



FAQs: Privacy Laws Impacting Survivors

Massachusetts

This FAQ card provides attorneys and advocates with a starting point for researching common privacy issues that impact victims of domestic violence, sexual assault, and stalking, and includes citations to laws that affect victims' privacy rights. Depending on the facts of a specific case, such as a victim's age or occupation, there may be additional laws that expand or limit a victim's privacy. This card is intended as a summary of relevant laws and was last revised in August 2018. We do not guarantee that all relevant laws are included and the information provided does not constitute legal advice. If you are dealing with a privacy-related situation, we recommend that you contact a local attorney. If you need help finding an attorney, visit the ABA's Lawyer Referral Directory at https://www.americanbar.org/groups/legal_services/flh-home/flh-hire-a-lawyer/ or contact your state coalition. We encourage you to contact the VRLC with your privacy-related questions at privacyTA@victimrights.org or 503-274-5477.

1

What mandatory reporting laws should I be aware of in my jurisdiction? Massachusetts law defines certain categories of individuals who *must* report abuse or injury to the department of children and families, department of elder affairs, disabled persons protection commission, or law enforcement. The chart below summarizes certain providers' mandatory reporting obligations for specific populations. Read the statutes for additional categories of mandatory reporters, definitions of abuse and injury, procedures for reporting abuse, and any exceptions to mandatory reporting obligations. The chart below includes only *mandatory* (and not optional) reporters. (This is because the Violence Against Women Act (VAWA) allows VAWA-funded entities to disclose a victim's personally identifying information without consent only if disclosure is mandated by a statute or court order.)

What must be reported?	Who is REQUIRED to report?			Citation
	Social worker	Mental health professional	Health care provider	
Child abuse	✓	✓	✓	Mass. Gen. Laws ch. 119, §§ 21, 51A
Elder abuse	✓	✓	✓	Mass. Gen. Laws ch. 19A, § 15
Disabled person abuse	✓	✓	✓	Mass. Gen. Laws ch. 19C, §§ 1, 10
Firearm, knife, or burn injury			✓	Mass. Gen. Laws ch. 112, § 12A
Sexual assault (non-identifying info only) ¹			✓	Mass. Gen. Laws ch. 112, § 12A1/2
Client is danger to others ²	✓ ³	✓		Mass. Gen. Laws ch. 123, § 36B

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If I am working in Indian Country or on federal property, what authorities should I consult to determine my mandatory reporting obligations?⁴ Several laws govern mandatory reporting obligations in Indian Country⁵ and on federal property. Tribal codes may require certain individuals to report child abuse and elder abuse to tribal officials, law enforcement, or tribal social services. Federal laws also address mandatory reporting. These laws apply to certain professionals who work in federal facilities or lands,⁶ or who suspect that child abuse has occurred or will occur in Indian Country.⁷ Additionally, state laws (discussed in Question 1), licensing regulations, and ethical obligations may require certain professionals to report abuse. Determining how these laws interact is complicated. Programs should contact attorneys and technical assistance providers for more information.⁸

3

May a victim counselor be present during a victim's privileged communications with an attorney, mental health professional, or physician without waiving the victim's right to keep those communications confidential? Massachusetts law does not directly address this question. The state recognizes several categories of privileged communications, including sexual assault counselor and victim,⁹ domestic violence counselor and victim,¹⁰ human trafficking victim caseworker and victim,¹¹ attorney and client,¹² psychotherapist and patient,¹³ social worker and client,¹⁴ and allied mental health or human services professional and client.¹⁵ However, the law does not indicate whether privilege is waived where a third party is present during a privileged conversation to further a victim's interests in legal or therapeutic services.¹⁶

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May an interpreter be present during a victim's privileged communications with a victim counselor, attorney, or mental health professional without waiving the victim's right to keep those communications confidential? Yes. Massachusetts law states that certain privileges are not waived by the presence of a third party who is reasonably necessary to providing the services.¹⁷ Additionally, where a qualified interpreter is appointed to a person in court proceedings, the person has a privilege to prevent the qualified interpreter from disclosing confidential communications that were facilitated by the interpreter.¹⁸

5

Are a victim's privileged communications with a victim counselor, attorney, or mental health professional protected from disclosure after the victim's death? Yes, for a victim's communications with an attorney, because Massachusetts law indicates that this privilege survives the client's death.¹⁹ Massachusetts law does not directly address whether the victim counselor privilege or mental health professional privilege survives the patient's death. Communications between social workers and clients may be disclosed in any proceeding after the death of a client in which client's mental or emotional condition is at issue.²⁰ For guidance on whether VAWA may help protect a victim's confidentiality after death, contact the Victim Rights Law Center or Jane Doe Inc.

