NATIONAL CRIME VICTIM LAW INSTITUTE

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LAW ENFORCEMENT-BASED VICTIM SERVICES IN TEXAS: PRIVACY, PRIVILEGE AND CONFIDENTIALITY

INTRODUCTION

Best practice in victim services is about facilitating victims' ability to exercise meaningful choices. This requires understanding of and supporting the exercise of victims' rights, which are found in state constitutions, statutes, rules and policies. For victims' rights to be meaningful both compliance with and enforcement of those rights is necessary. Compliance is the fulfillment of legal responsibilities to victims and making efforts to reduce willful, negligent or inadvertent failures to fulfill those legal responsibilities; enforcement is the pursuit, by a victim or someone on behalf of a victim, of a judicial or administrative order that either mandates compliance with victims' rights or provides remedies for violations of victims' rights laws.

In addition to understanding victims' rights, best practices in victim services requires understanding one's legal and ethical obligations as an advocate with regard to victim privacy, confidentiality and privilege, and the scope of one's services. Informing victims—at the first or earliest possible contact with them—of their rights and the advocate's role, including limitations on that role, is critical to victims' ability to make informed decisions about whether and how to exercise their rights, and whether, what and how much to share with any particular service provider. In addition, advocates need to build and maintain relationships throughout the community in order to provide meaningful referrals to victim service providers with complementary roles when a victim needs the referral.

USING THIS RESOURCE

This resource is designed to enhance victim services personnel's knowledge and understanding of the law governing crime victims' rights to privacy, confidentiality and privilege in Texas. It provides an overview of key concepts and excerpts of key legal citations that can help facilitate victims' meaningful choices regarding these rights. To keep this *Guide* as user-friendly as possible in light of the breadth, complexity and evolving nature of law, the *Guide* does not include all laws. It does not constitute legal advice, nor does it substitute for legal advice. This resource is best used together with its companion resource *Select Victims' Rights - Texas*.

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OVERVIEW

What are system-based and community-based advocates, and what are key similarities and the differences between them?

It is imperative that an advocate understands and communicates clearly—at the first encounter or earliest possible contact—whether one is a community-based or system-based advocate, the advocate's legal and ethical obligations with regard to privacy, confidentiality and privilege and the scope of the services that the advocate offers.[1] This information will assist the victim in understanding the role of the advocate and any limitations of that role regarding: (1) the services that the advocate can provide; and (2) the privacy protections that exist regarding information shared with the advocate. Further, providing a clear explanation of the advocate's role to the victim will help the victim make informed decisions, build rapport and avoid misunderstandings.

While both system-based and community-based advocates serve victims and operate under a general ethical rule of confidentiality, there are significant differences between them. System-based advocates are typically employed by a law enforcement agency, office of the prosecuting attorney, corrections or another entity within the city, county, state or federal government. Titles for system-based vary; for example, victim advocates, victim-witness coordinators, victim assistance personnel.[2] Because system-based advocates are typically a component of a government agency or program, a primary focus of their work is assisting victims in their interactions with the system, and they will typically be able to provide services to the victims during the pendency of the investigation, prosecution and post-conviction legal aspects of a case. In addition, this placement as part of a government agency or program generally means that system-based advocates are subject to the *Brady* disclosure obligations (*see Brady v. Maryland* Section below for additional information) and generally, their communications with victims are not protected by privilege.

By contrast, community-based advocates are generally not directly linked to any government actor or agency. As such, they are not subject to *Brady*; generally, can assist victims even if a crime has not been reported; can assist before, during and after a criminal case; can provide holistic services aimed at victims' broad needs; and, depending on the jurisdiction's laws and funding source, can maintain privileged communications with victims.[3]

Because each type of advocate has different duties and protections they can offer victims, knowledge of and partnerships between them is an integral part of facilitating meaningful victim choice and helping victims access holistic services.

What are privacy, confidentiality and privilege? Why do the differences matter?

Privacy

"Privacy" is a fundamental right, essential to victim agency, autonomy and dignity, which—among other things—permits boundaries that limit who has access to our communications and information.

Privacy can be understood as the ability to control the dissemination of personal information. *See Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) ("The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for [themselves] the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, and behavior and opinions are to be shared with or withheld from others."). For many crime victims, maintaining privacy in their personal information and communications is vitally important. In fact, maintaining privacy is so important that some victims refrain from accessing critical legal, medical or counseling services without an assurance that treatment professionals will protect their personal information from disclosure. Understanding this and wishing as a matter of public policy to encourage access to services when needed, federal and state legislatures and professional licensing bodies have created frameworks of laws and regulations that help protect the information victims share with professionals from further dissemination. To this end, every jurisdiction has adopted statutory or constitutional victims' rights; some jurisdictions explicitly protect victims' rights to privacy, or to be treated with dignity, respect or fairness.[4] Victims also have a federal Constitutional right to privacy.[5]

In addition to the broad rights to privacy that exist, privacy protections generally come in two forms: "confidentiality" and "privilege." Professionals who work with victims should understand each concept.

Confidentiality

"Confidentiality" is a legal and ethical duty not to disclose the victim-client's information learned in confidence.

As part of accessing services, victims frequently share highly sensitive personal information with professionals. The victims' willingness to share the information may be premised on the professionals' promise not to disclose the victims' information. The promise to hold in confidence the victim's information is governed by the professional's ethical duties, regulatory framework and/or by other various laws, and breaking the promise may carry sanctions. The promise not to disclose information that is shared in confidence—as well as the legal framework that recognizes this promise—are what qualifies this information as "confidential."

Key aspects of confidential communications are that: (1) they are made with the expectation of privacy; (2) they are not accessible to the general public; (3) there may or may not be legal requirements that the recipient keep the information private; and (4) there may be a professional/ethical obligation to keep the information private.

