

Family Court Bench Card on Violence Against Women Act (VAWA)
Confidentiality¹

By: Leslye E. Orloff and Benish Anver
National Immigrant Women's Advocacy Project (NIWAP)

October 11, 2013

VAWA Confidentiality²

Abusers frequently attempt to exert power and control over their victims by trying to use the immigration system to track and stalk them, to trigger immigration enforcement actions against the victim and to interfere with and attempt to undermine the victims' ability to attain legal immigration status. In response, Congress created federal VAWA confidentiality laws in order to protect battered victims from having information about their VAWA, T visa, and U visa applications for relief disclosed to their abuser or anyone who could provide the information to the abuser.³ Violations of VAWA confidentiality may place immigrants in danger, by notifying abusers, rapists, traffickers or other crime perpetrators that victims are taking steps to free themselves from abusive homes, workplaces, or other situations. It is well established that when victims of domestic violence⁴, trafficking⁵ and workplace⁶ sexual violence try to leave their perpetrators the likelihood that the perpetrator will retaliate using violence, threats or immigration related abuse is high. Federal immigration VAWA confidentiality protects against disclosure of the existence of a case filed by a crime victim and disclosure of information contained in the contents of the case to anyone inside or outside of the federal government except under limited circumstances. Federal immigration VAWA confidentiality protects against disclosure of the existence of a case filed by a crime victim and disclosure of information contained in the contents of the case to anyone inside or outside of the federal government except

¹ This document was developed under grant number SJI-12-E-169 from the State Justice Institute. The points of view expressed are those of the author(s) and do not necessarily represent the official position or policies of the State Justice Institute.

² For a comprehensive discussion of VAWA Confidentiality, see Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections*, in *Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault* (2013), available at: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man--Confidentiality-MANUAL-ES.pdf/view>

³ 8 U.S.C. § 1367(a)(2)(2013) (confidentiality measure prohibits federal authorities from allowing the use of any information related to a VAWA, T or U visa application or disclosure of such information to any third party). See also Leslye Orloff, *VAWA Confidentiality*, in *Breaking Barriers: A Complete Guide to Legal Rights and Resources for Battered Immigrants* (2013), available at: http://niwaplibrary.wcl.american.edu/vawa-confidentiality/tools/3.2_BB_IMM_VAWAConf_Confidentiality-Breaches-MANUAL-BB.pdf/view

⁴ VAWnet & The National Resource Center on Domestic Violence, *Intimate Partner Homicide Prevention*, (July 2011) available at <http://www.vawnet.org/special-collections/DVHomicide.php#200>

⁵ Freedom Network, Human Trafficking and Domestic Violence, (September 2012) available at <http://freedomnetworkusa.org/wp-content/uploads/2012/05/FN-Factsheet-Human-Trafficking-and-Domestic-Violence-Updated-Sept-2012.pdf>

⁶ Southern Poverty Law Center, *Under Siege: Life for Low-Income Latinos in the South*, 30 (April 2009).

under limited circumstances. This Bench Card provides an overview of federal immigration VAWA confidentiality laws for state family, civil and criminal court judges.

Three Prongs of VAWA Confidentiality

There are three forms of VAWA confidentiality prohibitions in U.S. immigration law. These prohibitions protect against disclosure or use of confidential information, prohibit federal government officials from seeking or relying on information provided by perpetrators or their family member and place restrictions on the locations at which federal immigration enforcement actions can occur. These three prohibitions allow immigrant victims to safely access legal and social service protections.

1. Protecting Immigration Files⁷

- Prohibits the Departments of Justice, Homeland Security, or State from disclosing of any information, including the existence of the case, filed by individuals and their children that are eligible for a:⁸
 - VAWA Self-Petition
 - Battered spouse waiver
 - VAWA Cuban adjustment applicants
 - VAWA HRIFA
 - VAWA NACARA
 - VAWA suspension of deportation
 - VAWA cancellation of removal
 - U visa crime victim
 - T visa trafficking victim
- **Exceptions:**
 - i. Disclosure to law enforcement or national security officials for solely for legitimate law enforcement or national security purposes:
 1. VAWA 2013 Amendment: disclosure must be done in a manner that “protects the confidentiality of such information.”⁹
 - ii. Statistical data collection.
 - iii. Benefit granting or public benefits purposes.
 - iv. Judicial review of the victim’s immigration case¹⁰
 - v. The chairman and ranking member of the judiciary committees if the House and Senate for the exercise of Congressional oversight functions

⁷ *Id.*

⁸ For a description of each of these forms of immigration relief *see*, National Immigrant Women’s Advocacy Project (NIWAP), Center for Public Policy Studies and Legal Momentum, *Glossary of Key Immigration Terms Relevant to State Court Judges* (September 11, 2013).

