program receives a subpoena: the court must perform a private review of the records to determine whether there in fact might be a need to breach confidentiality by disclosing the records.[2]

[2] *State v. Kalakosky,* 852 P.2d 1064 (Wash. App. 1993).

RECOMMENDED POLICY

It is the policy of **[name of agency]** to keep confidential all program participant records resulting from telephone contacts and any other work product related to recipients of service. There are a limited number of exceptions to breaching the confidentiality of program participant records. These exceptions are as follows:

- Duty to warn of an imminent threat of harm to self or others (this is known as a *Tarasoff* warning, based on case law);
- Following a court order, after a judge privately reviews program participant records (RCW 70.123.075); or
- When given express permission by the program participant to release information.

RECOMMENDED PROCEDURES[3]

General Agency Procedures

1. All staff, volunteers, student interns and board members should sign an agreement to maintain the confidentiality of program participant communications, records and written documentation (including crisis logs, emails and sticky notes).
2. All program participants, whether they are receiving services in person or on the telephone, will be informed of the agency's record-keeping practices and the exceptions to breaching confidentiality.
3. The agency should inform the program participant of the retention and destruction procedures regarding agency files.
4. All contents of program participant files and other written documentation should be limited to information that is required for statistical and funding purposes, establishing goals for the advocacy relationship, and documenting the need for services.
5. Emails and other electronic records stored on agency computers should be treated in the same manner as paper records for the purposes of confidentiality and record-keeping.
6. Program participant identifying information should not be disclosed in email messages either between program staff or to external parties, and appropriate steps should be taken to ensure the security of the agency's computer network. (For example, program participant information should not be stored on computers connected to the Internet.)

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[3] Adapted from the model confidentiality policy drafted by the Pennsylvania Coalition Against Domestic Violence (Barbara J. Hart, Staff Counsel) in December 1992 and contained in the Appendix of "Confidentiality for Domestic Violence Service Providers In Arizona Under Federal and State Law," Arizona Coalition Against Domestic Violence, June 2001, p. 26-38.

7. All records are confidential, even when shared by the program participant in the presence of an advocate and any third parties who are working on behalf of the program participant.
8. Requests by any third party for information or records, including the program participant's status as a client, will not be honored without express written permission from the program participant, with the exception of a court order (RCW 70.123.075). Third parties include, but are not limited to, the program participant's attorney, representatives of the criminal justice system, mental health or medical providers, social service workers such as welfare, housing or child protective services, or friends and family.
9. If the agency is required to disclose a program participant's personal information or records under a court order, they will make "reasonable attempts" to notify the program participant that this has occurred (RCW 70.123.076).
10. If a program participant's personally identifying information has to be disclosed because of a court order, the agency will take all necessary steps to protect the individual's safety and privacy (RCW 70.123.076).
11. The agency should provide the record-keeping policy and supporting documents (such as written releases) in appropriate languages (basic literacy level as well as language translations) and accessible formats (such as tape cassette or large print) to the program participant.
12. All program participants' files should be routinely reviewed and unnecessary documents purged from the files, including documents stored electronically.
13. The agency should develop a process for responding to subpoenas for records, other work product or communications between the program participant and staff/volunteers.
14. The agency should establish a relationship with an attorney who understands the program's legal obligations and potential liability under federal and state confidentiality laws, and is committed to the policies of the program.
15. The agency should provide periodic training for staff, volunteer and board members regarding: the legal obligations for records held by domestic violence programs, the meaning and scope of legal privilege for communications between the advocate and victims of domestic violence, and the importance of maintaining the confidentiality of program participants' records.
16. The agency should monitor the implementation of the record-keeping policy and workplace practices.

Informing the Program Participant

All program participants, whether they are receiving services in person or on the telephone, will be informed of the agency's record-keeping practices and the exceptions to breaching confidentiality.

On the Phone

The advocate will:

1. explain the agency's record-keeping policy;
2. *not* document the program participant's full name in the crisis log;
3. explain to the program participant that their full name will not be documented in the crisis log;
4. explain that records are maintained for statistical and informational purposes.

In Person

The advocate will:

1. explain that contact between the advocate and victim is documented for statistical and informational purposes.
2. explain what information will be kept in the program participant file.
3. explain the agency record-keeping policy and procedures and the exceptions to breaching confidentiality.
4. explain that files are kept in a locked place with limited access by staff.
5. explain who has access to the program participant file.
6. explain that program participants have the right to review the contents of their file and request the correction or removal of inaccurate, irrelevant, out-dated or incomplete information.
7. explain that information received from sources other than hers may be included in her file.
8. explain to the program participant that if she needs the agency to hold papers for safekeeping, those papers will not be part of her file but will be kept in a locked place.
9. ask the program participant to sign a form that states that she has been informed of the agency recording keeping and documentation policy and procedures, and place the signed form in the program participant's file.