Professional confidentiality obligations may be imposed by one's profession, e.g., advocate ethics; social worker ethics; attorney ethics; medical provider ethics; and mental health counselor ethics. In addition, certain laws may have confidentiality provisions that are tied to funding. If an entity receives such funds, then it is bound by confidentiality or risks losing funding. Examples of laws that impose confidentiality requirements include the: (1) Victims of Crime Act (VOCA), 28 C.F.R. § 94.115; (2) Violence Against Women Act (VAWA), 34 U.S.C.A. § 12291(b)(2)(A)-(B); and (3) Family Violence Prevention and Services Act (FVPSA), 42 U.S.C.A. § 10406 (c)(5)(B). For example, VAWA (Section 3), VOCA and FVPSA regulations prohibit sharing personally identifying information about victims without informed, written, reasonably time-limited consent. VAWA and VOCA also prohibit disclosure of individual information without written consent. In addition, depending on the types of victim information at issue, other statutes may impose additional restrictions, including the Federal Educational Rights & Privacy Act (FERPA), 20 U.S.C. § 1232g (protections governing the handling of education records); the Health Insurance Portability & Accountability Act (HIPAA), 42 U.S.C. § 1320d et seq. (protections governing the handling of health records); and the Stored Communications Act (SCA), 18 U.S.C. § 2701 et seq. (protections applying to electronic communications and transactions records).

When providing services, professionals should discuss with victims the consequences of sharing information before information is shared. These consequences may include the: (1) inability to "take back" a disclosure; (2) lack of control over the information once released; and (3) risk of the accused accessing the information. In addition, even when laws appear to prohibit disclosure, there are often exceptions that require disclosure, for instance in response to court orders or valid subpoenas. These limits should be explained to a victim. For example, a court may make a determination that an accused's interests outweigh the confidentiality protection afforded by a law and order the professional to disclose the victim's private information. Although a victim can be assured that a professional may not ethically disclose her confidential information unless legally required to do so, it is important that a victim understand that courts have the authority to require a professional to break the promise of confidentiality when certain conditions are met. Other circumstances that may compel disclosure of victims' otherwise confidential information include if the information is shared with a mandatory reporter of elder or child abuse and if the information falls within the state's required disclosures to defendant pursuant to the United States Supreme Court case *Brady v. Maryland*.

Thus, although the basic rule of confidentiality is that a victim's information is not shared outside an agency unless the victim gives permission to do so, it is important to inform victims before they share information whether, when and under what circumstances information may be further disclosed.

Privilege

"Privilege" is a legal right of the victim not to disclose—or to prevent the disclosure of—certain information in connection with court and other proceedings.

Legislatures throughout the country have recognized that the effective practice of some professions requires even stronger legal protection of confidential communications between the professional and client. This recognition has resulted in the passage of laws that prevent courts from forcing these professionals to break the promise of confidentiality no matter how relevant the information is to the issues in the legal proceeding. This additional protection is "privilege"—a legal right not to disclose certain information, even in the face of a valid subpoena.[6] Key aspects of privileged communications are that: (1) they are specially protected, often by statute; (2) disclosure without permission of the privilege holder (i.e., the victim) is prohibited; (3) they are protected from disclosure in court or other proceedings; (4) the protections may be waived only by the holder of the privilege (i.e. the victim); and (5) some exceptions may apply. Examples of communications that may be protected by privilege depending on jurisdiction include: (1) spousal; (2) attorney-client; (3) clergy-penitent; (4) psychotherapist/counselor-patient; (5) doctor-patient; and (6) advocate-victim. Jurisdictions that recognize a given privilege may narrowly define terms and thereby limit its applications. For example, among the jurisdictions that recognize an advocate-victim privilege, many define the term "advocate" to exclude those who are system-based (e.g., affiliated with a law-enforcement agency or a prosecutor's office).[7]

Understanding the Differences

Because maintaining a victim's control over whether and how to disclose personal information is so important and because community-based and system-based advocates can offer different levels of protection regarding communications, every professional must know whether their communications with a victim are confidential or privileged, as well as how courts have interpreted the scope of each protection. This information should be shared victims in advance of information disclosure. To do otherwise may provide victim-clients with a false sense of security regarding their privacy and inflict further harm if their personal information is unexpectedly disclosed.

What are HIPAA, FERPA, FOIA and VOCA, and why are these relevant to my work as an advocate?[8]

HIPAA: Federal law—as well as state law in many jurisdictions—provides crime victims with different forms of protections from disclosure of their personal and confidential information. This includes protections against the disclosure of medical and/or therapy and other behavioral health records without the victim's consent. HIPAA—codified at 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.500 et seq.—is the acronym for the Health Insurance Portability and Accountability Act, a federal law passed in 1996. HIPAA does a

variety of things, but most relevantly, it requires the protection and confidential handling of protected health information (PHI). This is important, because although it permits release of PHI in response to a valid court order, no such release may be made in response to a subpoena or other request unless one of the following circumstances is met:

1. The entity must receive "satisfactory assurance" from "the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request[,]" 45 C.F.R. § 164.512 (e)(1)(ii)(A).
-or-
2. The entity must receive "satisfactory assurance" from the "party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order" that meets certain requirements, detailed in subsection (iv), 45 C.F.R. § 164.512 (e)(1)(ii)(B).

Advocates may wish to inform victims that they may proactively contact their medical providers, informing them that the victims are asserting privilege and other legal protections in their records, and requesting that these providers: (1) give them prompt notice of any request for the victims' medical records; (2) refuse to disclose the records pursuant to any such request without first receiving a valid court order; and (3) ensure that no medical records are released without first permitting the victims to file a challenge to their release.

