



Violence Against Women Act (VAWA) and Privacy

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Introduction

The Violence Against Women Act (VAWA) was the first piece of federal legislation specifically addressing domestic abuse. VAWA created grants to reduce violent crimes against women. VAWA provided education; funded a national hotline, and defined new crimes and causes of action. VAWA and its grantmaking is the main way in which nationwide domestic violence policy is implemented.

VAWA has evolved to contain areas that specifically touch on the privacy of domestic violence victims: rules of evidence; confidentiality in grant conditions; federal criminal databases; data collection of the homeless; grants for privacy protection; cyberstalking definitions and DNA fingerprinting. VAWA has also called for several research reports on issues affecting domestic violence and privacy.

VAWA was first passed in 1994 as Title IV, §§ 40001 -- 40703 of the Violent Crime Control and Law Enforcement Act. Pub. L. 103-322, Sept. 13, 1994, 108 Stat. 1796 [hereinafter, VAWA 94]. VAWA was reauthorized in 2000 as part of the Trafficking Victims Protection Act with few changes. Pub. Law 106-306. In 2005, the VAWA reauthorization made several changes, including some affecting privacy. Pub. Law 109-162 [hereinafter, VAWA 2005].

Violence Against Women Act of 1994

Changes to the Federal Rules of Evidence in Sex Offense Cases.

VAWA 94 amended the Federal Rules of Evidence, changing Rule 412 covering the use of sexual history and sexual predisposition evidence in sexual misconduct cases. VAWA 94 § 40141. Rules of evidence govern what may be admitted at trial, and can serve to protect privacy of parties by preventing having embarrassing details of their lives discussed in open court and becoming a part of the public record.

The rule limited the admissibility of the alleged victim's past sexual conduct and alleged sexual predisposition in sexual misconduct cases -- both civil and criminal. This protects the privacy of victims -- often the accuser. It reduces the amount of sexual innuendo and sexual stereotyping in trials. Victims are more likely to participate in trials with these protections.

In rape cases, this limits the trial tactic of introducing a woman's past sexual history in order to display her loose morals and the likelihood that she consented to sex. Besides limiting that tactic, it also prevents a rape victim's sexual history -- including reputation -- from

being discussed in open court and entering the trial record. Thus the privacy of rape victims and rape accusers is protected. Also, the tactic of tarnishing the reputation of a rape accuser is limited.

This sort of evidence is generally prohibited with some exceptions for criminal and civil cases. Criminal exceptions include the use of sexual contact with another to show that some other person was the source of physical evidence and the use of past contact with the accused to show consent. In civil cases the evidence of past sexual history or sexual predisposition is admissible only if its value -- how well it clarifies an issue -- outweighs the harm done to the defendant.

Confidentiality of Abused Person's Address.

VAWA 94 required the postal service to issue regulations for protecting the confidentiality of addresses of abused persons and domestic violence shelters. VAWA 94 § 40281.

Access to and Entry Into Federal Criminal Information Databases

VAWA 94 authorized civil and criminal courts handling domestic violence and stalking cases access to national criminal information databases. VAWA 94 § 40601. State and federal law enforcement agencies were also permitted to enter domestic violence information into databases. This included arrests, convictions and arrest warrants for stalking, domestic violence, or violation of protection orders. The existence of protection orders can also be entered into the databases, if "periodically reviewed."

In many localities, the phenomenon of "dual arrest" -- where both parties are arrested -- entry into databases would create criminal records for victims who call the police.

Confidentiality of Communications between Domestic Violence Victims and Their Counselors.

Congress required that the Attorney General study the issue of how states protect the confidentiality of communications between sexual assault and domestic violence victim and their counselors. VAWA 94 § 40153. The report should include model legislation that would provide "maximum protection" for such communication.

The report is available in PDF and Abstract form from the National Criminal Justice Reference Service. Search for NCJ number 169588 [here](#).

The report recognizes the role that counseling can play in victim's lives, pointing out the emotional and physical trauma that results from domestic violence and sexual assault. The report analyzes the justification for the privilege.

The report summarizes the state of privilege law in 1995. It describes absolute, semi-absolute and qualified privileges regimes. Absolute privileges completely bar disclosure of statements that victims make to counselors. Semi-absolute privileges have some limited disclosures, such as when there is child abuse, or when a witness is committing perjury. In both of these situations, counselors can tell their clients that their communications will remain confidential with some certainty. Qualified privileges will force disclosure when the court weighs the value of the evidence against the interests of the client. This is a case-by-

case determination, and thus counselors will have a harder time telling their clients with any certainty whether information will remain confidential.