Content of Program Participant Files

The content of program participant files and other written documentation should be limited to information that is required for statistical and funding purposes, establishing goals for the advocacy relationship and documenting the need for services.

Verbatim statements made by or concerning a program participant are never included in the file. In some agencies, files related to the program participant may be held in more than one location or be tied to different kinds of advocacy services. For example, legal and sexual assault advocates may maintain separate files on the same program participant. Agencies should develop procedures that allow for the sharing of limited, relevant written information between staff regarding the program participant. For example, the legal advocate may send a brief memo to the sexual assault advocate that summarizes her contact with the participant. This memo should be dated and signed by the legal advocate and inserted into the sexual assault advocate file.

When the program participant no longer uses the agency services, all documents that required a signature (such as a release of information or medical releases) should be kept in an administrative file, not the program participant file.

Information received from sources other than the program participant may sometimes be included in the file. Keep in mind that summarizing documents obtained from other sources is not an appropriate practice. The original document, if relevant, should be maintained in the program participant's file until the end of service delivery. Copies of protection orders, as well as petitions and court orders in other family law matters, may be retained in the file. However, program participant files should *not* contain legal documents or statements containing legal conclusions that potentially may be used against her, except those conclusions made by a court of law or by an attorney for the program participant.

When a program participant asks the agency to hold personal papers (e.g., diary or journal writing or other important papers such as birth certificates, immigration documents, enrollment cards or car title) for safekeeping, these documents should be kept in a locked place. Such materials should not be considered part of the program participant records.

Written statements or letters should not be kept in the program participant file except where they are critical to service delivery or advocacy and then only for the duration of service delivery.

1. All entries in a program participant file must be legible and using wording familiar to program participants.
2. Shelter logs or telephone logs should use only the first name of clients whenever reasonable. These logs must be factual only and must not include interpretive or evaluative remarks about the program participant.
3. Essential communications about individual clients that cannot effectively be made orally to other workers in the program should be made in memo form and must be immediately destroyed by the recipient worker.

4. Volunteers and students/interns working in the program are not authorized to make entries in the program participant files. Counseling notes of the students should be kept in the student's supervision file. If and when student notes are released to college instructors, all identifying material must be removed from these notes, including the names of staff, volunteers, battered women and their children, and other students.

Access to Program Participant Files

Staff Access

1. Access to client records is permissible only to those people who are:
   - present at the time the information is shared and working to further the interests of the program participant.
   - working for the agency and also working on behalf of the program participant, such as the executive director, advocates, student interns and volunteers.
2. Access to client records files will be controlled and monitored by the advocate or executive director when needed.

Program Participant Access

1. Requests by program participants to review their files must be honored.
2. Requests by any third party, including but not limited to a program participant's attorney, will not be honored without the program participant's informed, written consent.
3. The program participant, or an authorized third party, may make notes about the contents of her file and make a written request for a copy of those portions of the file that are not the work product of the agency.
4. The program participant should be informed that a copy of her file released to any third party may no longer be covered by confidentiality and disclosure laws that protect domestic violence programs, and the information it contains could be used against her.
5. The program participant may request the correction or removal of inaccurate, irrelevant, out-dated or incomplete information from her file. Any document or notation required by a contract must remain in the file. The file may be corrected; however, if the agency disputes the accuracy of a proposed correction, the dispute shall be noted and the file remain unchanged. In response, the program participant may submit to her file information or a written statement supporting her proposed correction.
6. Written documents or materials held by the agency for safe-keeping are not to be kept in the program participant's file and must be released upon her request.

These materials are not subject to review, even by authorized persons who have access to program participant files.

7. Program participant files may not be removed from the agency except with prior written permission of the executive director or her delegate.

Access by Board Members

1. All members of the agency's board of directors are required to sign an agreement to maintain confidentiality and are informed of the agency's confidentiality obligations.
2. Board members do not have access to program participant files or to information that would identify a client, except with authorization of the program participant or the executive director. Generally, this authorization is given under the following circumstances: in specific administrative situations; for handling a subpoena of a program participant's file; or if there is litigation against the agency related to the program participant.

Access by General Public

1. The general public is not entitled to access the agency's records. Names and other case information that could identify a program participant must never be used in meetings, trainings or public speaking. Disclosure should be made only with the explicit, written permission of the program participant.
2. Agency records that are subpoenaed shall not be surrendered before consulting with an attorney and requesting a private court review to determine the need to breach confidentiality by disclosing the records (as outlined in RCW 70.123.075).