FERPA: The Family Educational Rights and Privacy Act (FERPA)–codified at 20 U.S.C. § 1232g–"is a federal law that protects the privacy of student education records, and the [personally identifiable information] contained therein, maintained by educational agencies or institutions or by a party acting for the agencies or institutions."[9] FERPA applies to those agencies and institutions that receive funding under any U.S. Department of Education program.[10] "Private schools at the elementary and secondary levels generally do not receive funds from the Department [of Education] and are, therefore, not subject to FERPA, but may be subject to other data privacy laws such as HIPAA."[11]

Protections afforded by FERPA include the right of parents or eligible students to provide a signed and dated, written consent that clearly identifies which education records or personally identifiable information may be disclosed by the educational agency or institution; the person who may receive such records or information; and the purpose for the disclosure prior to disclosure of an education record or personally identifiable information, except in limited circumstances such as health or safety.[12]

Notably, while the Department of Education provides that law enforcement records are not education records, "personally identifiable information [collected] from education records, which the school shares with the law enforcement unit, do not lose their protected status as education records just because they are shared with the law enforcement unit."[13] Thus, law enforcement has a duty to understand and comply with FERPA when drafting police reports, supplemental reports and, generally, sharing or relaying information.

It is important that advocates have an understanding of FERPA as well as other federal laws, state laws and local policies that address student privacy in education records as eligible students or parents may be afforded privacy protections in addition to FERPA. For example, "the education records of students who are children with disabilities are not only protected by FERPA but also by the confidentiality of information provisions in the Individuals with Disabilities Education Act (IDEA)."[14]

FOIA: Open records' laws—also commonly referred to as public records' laws or sunshine laws—permit any person to request government documents and, if the government refuses to turn them over, to file a lawsuit to compel disclosure. Every state and the federal government have such laws, which carry a presumption of disclosure, meaning that all government records are presumed open for public inspection unless an exemption applies.

The federal open records' law, known as the Freedom of Information Act (FOIA or the "Act"), 5 U.S.C. §552, was enacted in 1966. Similar to its state counterparts, FOIA provides for the legally enforceable right of any person to obtain access to federal agency records subject to the Act, except to the extent that any portions of such records are protected from public disclosure by one of the nine exemptions. Three such exemptions, Exemptions 6, 7(C) and 7(F) protect different types of personal information in federal records from disclosure. Exemption 6 "protects information about individuals in 'personnel and medical files and similar files' when the disclosure of such information 'would constitute a clearly unwarranted invasion of personal privacy.'"[15] Exemption 7(C) "is limited to information compiled for law enforcement purposes, and protects personal information when disclosure 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.' Under both exemptions, the concept of privacy not only encompasses that which is inherently private, but also includes an 'individual's control of information concerning [his/her/their] person.'"[16] Exemption 7(F), which also applies to law enforcement records, exempts records that contain information that "could reasonably be expected to endanger the life or physical safety of any individual."

Similar to FOIA, state open records' laws contain numerous exemptions, including for some types of law enforcement records (for example prohibitions on disclosing identifying information of victims' and witnesses' generally or of child-victims and/or victims of certain crimes). Advocates should have an understanding of their jurisdiction's open records' laws, especially as they relate to exemptions from disclosure that may be afforded to law enforcement and other victim-related records within their office's possession. Jurisdiction-specific victims' rights laws—including rights to privacy and protection—also provide grounds for challenging public records' requests for victims' private information.

VOCA: The Victims of Crime Act of 1984 (VOCA)–codified at 34 U.S.C. §§ 20101-20111–established the "Crime Victims Fund," which is managed by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The Crime Victims Fund (the Fund) is financed by, *inter alia,* fines and penalties from persons convicted of crimes against the United States as opposed to by tax dollars.[17] The Fund supports victim assistance programs that offer direct victim services and crime victim compensation.[18] Examples of direct services are crisis intervention, emergency shelters or transportation,

counseling and criminal justice advocacy; and crime victim compensation programs that cover expenses incurred as a result of the crime.[19]

Agencies that receive VOCA funding are mandated to protect crime victims' confidentiality and privacy except in limited exceptions, such as mandatory reporting or statutory or court mandates. Specifically, state administering agencies and subrecipients of VOCA funding, are mandated "to the extent permitted by law, [to] reasonably protect the confidentiality and privacy of [victims] receiving services . . . and shall not disclose, reveal, or release, except . . . [in limited circumstances:] (1) [a]ny personally identifying information or individual information collected in connection with VOCA–funded services requested, utilized, or denied, regardless of whether such information has been encoded, encrypted, hashed, or otherwise protected; or (2) [i]ndividual client information, without the informed, written, reasonably time-limited consent of the person about whom information is sought . . . ." 28 C.F.R. § 94.115(a)(1)-(2).

Even if disclosure of individual client information is required by statute or court order, state administering agencies and sub-recipients' privacy and confidentiality obligations owed to crime victims do not disappear. State administering agencies and subrecipients of VOCA funds "shall make reasonable attempts to provide notice to victims affected by the disclosure of the information, and take reasonable steps necessary to protect the privacy and safety of the persons affected by the release of the information." 28 C.F.R. § 94.115(b).

VOCA also mandates that none of the protections afforded to victims be circumvented. For example, a crime victim may neither be required to release personally identifying information in exchange for services nor be required to provide personally identifying information for recording or reporting purposes. 28 C.F.R. § 94.115(d).

It is important that advocates are aware if their positions and/or offices are subject to VOCA's mandates regarding victims' confidentiality and privacy protections and if so, understand how these mandates interact with disclosure obligations.

Is there an ethical code relevant to my work as an advocate?

