



FAQs: Privacy Laws Impacting Survivors

West Virginia

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? West Virginia law defines certain categories of individuals who *must* report abuse or injury to the Department of Health and Human Resources, Adult Protective Services, 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
	Any person over 18	Social worker	Health care provider	Mental health professional	
Abuse or neglect of a child		✓	✓	✓	W. Va. Code §§ 49-1-201, 49-2-803
Sexual abuse of a child	✓	✓	✓	✓	W. Va. Code §§ 49-1-201, 49-2-803
Abuse of an incapacitated adult		✓	✓	✓	W. Va. Code § 9-6-9
Gunshot or knife wound			✓		W. Va. Code § 61-2-27

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2. If I am working in Indian Country or on federal property, what authorities should I consult to determine my mandatory reporting obligations?¹ Several laws govern mandatory reporting obligations in Indian Country² 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,³ or who suspect that child abuse has occurred or will occur in Indian Country.⁴ 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.⁵

3

May an advocate be present during a victim’s privileged communications with an attorney or mental health professional without waiving the victim’s right to keep those communications confidential? State law does not directly address this question. West Virginia recognizes several categories of privileged communications, including attorney and client,⁶ licensed professional counselor and patient,⁷ and domestic violence or sexual assault advocate and victim.⁸ However, the law does not indicate whether privilege is waived where a third party is present during a privileged conversation to further a client’s interests in legal or therapeutic services.⁹

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May an interpreter be present during a victim’s privileged communications with an advocate, attorney, or mental health professional without waiving the victim’s privilege to keep those communications confidential? West Virginia law does not directly address this question, except where a qualified interpreter must be appointed to a Deaf person in court proceedings. Any information that the interpreter gathers from the Deaf person pertaining to the proceedings remains privileged.¹⁰

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Are a victim’s privileged communications with an advocate, attorney, or mental health professional protected from disclosure after the victim’s death? It depends. The United States Supreme Court has held that the attorney privilege can survive the death of the client¹¹ and West Virginia law indicates that the attorney and mental health professional privileges survive the death of the client or patient.¹² The advocate 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 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.¹³ 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	West Virginia law requires a legal proceeding to be pending in order for a subpoena duces tecum to issue ¹⁴
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 (such as publication of private facts or intrusion) or intentional infliction of emotional distress. Additionally, a civil cause of action is available under the West Virginia Computer Crime and Abuse Act for persons who have been injured by obscene, harassing, and threatening communications.¹⁵ 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 We have included this information for all jurisdictions because it may aid professionals who work across state lines or in federal lands or facilities.

² 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.

³ Victims of Child Abuse Act: 42 U.S.C. § 13031 *et seq.* & 18 U.S.C. § 2258.

⁴ Indian Child Protection & Family Violence Prevention Act: 25 U.S.C. § 3201 *et seq.* & 18 U.S.C. § 1169.

⁵ A list of OVW technical assistance (TA) providers, including tribal TA providers, is available at <https://ta2ta.org/directory.html>.

⁶ State ex rel. Med. Assur. of W. Va., Inc. v. Recht, 583 S.E.2d 80 (W. Va. 2003).

⁷ W. Va. Code § 30-31-16.

⁸ W. Va. Code § 48-26-701.

⁹ This question does not address physician-patient privilege because West Virginia 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.

¹⁰ W. Va. Code § 5-14A-8.

¹¹ See Swidler & Berlin, 524 U.S. 399 (1978).

¹² 1-5 Handbook on Evidence for West Virginia Lawyers § 501.02; W.V. Code § 30-31-16.

¹³ 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.

¹⁴ State v. McGill, 741 SE 2d 127 (W. Va. 2013).

¹⁵ W. Va. Code §§ 61-3C-14a, 61-3C-16.