



# FAQs: Privacy Laws Impacting Survivors

## New Mexico

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/](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](mailto:privacyTA@victimrights.org) or 503-274-5477.

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**What mandatory reporting laws should I be aware of in my jurisdiction?** New Mexico law requires any person to report child abuse or incapacitated adult abuse to the Children, Youth, and Families Department, the Aging and Long-term Services Department, local law enforcement, or tribal law enforcement. Read the statutes for definitions of abuse,<sup>1</sup> reporting procedures, and any exceptions to mandatory reporting obligations.

What must be reported?	Who is REQUIRED to report?	
	Any person	Citation
Child abuse	✓	N.M. Stat. Ann. § 32A-4-3
Incapacitated adult abuse	✓	N.M. Stat. Ann. § 27-7-30

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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?**<sup>2</sup> Several laws govern mandatory reporting obligations in Indian Country<sup>3</sup> 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,<sup>4</sup> or who suspect that child abuse has occurred or will occur in Indian Country.<sup>5</sup> 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.<sup>6</sup>

**3**

**May a victim counselor be present during a victim’s privileged communications with an attorney, psychotherapist, or physician without waiving the victim’s right to keep those communications confidential?** New Mexico courts have not directly addressed this issue. The state recognizes several categories of privileged communications, including victim counselor and victim,<sup>7</sup> attorney and client,<sup>8</sup> physician and patient,<sup>9</sup> and psychotherapist and patient.<sup>10</sup> Contact your state coalition for more information regarding procedures for protecting privileged communications.

**4**

**May an interpreter be present during a victim’s privileged communications with a victim counselor, attorney, psychotherapist, or physician without waiving the victim’s privilege to keep those communications confidential?** Yes, if the interpreter is needed to relay the communications. In New Mexico, privileged communications (such as those discussed in Question 3) are still considered confidential if a third party is present in furtherance of the purpose of the communications.<sup>11</sup> Additionally, New Mexico law provides that when a Deaf person communicates through an interpreter under such circumstances that the communication would be privileged, the privilege applies to the interpreter as well.<sup>12</sup>

**5**

**Are a victim’s privileged communications with a victim counselor, attorney, psychotherapist, or physician protected from disclosure after the victim’s death?** It depends. A victim’s communications with an attorney, physician, or psychotherapist will remain privileged, because New Mexico law indicates that these privileges survive the death of the client or patient.<sup>13</sup> The victim counselor privilege is silent as to this issue. For guidance on whether VAWA may help protect a victim’s confidentiality after death, contact the Victim Rights Law Center or your state coalition.

**6**

**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 an advocate 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.

# 8

**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.<sup>14</sup>

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 New Mexico's physician-patient privilege <sup>15</sup>
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

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**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.

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**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 invasion of privacy and intentional infliction of emotional distress. 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 request that the website remove it.

In addition, New Mexico has a criminal nonconsensual pornography (aka “revenge porn”) statute.<sup>16</sup> It is unlawful to distribute or publish sensitive images (defined as images of genitals, a woman’s breast, or sexual acts) of a person; without that person’s consent; with the intent to harass, humiliate, or intimidate; where the conduct is such that it would cause a reasonable person to suffer substantial emotional distress.

<sup>1</sup> See N.M. Stat. Ann. § 32A-4-2 for the state’s definitions of “abused child” and “neglected child.” The statute defines abuse and neglect in terms of action or inaction by the child’s parent, guardian, or custodian.

<sup>2</sup> We have included this information for all jurisdictions because it may aid professionals who work across state lines or in federal lands or facilities.

<sup>3</sup> 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.

<sup>4</sup> Victims of Child Abuse Act: 42 U.S.C. § 13031 *et seq.* & 18 U.S.C. § 2258.

<sup>5</sup> Indian Child Protection & Family Violence Prevention Act: 25 U.S.C. § 3201 *et seq.* & 18 U.S.C. § 1169.

<sup>6</sup> A list of OVW technical assistance (TA) providers, including tribal TA providers, is available at <https://ta2ta.org/directory.html>.

<sup>7</sup> N.M. Stat. Ann. § 31-25-3.

<sup>8</sup> N.M. R. Evid. § 11-503.

<sup>9</sup> N.M. R. Evid. § 11-504.

<sup>10</sup> *Id.*

<sup>11</sup> N.M. Stat. Ann. § 31-25-2; N.M. R. Evid. 503, 504.

<sup>12</sup> N.M. Stat. Ann. § 38-9-10.

<sup>13</sup> N.M. R. Evid. §§ 11-503, 11-504.

<sup>14</sup> 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.

<sup>15</sup> See N.M. R. Evid. § 11-504; N.M. R. Civ. Pro. 1-045.

<sup>16</sup> H.B. 142, 2015 Reg. Sess. (N.M. 2015), <http://www.nmlegis.gov/Sessions/15%20Regular/final/HB0142.pdf>.