Yes, there is an ethical code–or "principles of conduct"–that guides victim advocates in their work.[20] Although there is no formal regulatory board that oversees victim assistance programs, the *Model Standards for Serving Victims & Survivors of Crime (Model Standards)* was created by the National Victim Assistance Standards Consortium with guidance from experts across the nation "to promote the competency and ethical integrity of victim service providers, in order to enhance their capacity to provide high-quality, consistent responses to crime victims and to meet the demands facing the field today."[21] The *Model Standards* cover three areas: (1) Program Standards for Serving Victims & Survivors of Crime; (2) Competency Standards for Serving Victims & Survivors of Crime; and (3) Ethical Standards for Serving Victims & Survivors of Crime.

The third area–"Ethical Standards for Serving Victims & Survivors of Crime"–contains "ethical expectations" of victim service providers that are "based on core values" in the field and are intended to serve as guidelines for providers in the course of their work. The Ethical Standards are comprised of five sections:
(1) Scope of Services;
(2) Coordinating within the Community;
(3) Direct Services;
(4) Privacy, Confidentiality, Data Security and Assistive Technology; and
(5) Administration and Evaluation.[22,]

Notably, "[p]rofessionals who are trained in another field (e.g., psychology, social work) but are engaging in victim services will [also] abide by their own professional codes of ethics. If th[ose] ethical standards establish a higher standard of conduct than is required by law or another professional ethic, victim assistance providers should meet the higher ethical standard. If ethical standards appear to conflict with the requirements of law or another professional ethic, providers should take steps to resolve the conflict in a responsible manner."[23]

What is the difference between discovery and production and how does this relate to the Supreme Court's decision in *Brady v. Maryland*?

The Supreme Court case Brady v. Maryland, as well as jurisdiction-specific statutes and court rules, impose discovery and disclosure obligations on the prosecution and defendant–not on the victim.

In criminal cases, victim privacy is routinely at risk by parties seeking personal records, such as counseling, mental health, medical, employment, educational and child protective services records. The law governing when these records must be disclosed to a defendant is complex, touching on a number of factors, including whether the records are within the government's control; whether they are protected by a privilege; whether any applicable privilege is absolute or qualified; whether a victim has waived any privilege in full or in part; the scope of the jurisdiction's constitutional or statutory rights and/or protections for victims; and the jurisdiction's statutes and rules governing discovery and production. If the records sought are properly in the possession or control of the prosecutor, a defendant may be entitled to those records pursuant to constitutional, statutory or rule-based rights to discovery. If, however, the records are not in the possession (or properly in the possession) of the prosecutor, a defendant must subpoena those records pursuant to the jurisdiction's statutes and rules governing production of documents from a nonparty. Although courts and practitioners sometimes refer to defendant's receipt of materials from both the prosecutor and nonparties as "discovery," this imprecise use of the term confuses a defendant's right to discovery from the prosecutor with a defendant's right to production from a nonparty.

In a criminal prosecution, the term "discovery" refers to the exchange of information between parties to the case—the prosecutor and defendant. *See, e.g.*, Fed R. Crim. P. 16 (entitled "Discovery and Inspection," the rule explicitly and exclusively governs discovery

between the government and defendant). It does not govern defendant's ability to obtain information directly from a crime victim or other nonparty. With regard to discovery from the prosecutor, a criminal defendant has no federal constitutional right to general discovery.[24] The prosecutor, instead, is only constitutionally required to disclose information that is exculpatory and material to the issue of guilt, *see Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), and which is within the custody or control of the prosecutor.[25] The *Brady* rule imposes an affirmative "duty to disclose such evidence . . . even [when] there has been no request [for the evidence] by the accused, . . . and . . . the duty encompasses impeachment evidence as well as exculpatory evidence."[26] The prosecutor's *Brady* obligation extends to all exculpatory material and impeachment evidence and to "others acting on the government's behalf in th[e] case."[27]

Federal and state courts have found that prosecution-based victim advocates are considered part of the "prosecution team" for *Brady* purposes.[28] Beyond that material to which a defendant is constitutionally entitled, a prosecutor's obligation to disclose information is governed by statute or procedural rule. A criminal defendant is often entitled to additional discovery materials from the prosecutor pursuant to statutes or rules, though discovery statutes and rules vary widely between jurisdictions.

Victims should be informed that disclosure requirements—imposed by Brady as well as a jurisdiction's statutes and rules governing discovery—may impact victim privacy.

Prosecutors are required by law to disclose exculpatory statements to the defense. Because system-based advocates are generally considered agents of the prosecutors, and prosecutors are deemed to know what advocates know, such advocates are generally required to disclose to the prosecutors the exculpatory statements made by victims to advocates.[29] Examples of exculpatory statements might include:

- "I lied to the police."
- "I hit him first and he was defending himself."
- "The crime didn't happen."
- "The defendant is not really the person who assaulted me."
- *Any other statement from a victim that directly implicates a victim's truthfulness regarding the crime.*
- *Any other statement from the victim that provides information that could be helpful to a defendant's case.*

Important steps that victim advocates may take to help ensure that their office has appropriate policies and procedures in place to protect victims in light of required disclosures to prosecutors' offices include:

- Ensure that every person clearly understands the prosecutor's interpretation and expectations regarding discovery and exculpatory evidence with regard to victim advocates.
- Work with the prosecutors' offices to create a policy/practice that addresses the limits of system-based advocate confidentiality.
- Inform victims prior to sharing of information if the victim advocate is bound by the rules that govern prosecutors.