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Are communications between a victim and a prosecutor's office or law enforcement agency confidential? No. Communications between a victim and employees of a law enforcement agency or prosecutor's office are not confidential because the government has a duty to turn over exculpatory evidence to the defendant. Exculpatory evidence is information that tends to prove the defendant's innocence and could include statements or personal records the victim gave to a victim-witness assistant employed by a prosecutor's office, law enforcement, or other government agency. By contrast, advocates with non-profit agencies typically are not subject to these rules, as they are not part of the prosecution team or a party to the criminal case.

7

When must school employees report gender-based violence against adult victims to the school's Title IX Coordinator? An employee's role determines when a report of gender-based violence, e.g., sexual assault, domestic violence, dating violence, or sexually motivated stalking, must be made to a Title IX Coordinator. Under Title IX, a "responsible employee" has a duty to report such violence if they "knew, or in the exercise of reasonable care should have known, about the harassment." Responsible employees include anyone who has authority to address the violence; who has a duty to report other misconduct that violates school policy; or whom a student

could reasonably believe has this authority or duty. In 2017, the Office for Civil Rights retracted the 2011 Dear Colleague Letter and companion guidance. The federal requirements for what a responsible employee must disclose to a Title IX Coordinator are currently unclear. If an employee's communication with the survivor are privileged, e.g., communications discussed in Question 3, they have no duty to report the violence unless other mandatory reporting obligations are in effect, e.g. reporting abuse of a minor or of an adult with a disability.

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May law enforcement access an adult victim's health information without the victim's consent? It depends on the type of information that is requested. The chart below summarizes some of the common situations in which law enforcement (LE) may access health information *without* patient consent under Health Insurance Portability and Accountability Act (HIPAA) regulations.²¹ Additionally, health care providers may be required by law to report certain injuries to LE, as discussed in Question 1.

Scenario	What may be disclosed?	Limitations on what may be disclosed
Health care provider receives court order, court-ordered warrant, subpoena or summons issued by a judicial officer, or grand jury subpoena	Information authorized by the court order, court-ordered warrant, subpoena, or summons	Disclosure may be limited by Massachusetts' health records privacy laws ²²
Provider receives administrative subpoena, summons, investigative demand, or other non-judicial process authorized by law	Information authorized by the administrative demand	LE must certify that the information requested is relevant, material, specific, and limited in scope, and that de-identified information could not reasonably be used
LE asks about a patient by name	The patient's location in the health care facility and general medical condition	Information must not be released if the patient has opted out
LE requests information to identify or locate a suspect, fugitive, witness, or missing person	Name; address; birth date; SSN; blood type; injury; date and time of treatment; date and time of death; physical description	Provider cannot disclose information related to the patient's DNA; dental records; or typing, samples, or analysis of body fluids or tissue
LE requests information about a crime victim who cannot consent due to incapacity or emergency	Information that LE states is needed to determine whether a crime has occurred	Information cannot be intended to be used against the victim; LE's need must be immediate; disclosure must be in the victim's best interests

How can I determine the privacy rights of minors and whether minors may legally consent to domestic violence, dating violence, sexual assault, or stalking services? The laws that govern a minor's right to privacy and right to consent to services are varied and complex. A program may need to consult several different laws, including the jurisdiction's laws regarding mandatory reporting (discussed in Question 1), emancipation, a minor's right to consent to medical and mental health services, and a parent or guardian's right to access a child's medical, counseling, or other personal records. Contact your state coalition or the Victim Rights Law Center for more information on how to approach this question.