The report concludes with two model statutes -- one for absolute and one for qualified privileges. The purpose of the statutes is "to encourage victims of sexual assault and domestic violence to feel secure in seeking counseling, to make full and honest disclosures to their counselors, and to receive the maximum psychological and therapeutic benefit from counseling which will assist them in their personal recovery and result in the prosecution of these crimes."

For more on Confidentiality of Communications, see EPIC's page on [Privileges](#).

Violence Against Women Act 2005

Privacy Protections In VAWA 2005 Grants

Recipients of VAWA grants have to protect the personal information of their clients VAWA 2005 defines "personal information" in strong language. 42 USC §11383(a)(18):

[I]ndividually 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.

This definition prevents demographic data which could help to identify a client from being released. Rural or nearly homogenous communities could have some residents for whom release of demographic information, such as family size or religion or ethnicity, could be identifying. Even if it is not specifically identifying, it could narrow the pool of people down to a select few, and label all of them suspected victims and abusers.

Grant recipients are required to maintain the confidentiality of personal information. 42 USC § 11383(b)(2). Data may be shared with informed, written, and reasonably time-limited consent of the client. 42 USC § 11383(b)(2)(B)(ii). These requirements mean that simple form contracts and fine print will not be used to release the data. Grantees will have to educate their clients about the requirements of most disclosures. The reasonable time limitation of the releases means that clients are kept aware of the purposes of new disclosures as they come up.

If a court order or other process requests the data, the grantee should make reasonable efforts to alert the client of the release. 42 USC § 11383(b)(2)(C). This way clients are alerted whenever others -- specially an opposing party -- accesses their information.

Limits On Internet Publication of Protection Order Information

VAWA 2005, section 106, amended 18 USC § 2265, governing the Full Faith and Credit given the protection orders issued by other states. The amendment limits internet publication of filing or registration information of protection orders when these are likely to reveal the identity or location of the individual protected by the order. That amendment allows sharing of this information in secure format intergovernmentally for law enforcement purposes. For more information on the privacy of court and public records, see EPIC's [Privacy and Public Records page](#).

Homeless Management Information System

VAWA 2005 included changes to the collection of data from domestic violence service providers for the Homeless Management Information System (HMIS). HMIS is a nationwide database of homeless people, with data collected from homeless shelters receiving HUD grants. The aim of the program is to provide an unduplicated count of homeless people, understand how they use shelters, and determine the effectiveness of homelessness strategies. VAWA 2005 included increased privacy protections for domestic violence providers covered under the HMIS system.

People fleeing domestic violence often face homelessness, and in many localities, the domestic violence shelter is the only resource available to the homeless. "A 1990 Ford Foundation study found that 50% of homeless women and children were fleeing abuse...More recently, in a study of 777 homeless parents (the majority of whom were mothers) in ten U.S. cities, 22% said they had left their last place of residence because of domestic violence...In addition, 46% of cities surveyed by the U.S. Conference of Mayors identified domestic violence as a primary cause of homelessness." Domestic Violence and Homelessness, NCH Fact Sheet #8, National Coalition for the Homeless, April 1999.

Entry into this system raises serious privacy concerns for those fleeing domestic violence. Legal confidentiality could be compromised by turning over information. Furthermore, a system that tracks people as they move from shelter to shelter would allow an abuser to locate a fleeing victim. Lastly identifying or demographic information being leaked could allow for the leak of the identities of those seeking services in domestic violence shelters.

In September of 2003, EPIC [filed comments](#) on the proposed rules focusing on Homeless privacy in general.

In 2004, HUD issued rules that would include domestic violence shelters among those that have to turn over data to HMIS. Homeless Management Information Systems (HMIS) Data and Technical Standards Final Notice, 69 Fed. Reg. 45,888 (July 30, 2004). This was later clarified to include that domestic violence shelters would not need to submit names and Social Security Numbers, but would instead have to submit other identifying information for de-duplication. Homeless Management Information Systems (HMIS) Data and Technical Standards Final Notice; Clarification and Additional Guidance on Special Provisions for Domestic Violence Provider Shelters, 69 Fed. Reg. 61,517 (Oct. 19, 2004).

VAWA 2005 changed what data could be collected from domestic violence shelters. The HUD secretary is to tell domestic violence providers to not disclose personal information, as defined above for the purposes of the Homeless Management Information System. 42 USC § 11383(a)(8)(A). Furthermore, HUD can collect non-personally identifiable information only after new rules are issued, and this information must be de-identified, encrypted or otherwise encoded. *Id.* HUD has not yet issued new rules.