- Develop a short, simple explanation to use with victims to communicate your responsibilities (e.g., don't use the word "exculpatory").
- Consider including a simple statement in the initial contact letter or notice explaining limitations.
- Determine how and when advocates will remind victims of the limits of confidentiality throughout the process.
- Identify what documentation an advocate might come into contact with and whether the prosecutors' office considers it discoverable. For example: (1) Victim compensation forms; (2) victim impact statements; (3) restitution documentation; and (4) U-Visa application documentation.
- Create policies regarding the types of documentation that an advocate may not need from the victim in order to provide effective victim advocacy (e.g., victim statements, treatment plans, safety plans, opinions, conclusions, criticisms). Determine a process for clearly marking documents that are not discoverable to ensure they are not inadvertently disclosed. For example, use a red stamp that says, "Not Discoverable."
- Inform the victim at the time they make a disclosure that constitutes exculpatory evidence—or soon as a statement is deemed exculpatory—that it is going to be disclosed.
- When possible, avoid receiving a victim impact statement in writing prior to sentencing.
- Develop relationships with complementary victim advocates and communicate about your obligations and boundaries regarding exculpatory evidence. This will allow everyone to help set realistic expectations with victims regarding privacy.
- Establish how exculpatory information will be communicated to the prosecutor's office.

What is *Giglio*, and why is it relevant to my work as an advocate?

Giglio v. United States, 405 U.S. 150 (1972), is a case that was heard before the United States Supreme Court.[30] The impact of the Court's decision in *Giglio* intersects with advocates' work as it makes it imperative that advocates understand: (1) what "material evidence" is (see *Brady v. Maryland* section for additional information); (2) how the advocate's role is or is not related to the prosecutor's office along with any corresponding professional, ethical obligations; (3) ways to avoid re-victimization by preventing violations that would cause a victim to undergo a second trial for the same crime; (4) the types of procedures and regulations that need to be implemented for advocates to ensure–in the face of prosecutor or advocate turnover–that all relevant and appropriate information is provided to the prosecutor handling the case; and (5) whether state or other local laws impose additional obligations that build on those prescribed by *Giglio*.

What are key considerations for system-based advocates who receive a subpoena?[31]

In addition to providing prompt notice of receipt of a subpoena to the victim—whose rights and interests are implicated—a key consideration for system-based advocates, their superiors and the attorneys with whom they work is determining the type of subpoena received.[32] Subpoenas that system-based advocates often encounter are subpoenas demanding either: (a) a person's presence before a court or to a location other than a court for a sworn statement; or (b) a person's presence along with specified documentation, records or other tangible items.[33]

When system-based advocates receive the latter (which is called a subpoena duces tecum) there are a number of factors that should be considered, such as whether the documentation, record or item sought (a) is discoverable; or (b) constitutes *Brady* material, as defined by federal, state and local law. If an item, for example, is neither discoverable nor *Brady* material, an advocate, by law, may not be required to disclose the item. The same may be true if the item falls within an exception to discovery and does not constitute *Brady* material.[34] For additional information on *Brady* material, *see* the *Brady v. Maryland* section pertaining to disclosure obligations. Notably, this analysis is relevant to other types of subpoenas as well. For example, if a person is subpoenaed to testify and it is anticipated that defense counsel will attempt to elicit testimony that he/she/they are not legally entitled to, a prosecutor may file a motion in advance–such as a motion in limine or a motion for a protective order–requesting that the scope of the testimony be limited, narrowly tailored or otherwise limited in accordance with the jurisdiction's laws. For advocates employed by prosecutor's offices this analysis must be completed in cooperation with the prosecuting attorney.

Other key considerations for system-based advocates, their superiors and the attorneys they work with include determining: whether the requester has a right to issue a subpoena, and, more specifically, a right to issue a subpoena for the person's attendance and/or items sought; whether the subpoena is unspecified, vague or overbroad to warrant an objection that the subpoena is facially invalid or procedurally flawed; which court mechanisms are available to oppose the subpoena; whether such mechanisms are time sensitive and require immediate action; whether the victim received ample notice and adequate information; what the victim's position is; and whether the law affords the victim privacy, confidentiality or privilege rights or protections that must be protected and enforced.

SELECT LAWS

SELECT PRIVACY LAWS

What are key privacy rights and/or protections in Texas?

Victims of crime in Texas have myriad constitutional rights—under Article 1, section 30 of Texas's Constitution—that protect victims' rights and interests and contemplate or necessitate victims' privacy. *See, e.g.,* Tex. Const. art. I, § 30(a)(1) (recognizing the right of victims "to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process"); Tex. Const. art. I, § 30(a)(2) (recognizing the right of the victim "to be reasonably protected from the accused throughout the criminal justice process"); Tex. Const. art. I, § 30(b)(1), (5) (recognizing the right of the victim, upon request, to "to notification of court proceedings" and "to information about the conviction, sentence, imprisonment, and release of the accused").

Texas has also adopted numerous statutes and rules recognizing victims' rights and interests and protecting victims' privacy. *See, e.g.*, Tex. Crim. Proc. Code Ann. § 56.09 ("As far as reasonably practical, the address of the victim may not be a part of the court file except as necessary to identify the place of the crime. The phone number of the victim may not be a part of the court file."); Tex. Crim. Proc. Code Ann. § 56.02(a)(14)(A)-(C) (recognizing the rights of victims in capital felony cases to (1) "receive by mail from the court a written explanation of defense-initiated victim outreach if the court has authorized expenditures for a defense-initiated victim outreach specialist; (B) not be contacted by the victim outreach specialist unless the victim, guardian, or relative has consented to the contact by providing a written notice to the court; and (C) designate a victim service provider to receive all communications from a victim outreach specialist acting on behalf of any person"); Tex. Crim. Proc. Code Ann. § 56.03(g) ("A victim impact statement is subject to discovery under Article 39.14 of this code before the testimony of the victim is taken only if the court determines that the statement contains exculpatory material."); Tex. Crim. Proc. Code Ann. § 56.65(b)(2), (c) (providing that victims' applications for compensation as well as accompanying records and information are "not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release" except under limited circumstances, which include that the application may be disclosed pursuant to subpoena in a criminal case, but that the confidential information must be redacted).