Does a victim whose private information or photographs have been posted online without consent have any civil legal remedies? Likely yes, but legal and practical success and the victim's options will vary greatly depending on the facts of the case. Consult an attorney familiar with these issues before advising victims. Civil causes of action against the person who posted the content may include intentional infliction of emotional distress and invasion of privacy.²³ If the website hosting the content has policies regarding harassment or sexually explicit content, the victim should use these policies to request removal. Additionally, if the victim took the photo, video, or other content at issue, the victim may submit a Digital Millennium Copyright Act notice requesting that the website remove it.

¹ Massachusetts law explicitly states that the health care provider's report of sexual assault shall not include the victim's name, address, or any other identifying information. Mass. Gen. Laws ch. 112, § 12A1/2.

² Mass. Gen. Laws ch. 123 § 36B imposes a duty to warn when a patient has made an explicit threat to kill or seriously injure a reasonably identifiable victim and has an apparent intent and ability to carry out the threat; or when a patient has a history of physically violent behavior and the mental health professional believes that there is a clear and present danger that the patient will attempt to kill or seriously injure a reasonably identifiable victim.

³ See *Shea v. Caritas*, 79 Mass. App. Ct. 530 (2011) (holding that a licensed clinical social worker is considered a "mental health professional" for duty to warn purposes).

⁴ We have included this information for all jurisdictions because it may aid professionals who work across state lines or in federal lands or facilities.

⁵ Federal law defines "Indian Country" as all land within the limits of an Indian reservation under the jurisdiction of the U.S. government; all dependent Indian communities; and all Indian allotments still in trust. 18 U.S.C. § 1151.

⁶ Victims of Child Abuse Act: 42 U.S.C. § 13031 *et seq.* & 18 U.S.C. § 2258.

⁷ Indian Child Protection & Family Violence Prevention Act: 25 U.S.C. § 3201 *et seq.* & 18 U.S.C. § 1169.

⁸ A list of OVW technical assistance (TA) providers, including tribal TA providers, is available at <https://ta2ta.org/directory.html>.

⁹ Mass. Gen. Laws ch. 233, § 20J.

¹⁰ Mass. Gen. Laws ch. 233, § 20K.

¹¹ Mass. Gen. Laws ch. 233, § 20M.

¹² Mass. G. Evid. § 502. See, e.g., *Comm'r of Revenue v. Comcast Corp.*, 901 N.E.2d 1185 (Mass. 2009); *Matter of the Reorg. of Elec. Mut. Liab. Ins. Co. (Bermuda)*, 681 N.E.2d 838 (Mass. 1997).

¹³ Mass. Gen. Laws ch. 233, § 20B.

¹⁴ Mass. G. Evid. § 507. See *Commonwealth v. Pelosi*, 805 N.E.2d 1, 5 n.6 (Mass. 2004).

¹⁵ Mass. G. Evid. § 508. See *Commonwealth v. Vega*, 866 N.E.2d 892, 895 (Mass. 2007).

¹⁶ This question does not address physician-patient privilege because Massachusetts does not recognize this privilege. However, other laws, such as health information privacy laws and ethical duties of confidentiality, may protect the privacy of communications between patients and health care providers.

¹⁷ Mass. Gen. Laws ch. 233, §§ 20J, 20K, 20M; Mass. G. Evid. § 502(a)(4); Mass. G. Evid. § (b)(1); See *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.*, 870 N.E.2d 1105 (Mass. 2007). *Foster v. Hall*, 29 Mass. 89, 94 (1831) (establishing confidentiality protections for those "whose intervention is necessary to facilitate the communication between attorney and client, as interpreters, agents, and attorneys' clerks.").

¹⁸ Mass. Gen. Laws ch. 221, § 92A; Mass. Gen. Laws ch. 221C, § 4.

¹⁹ Mass. G. Evid. § 502(c); In re *John Doe Grand Jury Investigation*, 562 N.E.2d 69 (Mass. 1990).

²⁰ Mass. Gen. Laws ch. 112, § 135B(d).

²¹ 45 C.F.R. § 164.512. The regulations define "law enforcement official" as "an officer or employee of any agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, who is empowered by law to: (1) Investigate or conduct an official inquiry into a potential violation of law; or (2) Prosecute or otherwise conduct a criminal, civil, or administrative proceeding arising from an alleged violation of law." 45 C.F.R. § 164.103.

²² See Mass. Gen. Laws ch. 111, §§ 70, 70E.

²³ Mass. Gen. Laws ch. 214, § 1B.