Maintenance and Destruction of Program Participant Files

1. Program participant files must be kept in locked file cabinets or a locked area, which is secure at all times. Keys to the file cabinets or locked area should be in a secure and restricted location.
2. All files will be maintained and destroyed as contractually required.
3. The program participant should sign a statement acknowledging that she has been notified of the retention and destruction procedures regarding agency files.
4. The designated staff person will supervise the destruction of program participant files and program logs. Under no circumstances is a file, or any part thereof, to be destroyed to avoid a subpoena.

APPENDIX

Responding to Subpoenas and Warrants: Organizational Preparation

This material was adapted from the model confidentiality policy drafted by the Pennsylvania Coalition Against Domestic Violence (Barbara J. Hart, Staff Counsel) in December 1992 and contained in the Appendix of "Confidentiality for Domestic Violence Service Providers In Arizona Under Federal and State Law," Arizona Coalition Against Domestic Violence, June 2001, p. 38-40.

I. Review record-keeping procedures.

Ask yourself these questions:

- What kinds of records are maintained?
- How much factual information is kept in the records?
- Are statements taken verbatim from the victim and quotation marks used?
- What sources of money does your facility receive?
- What state and federal laws apply to you?
- What do the laws require?
- Which staff have confidentiality privileges by statute?

After you have answered these questions:

- Decide how and where files are kept.
- Decide who has access.
- Decide your retention and destruction policy.
- Decide when you will release information.
- Revise record-keeping policy.
- Review your forms.
- Train staff/volunteers how to use new forms.
- Inform program participants about policy.

II. Designate a custodian of records who shall:

- Maintain control over the records.
- If necessary, bring the records to court.
- Ensure conformity in procedures.
- Keep track of number and types of subpoenas served.
- Follow the agency procedures when responding to a subpoena.
- Include in your procedures that:
  - If there is an administrative office separate from the shelter, the custodian should be at the administrative office**.**
  - Only the custodian or person named on document can accept subpoenas and warrants.

III. Develop a relationship with an attorney who:

- Advises the program on its potential liability.
- Is committed to the policy of the program.
- Is aware of the program's legal obligations under federal and state confidentiality laws.

IV. Inform and train staff, volunteers, student interns and board members about all policies and procedures.

- Specifically spell out procedures.
- Tell staff that only authorized persons can accept subpoenas.
- Ensure that staff who may be the first point of contact for a subpoena are well trained.

V. Proceed on a case-by-case basis for each subpoena.

- Never reveal information to anyone who is serving the subpoena.
- Do not answer any questions from the process server.

VI. Examine and develop procedures.

- Review existing record-keeping procedures.
- Require all volunteers, board members, student interns and staff workers to sign confidentiality agreements with the program.
- Consider changing record-keeping procedures so that no confidential information is kept in the program participant files.
- Assess the impact that the disclosure of records will have in court.
- Whenever possible, secure the program participant's informed, express consent before releasing records or testifying.
- Have the attorney (both one working for the agency and the program participant's attorney, if applicable) explain to the program participant the effect of records release.
- Ensure that workers or volunteers who receive a subpoena contact the program immediately.
- Remember that a subpoena, even one signed by a judge, *does not* require the automatic release of files or other information. Follow the established agency process when responding to a subpoena.

VII. Determine how far the program will go to challenge a subpoena.

- Release nothing at all from the start.
- Discuss a possible contempt citation and other consequences with an attorney.
- Appear in court or at a hearing and assert privilege under state and federal laws.
- Show records to the judge *in camera* but release nothing to the party requesting information.
- If ordered by the court to disclose records or communications, discuss risking a contempt citation or imprisonment with staff and attorney.
- Discuss options to appeal contempt citation or confinement with an attorney.

- Discuss strategies and ability to mobilize community support if the agency chooses to face imprisonment and refuses to release records.

VIII. Take the appropriate legal actions.

1. The attorney working with the agency should:
   - File a motion to quash the subpoena.
   - Object to procedural defects with documents – e.g., incomplete, overly broad, unclear, improperly served.
   - Insist that the information sought is privileged or confidential.
   - Learn why the records are sought and for what purpose.
   - Present testimony on the critical importance of confidentiality and safety to battered women.
   - Use litigation to educate the judge on purpose of the program and why confidentiality is so essential.

2. If the motion to quash is unsuccessful:
   - Ask for *in camera* review.
   - File a motion for a protective order for the records.
   - Argue for partial protection for the records or scope of questions.
   - If both motions are unsuccessful, appeal with other organizations joining by amicus curiae.

IX. If someone must take the witness stand:

- Consult an attorney immediately.
- Prepare for questions most likely to be asked.
- Listen carefully to the language of the questions.
- Pause before answering – to allow for an objection by your attorney.
- Limit your answer to what was asked.
- Bring copies of policies and records to court.
- Tell the truth.
- Do not volunteer information.
- Do not show anger.
- Bring bail money.