For information about victims' privacy protections when persons attempt to access victims' personal information through alternate means, such as public records requests, *see* "Select Confidentiality Laws" section below.

SELECT CONFIDENTIALITY LAWS

What are key confidentiality rights and/or protections in Texas?

Texas has additional statutory and rule-based mechanisms that protect victims from disclosures of their confidential or private information—even when otherwise discoverable. For example, victims of family violence, sexual assault or abuse, stalking and trafficking of persons, may apply to participate in the Address Confidentiality Program (Program). Victim-participants in the Program are entitled to have their address and other information treated as confidential—*see* Tex. Crim. Proc. Code Ann. § 56.88(a)(1)—and to have the Attorney General "(1) designate a substitute post office box address that a participant may use in place of the participant's true residential, business, or school address; (2) act as agent to receive service of process and mail on behalf of the participant; and (3) forward to the participant mail received by the office of the attorney general on behalf of the participant." Tex. Crim. Proc. Code Ann. § 56.82(a)-(b).

Additional privacy rights and protections apply to specific victims or to specific types of crimes. For example, Texas law provides for the sealing of court records that contain some child-victims' medical information. *See* Tex. Crim. Proc. Code Ann. § 57C.02(a)-(b), (e) (providing that on the court's own motion or upon a motion filed by the prosecutor, defendant or the victim—or the victim's parent or guardian—"the court shall seal the medical records of a child who is a victim of an offense described by Section 1, Article 38.071" and that the sealed records shall not be open for further inspection except under specific circumstances).

Texas has also adopted a number of privacy protections for victims of sexual assault. *See, e.g.,* Tex. Crim. Proc. Code Ann. § 56.065(j)-(k) (providing for the confidentiality of sexual assault victims' "identifying information" in communications and records relating to forensic medical examinations pursuant to this statute, and defining "identifying information" to include: "(1) information revealing the identity, personal history, or background of the person; or (2) information concerning the victimization of the person"). Another statute provides for the right of a victim of sexual assault to complete and return a pseudonym form to the law enforcement agency investigating the case to choose a pseudonym that will be used "in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings." Tex. Crim. Proc. Code Ann. § 57.02(b). The statute further provides that a victim who completes and returns the form "may not be required to disclose [his/her/their] name, address, and telephone number in connection with the investigation or prosecution of the offense[,]" and that the "form is confidential and may not be disclosed to any person other than a defendant in the case or the defendant's attorney, except on an order of a court of competent jurisdiction." Tex. Crim. Proc. Code Ann. § 57.02(c)-(d). The law enforcement agency that receives a completed form is required to do the following:
"(1) remove the victim's name and substitute the pseudonym for the name on all reports, files, and records in the agency's possession; (2) notify the attorney for the state of the pseudonym and that the victim has elected to be designated by the pseudonym; and (3)

maintain the form in a manner that protects the confidentiality of the information contained on the form." Tex. Crim. Proc. Code Ann. § 57.02(e)(1)-(3). Courts "may order the disclosure of a [sexual assault] victim's name, address, and telephone number only if the court finds that the information is essential in the trial of the defendant for the offense or the identity of the victim is in issue." Tex. Crim. Proc. Code Ann. § 57.02(g).

Similar protections exist for victims of stalking, family violence and trafficking. *See, e.g.,* Tex. Crim. Proc. Code Ann. § 57A.02(b)-(c) (providing that victims of stalking who complete and return a pseudonym form to law enforcement "may not be required to disclose [his/her/their] name, address, and telephone number in connection with the investigation or prosecution of the offense"); Tex. Crim. Proc. Code Ann. § 57B.02(b)-(c) (same for victims of family violence); Tex. Crim. Proc. Code Ann. § 57D.02(b)-(c) (same for trafficking victims); Tex. Crim. Proc. Code Ann. § 57A.02(d) (providing for the confidentiality of the form submitted by a victim of stalking, and prohibits the disclosure of the form "to any person other than the victim identified by the pseudonym form, a defendant in the case, or the defendant's attorney, except on an order of a court of competent jurisdiction"); Tex. Crim. Proc. Code Ann. § 57B.02(d) (same for victims of family violence); Tex. Crim. Proc. Code Ann. § 57D.02 (same for trafficking victims); Tex. Crim. Proc. Code Ann. § 57A.02(e)(1)-(4) ("If a [stalking] victim completes and returns a pseudonym form to a law enforcement agency under this article, the law enforcement agency receiving the form shall: (1) remove the victim's name and substitute the pseudonym for the name on all reports, files, and records in the agency's possession; (2) notify the attorney for the state of the pseudonym and that the victim has elected to be designated by the pseudonym; (3) provide to the victim a copy of the completed pseudonym form showing that the form was returned to the law enforcement agency; and (4) maintain the form in a manner that protects the confidentiality of the information contained on the form."); Tex. Crim. Proc. Code Ann. § 57B.02(e)(1)-(3) (same for victims of family violence except that law enforcement is not required to provide a copy of the form to the victim); Tex. Crim. Proc. Code Ann. § 57D.02(e)(1)-(3) (same protections for trafficking victims as victims of family violence); Tex. Crim. Proc. Code Ann. § 57A.02(g)(1)-(3) (providing that courts "may order the disclosure of a [stalking] victim's name, address, and telephone number only if the court finds that: (1) the information is essential in the trial of the defendant for the offense; (2) the identity of the victim is in issue; or (3) the disclosure is in the best interest of the victim"); Tex. Crim. Proc. Code Ann. § 57B.02(g) (same protections for family violence victims except no exception for a finding that disclosure is in the best interests of the victim); Tex. Crim. Proc. Code Ann. § 57D.02(g) (same protections for trafficking victims as family violence victims).