⁹ 8 U.S.C. 1637(b)(2)(2013); 8 U.S.C. 1637(b)(8)(2013).

¹⁰ *Hawke v. U.S. Dep’t of Homeland Sec.*, NO. C-07-03455, 2008 WL 4460241 at *7 (N.D. Cal. Sept. 29, 2008)

- can review only closed cases and in a manner that omits personal identifying information and protects victim confidentiality
- vi. Limitation ends when application for relief is denied based on substantive grounds and all opportunities for appeals have been exhausted.

2. Relying on Information ¹¹

- The government cannot seek information from or use information provided solely by a perpetrator or his or her family members to make adverse determinations regarding admissibility/deportability. VAWA confidentiality provisions 8 U.S.C. 1631(a)(1) specifies that the government cannot seek or rely upon information provided by --

“(A)a spouse or parent who has battered the alien or subjected the alien to extreme cruelty,

(B)a member of the spouse’s or parent’s family residing in the same household as the alien who has battered the alien or subjected the alien to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty,

(C)a spouse or parent who has battered the alien’s child or subjected the alien’s child to extreme cruelty (without the active participation of the alien in the battery or extreme cruelty),

(D)a member of the spouse’s or parent’s family residing in the same household as the alien who has battered the alien’s child or subjected the alien’s child to extreme cruelty when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty,

(E)in the case of an alien applying for status under section 101(a)(15)(U) of the Immigration and Nationality Act [8 U.S.C. [1101\(a\)\(15\)\(U\)](#)], the perpetrator of the substantial physical or mental abuse and the criminal activity,^[11]

(F)in the case of an alien applying for status under section 101(a)(15)(T) of the Immigration and Nationality Act (8 U.S.C. [1101\(a\)\(15\)\(T\)](#)), under section [7105\(b\)\(1\)\(E\)\(i\)\(II\)\(bb\)](#) of title [22](#), under section 244(a)(3) of the Immigration and Nationality Act (8 U.S.C. [1254a\(a\)\(3\)](#)), as in effect prior to March 31, 1999, or as a VAWA self-petitioner (as defined in section 101(a)(51) of the Immigration and Nationality Act (8 U.S.C. [1101\(a\)\(51\)](#))^[12], the trafficker or perpetrator”

- The victim does not have to have filed the qualifying application to be eligible.
- Need only prove that the individual is a protected immigrant.

3. Location Prohibitions ¹²

¹¹ Leslye E. Orloff, *VAWA confidentiality: History, Purpose, DHS implementation and Violations of Confidentiality Protections*, in “*In Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*” (2013) available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man--Confidentiality-MANUAL-ES.pdf/view>

- Prohibits enforcement actions at any of the following locations: domestic violence shelter; victim services program; family justice center; supervised visitation center; or courthouse if the victim is appearing in connection with a protection order case, a child custody case or other civil or criminal case related to domestic violence, sexual assault, trafficking, or stalking. If any part of an enforcement action took place at any of these locations, DHS must disclose this fact in the Notice to Appear and in immigration court can dismiss the proceedings
- DHS also prohibits enforcement actions “near sensitive community locations such as, schools, places of worship and funerals or other religious ceremonies.”¹³

Consequences of VAWA Confidentiality Violations

Government officials who violate any of VAWA confidentiality’s prohibitions by releasing information, relying on prohibited information or making immigration enforcement actions at prohibited locations is subject to the following penalties.

“Anyone who willfully uses, publishes, or permits information to be disclosed in violation of this section or who knowingly makes a false certification [to an immigration judge] under section 239(e) of the Immigration and Nationality Act [8 U.S.C. 1229(e)] shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than \$5,000 for each such violation.”

The procedures for filing a complaint with DHS for VAWA confidentiality violations, including immigration enforcement actions taken or attempted at court houses id described in Procedures for filing complaints about VAWA confidentiality violations with the Office of Civil Rights and Civil Liberties at the Department of Homeland Security "Violence Against Women Act (VAWA) Confidentiality Provisions at the Department of Homeland Security (2008)

VAWA Confidentiality and State Court Discovery Issues

Information contained in or regarding the existence of a VAWA, T or U visa application is “absolutely privileged information” that cannot be demanded for use in a criminal or civil proceeding.¹⁴ In order to ensure the safety of the victim from attempts by the abuser to use family/civil and criminal courts to obtain information from DHS about his or her whereabouts or regarding a VAWA, T or U visa, it is important to understand how confidentiality issues will present themselves in the criminal or family/civil court context. Judges should be aware of attempts by an abuser to obtain protection information for the purposes of maintaining power and control over a victim.