For more on HMIS, see EPIC's [page on poverty and privacy](#).

Grants to Protect Privacy

VAWA 2005 allows the attorney general to issue grants to protect the privacy of survivors of domestic violence. 42 USC § 14043b. Grants may be made for several purposes:

- (1) to develop or improve protocols, procedures, and policies for the purpose of preventing the release of personally identifying information of victims (such as developing alternative identifiers);
- (2) to defray the costs of modifying or improving existing databases, registries, and victim notification systems to ensure that personally identifying information of victims is protected from release, unauthorized information sharing and disclosure;
- (3) to develop confidential opt out systems that will enable victims of violence to make a single request to keep personally identifying information out of multiple databases, victim notification systems, and registries; or
- (4) to develop safe uses of technology (such as notice requirements regarding electronic surveillance by government entities), to protect against abuses of technology (such as electronic or GPS stalking), or providing training for law enforcement on high tech electronic crimes of domestic violence, dating violence, sexual assault, and stalking.

42 USC § 14043b-1. Congress also authorized 5 million dollars for these grants for each fiscal year between 2007 and 2011. 42 USC § 14043b-4.

Criminal Stalking Provision / Surveillance With Intent to Harm

VAWA 2005 updated stalking laws, taking into account new technologies and new understandings of stalking.

VAWA 2005 criminalizes placing under surveillance with the intent to kill, injure, harass or intimidate another person in a way that causes the other person, spouse, immediate partner, or immediate family of that person to fear for death, or suffer substantial emotional distress. 18 USC § 2261A. This recognizes the harm and distress that surveillance by an abuser can cause. Being placed under surveillance can be paralyzing, as one is fearful of reprisals for conduct that is not agreeable to the watcher. In an abusive situation, where there is intent to control, surveillance -- and fear of surveillance -- is used to extend the control of the abusive party.

Criminalized are those who cross state lines for stalking purposes, or use the Internet or the mails in the stalking. Id. Increased penalties are provided for those who stalk while subject to a civil protection or restraining order. 18 USC § 2261(b).

VAWA 2005 also updated prohibitions on harassing telephone calls to include communications made using the internet. 47 USC § 223(h)(1).

Confidentiality and Non-Disclosure of Certain Immigrant's Information.

VAWA 2005 amended § 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 USC § 1367). This section prevents the Department of Homeland Security, the Attorney General, and the Department of State from making adverse determinations of admissibility or deportation based solely on information provided by batterers and their family members. Officials are also prohibited from disclosing information on applicants for VAWA self-petition, T and U visas. T and U visas are for victims of certain crimes that assist authorities investigating or prosecuting those crimes. Violating these provisions subjects employees to disciplinary sanctions and civil fines.

The amendment permitted officials to disclose the information to non-profit victim's service providers for the purpose of providing services to immigrant victims of domestic violence. Disclosure is permitted with the prior written consent of the immigrant.

DNA Fingerprinting.

VAWA 2005 also included, via the Kyl Amendment, a section on federal DNA fingerprinting. This authorized the collection of DNA from any non-US citizen detained by a federal agency. 42 USC § 14135a(a)(1)(A). It also authorized the collection of DNA from anyone arrested, charged or convicted for a felony or crime of violence. Id.

DNA samples are sent to the CODIS system. 42 USC § 14135a(b). Those whose convictions are overturned, or whose charges are dropped, can have their DNA removed. 42 USC § 14132(d)(1). However, those who are arrested, but against whom no charges are brought, have no way to remove their DNA from the system.

Many localities have mandatory arrest policies for domestic violence complaints: when a call is received, officers must arrest the initiating party. Oftentimes, the police arrive to see both parties showing indications of being hit. This leads to "dual arrest" situations where the police will arrest both the complainant and the perpetrator. With this sort of a policy, complainants will have their DNA collected when they are arrested.

The collection of genetic material has special concerns for privacy. Genetic material can reveal information about not just an individual, but also their family. Genetic material can do more than identify: it can also reveal genetic predispositions and health issues. Lastly, genetic material is ubiquitous: we leave traces behind in most places we go.

For more on DNA databases, see EPIC's [Genetic Privacy Page](#).

EPIC has worked on several DNA cases. Our amicus filings contain much information on problems with DNA analysis and DNA recordkeeping:

[Johnson v. Quander](#): Compelled Disclosure for DNA databases.

[United States v. Kincade](#): Compelled Disclosure for DNA databases.

[Kohler v. Englade](#): DNA Dragnets.

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