Additional protections from disclosure of confidential or otherwise private information are found in Texas's public records laws. Although Texas public records' laws provides that the laws are to be "liberally construed in favor of granting a request for information[,]" there are many exceptions protecting victims' privacy. Tex. Gov't Code Ann. § 552.001(b). For example, Texas excepts the following categories of information from disclosure: (1) "Information is excepted from the requirements of Section 552.021 if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision[,]" Tex. Gov't Code Ann. § 552.101; (2) "A sensitive crime scene image in the

custody of a governmental body is confidential and excepted from the requirements of Section 552.021 and a governmental body may not permit a person to view or copy the image except as provided by this section[,]" Tex. Gov't Code Ann. § 552.1085(c); (3) "[t]he following information that is held by a governmental body or filed with a court and that is contained in a victim impact statement or was submitted for purposes of preparing a victim impact statement is confidential: (1) the name, social security number, address, and telephone number of a crime victim; and (2) any other information the disclosure of which would identify or tend to identify the crime victim[,]"

Tex. Gov't Code Ann. § 552.1325(b)(1)-(2); and (4) "information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime; (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; (3) it is information relating to a threat against a peace officer or detention officer collected or disseminated under Section 411.048; or (4) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state[,]" Tex. Gov't Code Ann. § 552.108(a)(1)-(4).

Another category of records to which access is restricted pursuant to public records' requests, is information held by family violence shelter centers, trafficking shelter centers, and sexual assault programs. Texas law provides that ["i]nformation maintained by a family violence shelter center, victims of trafficking shelter center, or sexual assault program is excepted from the requirements of Section 552.021 if it is information that relates to: (1) the home address, home telephone number, or social security number of an employee or a volunteer worker of a family violence shelter center, victims of trafficking shelter center, or sexual assault program, regardless of whether the employee or worker complies with Section 552.024; (2) the location or physical layout of a family violence shelter center or victims of trafficking shelter center; (3) the name, home address, home telephone number, or numeric identifier of a current or former client of a family violence shelter center, victims of trafficking shelter center, or sexual assault program; (4) the provision of services, including counseling and sheltering, to a current or former client of a family violence shelter center, victims of trafficking shelter center, or sexual assault program; (5) the name, home address, or home telephone number of a private donor to a family violence shelter center, victims of trafficking shelter center, or sexual assault program; or (6) the home address or home telephone number of a member of the board of directors or the board of trustees of a family violence shelter center, victims of trafficking shelter center, or sexual assault program, regardless of whether the board member complies with Section 552.024." Tex. Gov't Code Ann. § 552.138(b)(1)-(6). Additional exceptions from public records' requests exist for social security numbers, Tex. Gov't Code Ann. § 552.147, and student records, Tex. Gov't Code Ann. § 552.114.

Texas also has a "[b]ody worn camera program" that addresses public requests for information recorded on a body worn camera. The "program" requires the public "to

provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera: (1) the date and approximate time of the recording; (2) the specific location where the recording occurred; and (3) the name of one or more persons known to be a subject of the recording." Tex. Occ. Code Ann. § 1701.661(a). The statute provides that except for "[i]nformation that is or could be used as evidence in a criminal prosecution[,]" information recorded by a body worn camera and held by a law enforcement agency is not subject to the requirements of Section 552.021, Government Code. Tex. Occ. Code Ann. § 1701.661(c)-(d). In response to a request for information, "[a] law enforcement agency may: (1) seek to withhold information subject to Subsection (d) in accordance with procedures provided by Section 552.301, Government Code; (2) assert any exceptions to disclosure in Chapter 552, Government Code, or other law; or (3) release information requested in accordance with Subsection (a) after the agency redacts any information made confidential under Chapter 552, Government Code, or other law." Tex. Occ. Code Ann. § 1701.661(e)(1)-(3). Law enforcement agencies are prohibited from releasing "any portion of a recording made in a private space, or of a recording involving the investigation of conduct that constitutes a misdemeanor punishable by fine only and does not result in arrest, without written authorization from the person who is the subject of that portion of the recording or, if the person is deceased, from the person's authorized representative." Tex. Occ. Code Ann. § 1701.661(f). Lastly, the statute provides that "[a] recording is confidential and excepted from the requirements of Chapter 552, Government Code, if the recording: (1) was not required to be made under this subchapter or another law or under a policy adopted by the appropriate law enforcement agency; and (2) does not relate to a law enforcement purpose." Tex. Occ. Code Ann. § 1701.661(h)(1)-(2).

SELECT PRIVILEGE LAWS

What are key privileges in Texas?

Victims in Texas have privileges they can assert under limited circumstances to prevent disclosure of their private communications with, among others, physicians and other "professionals" who are "licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder." *See, e.g.,* Tex. R. Evid. 509 (recognizing a physician-patient privilege in criminal cases for confidential communications between a physician and patient); Tex. R. Evid. 510 (recognizing a privilege in civil cases for confidential communications between a "professional" who is "licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder" and a patient).

Physician-patient privilege: "There is no physician-patient privilege in a criminal case. But a confidential communication is not admissible in a criminal case if made: (1) to a person involved in the treatment of or examination for alcohol or drug abuse; and (2) by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse." Tex. R. Evid. 509(b)(1)-(2). "In a civil case, a patient has a privilege to refuse to

disclose and to prevent any other person from disclosing: (1) a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and
(2) a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician." Tex. R. Evid. 509(c)(1)-(2).

"Professional"-patient privilege: "In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing: (A) a confidential communication between the patient and a professional; and (B) a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional." Tex. R. Evid. 510(b)(1)(A)-(B).