¹² INA Section 239(e); * U.S.C. 1229(e)

¹³ Julie L. Myers, Assistant Secretary, Immigration and Customs Enforcement, *DHS Field Guidance on Enforcement Activities in and Around Sensitive Locations* (July 3, 2008) available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/INS-enforcement-sensitive-locations-memo-1993.pdf/view>

¹⁴ *Hawke v. U.S. Dep’t of Homeland Sec.*, NO. C-07-03455, 2008 WL 4460241 at *7 (N.D. Cal. Sept. 29, 2008) (denying demand from accused batterer that the Department of Homeland Security disclose information regarding his wife’s immigration records for use in a criminal battery case); *Demaj v. Skaj*, No. 3:09-CV-255, 2012 WL 476168 at *5 (D. Conn. Feb. 14, 2012)(denying a motion to compel disclosure of U visa application in a child custody case because “disclosure of these documents for this purpose runs contrary to the intent of the protections afforded by 8 U.S.C. § 1367”).

An abuser will commonly demand information regarding the victim’s VAWA, T or U application in a family/civil court proceeding¹⁵ by claiming that the information is not protected because it falls within the limited exceptions to the confidentiality provision. These exceptions allow for the disclosure of confidential information for “legitimate law enforcement purpose[s],” census information, congressional oversight, national security purposes, or to assist with an immigrant victim’s eligibility for certain public benefits.¹⁶ These narrow exceptions illustrate Congress’ intent to prevent the disclosure of the victim’s protected information to the abuser in the course of ordinary civil or family court proceedings. If such information was requested from DHS by the abuser, DHS would deny such a request and not disclose the information because doing so would constitute a violation of VAWA confidentiality requirements. Such a violation would subject any government official that discloses protected information to sanctions, including disciplinary action and a penalty of up to \$5,000.¹⁷

If a party in a civil or family court case seeks through discovery or cross examination seeks to obtain information about or information contained in a VAWA confidentiality protected case the court should deny such requests. The court can do this by granting¹⁸

- A Motion in Limine to Strike the Defendant’s Pleadings, Motions, and Advocacy for Pleadings and Motions for Violations of Federal Rule of Civil Procedure 11¹⁹
- A Motion for Protective Order to Prevent Disclosure of VAWA Confidentiality Protected Information
- A Motion to Quash

¹⁵ In a criminal case the U visa certification will generally be discoverable. However, in state court proceedings the contents of the federal immigration case that the police and prosecutors have never had access to and are not part of their criminal case against the defendant may be protected by VAWA confidentiality. The DHS U visa rule states that “DHS may have an obligation to provide portions of petitions for U nonimmigrant status to federal prosecutors for disclosure to defendants in pending criminal proceedings. This obligation stems from constitutional requirements that pertain to the government’s duty to disclose information, including exculpatory evidence or impeachment material, to defendants. See U.S. Const. amend. V & VI; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972).” 72 Fed. Reg. 53027 (September 17, 2007). For further information go to: <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/vawa-confidentiality/69367710--1-AmiciBrief-FiledCopy-1%20DI-10-10-12.pdf/view>

¹⁶ 8 U.S.C. § 1367(b)(2013).

¹⁷ 8 U.S.C. § 1367(c) (2013) (in addition to disciplinary action, the section imposes a penalty of up to \$5,000 for each violation for anyone who “willfully uses, publishes, or permits information to be disclosed in violation of [these provisions].”

¹⁸ For more information see <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/november-12-15-2012-atlanta-ga/family-law-track/custody/vawa-confidentiality/AmicusinVAWADiscoveryCase%20DI-10-10-12.pdf/view>

¹⁹ Michael Lyons and Darcy Paul, *Memorandum VAWA Confidentiality and Federal Civil Procedure Rule 11 Violations*, found in Leslye E. Orloff, *VAWA confidentiality: History, Purpose, DHS implementation and Violations of Confidentiality Protections, in In Empowering Survivors: Legal Rights of Immigrant Victims of Sexual Assault*, 29 (2013) available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/iwp-training-powerpoints/september-20-21-2012-new-orleans-la/vawa-confidentiality/vawa-confidentiality-chapters/Ch3-SA-Man--Confidentiality-MANUAL-ES.pdf/view>