SELECT DEFINITIONS

For purposes of the Crime Victim's Rights statutes, Tex. Crim. Proc. Code Ann. §§ 56.01 - 56.15, terms are defined as follows:
"(1) 'Close relative of a deceased victim' means a person who was the spouse of a deceased victim at the time of the victim's death or who is a parent or adult brother, sister, or child of the deceased victim.
(2) 'Guardian of a victim' means a person who is the legal guardian of the victim, whether or not the legal relationship between the guardian and victim exists because of the age of the victim or the physical or mental incompetency of the victim.
(2-a) 'Sexual assault' means an offense under Section 21.02, 21.11(a)(1), 22.011, or 22.021, Penal Code.
(3) 'Victim' means a person who is the victim of the offense of sexual assault, kidnapping, aggravated robbery, trafficking of persons, or injury to a child, elderly individual, or disabled individual or who has suffered personal injury or death as a result of the criminal conduct of another." Tex. Crim. Proc. Code Ann. § 56.01.

For purposes of the Address Confidentiality Program, Tex. Crim. Proc. Code Ann. §§ 56.81 - 56.93, terms are defined as follows:
"(1) 'Applicant' means a person who applies to participate in the program.
(2) 'Family violence' has the meaning assigned by Section 71.004, Family Code.
(3) 'Family violence shelter center' has the meaning assigned by Section 51.002, Human Resources Code.
(3-a) 'Household' has the meaning assigned by Section 71.005, Family Code.
(4) 'Mail' means first class mail and any mail sent by a government agency. The term does not include a package, regardless of size or type of mailing.
(5) 'Participant' means an applicant who is certified for participation in the program.
(6) 'Program' means the address confidentiality program created under this subchapter.
(6-a) 'Sexual abuse' means any conduct that constitutes an offense under Section 21.02, 21.11, or 25.02, Penal Code.

(6-b) 'Sexual assault' means any conduct that constitutes an offense under Section 22.011 or 22.021, Penal Code.
(6-c) 'Stalking' means any conduct that constitutes an offense under Section 42.072, Penal Code.
(7) 'Trafficking of persons' means any conduct that constitutes an offense under Section 20A.02, 20A.03, 43.03, 43.04, 43.05, 43.25, 43.251, or 43.26, Penal Code, and that results in a person:
(A) engaging in forced labor or services; or
(B) otherwise becoming a victim of the offense." Tex. Crim. Proc. Code Ann. § 56.81(1)-(7).

For purposes of statutes Tex. Crim. Proc. Code Ann. §§ 57.01 – 57.03, providing for the confidentiality of identifying information of victims of sex offenses, terms are defined as follows:
"(1) 'Name' means the legal name of a person.
(2) 'Pseudonym' means a set of initials or a fictitious name chosen by a victim to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings.
(3) 'Public servant' has the meaning assigned by Subsection (a), Section 1.07, Penal Code.
(4) 'Victim' means a person who was the subject of:
(A) an offense the commission of which leads to a reportable conviction or adjudication under Chapter 62; or
(B) an offense that is part of the same criminal episode, as defined by Section 3.01, Penal Code, as an offense described by Paragraph (A)." Tex. Crim. Proc. Code Ann. § 57.01(1)-(4).

For purposes of statutes Tex. Crim. Proc. Code Ann. §§ 57A.01 - 57A.04, providing for the confidentiality of identifying information of victims of stalking, terms are defined as follows:
"(1) 'Name' means the legal name of a person.
(2) 'Pseudonym' means a set of initials or a fictitious name chosen by a victim to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings.
(3) 'Public servant' has the meaning assigned by Section 1.07(a), Penal Code.
(4) 'Victim' means a person who is the subject of:
(A) an offense that allegedly constitutes stalking under Section 42.072, Penal Code; or
(B) an offense that is part of the same criminal episode, as defined by Section 3.01, Penal Code, as an offense under Section 42.072, Penal Code." Tex. Crim. Proc. Code Ann. § 57A.01(1)-(4).

For purposes of statutes Tex. Crim. Proc. Code Ann. §§ 57B.01 - 57B.05, providing for the confidentiality of identifying information of victims of family violence, terms are defined as follows:

"(1) 'Name' means the legal name of a person. (2) 'Pseudonym' means a set of initials or a fictitious name chosen by a victim to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings. (3) 'Public servant' has the meaning assigned by Subsection (a), Section 1.07, Penal Code. (4) 'Victim' means a person who is the subject of: (A) an offense that allegedly constitutes family violence, as defined by Section 71.004, Family Code; or (B) an offense that is part of the same criminal episode, as defined by Section 3.01, Penal Code, as an offense described by Paragraph (A)." Tex. Crim. Proc. Code Ann. §§ 57B.01(1)-(4).
For purposes of statutes Tex. Crim. Proc. Code Ann. §§ 57D.01 - 57D.03, providing for the confidentiality of identifying information of victims of trafficking of persons, terms are defined as follows: "(1) 'Name' means the legal name of a person. (2) 'Pseudonym' means a set of initials or a fictitious name chosen by a victim to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings. (3) 'Public servant' has the meaning assigned by Section 1.07(a), Penal Code. (4) 'Victim' means a person who is the subject of: (A) an offense under Section 20A.02, Penal Code; or (B) an offense that is part of the same criminal episode, as defined by Section 3.01, Penal Code, as an offense under Section 20A.02, Penal Code." Tex. Crim. Proc. Code Ann. § 57D.01(1)-(4).
For purposes of statute Tex. Crim. Proc. Code Ann. § 57C.02, providing for the sealing of court records containing medical information for certain child victims, terms are defined as follows: "(1) 'Child' means a person who is younger than 18 years of age. (2) 'Medical records' means any information used or generated by health care providers, including records relating to emergency room treatment, rehabilitation therapy, or counseling." Tex. Crim. Proc. Code Ann. § 57C.01(1)-(2).
For purposes of Texas's public records' laws, the term "public information" is defined as follows: "(a) In this chapter, 'public information' means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; (2) for a governmental body and the governmental body: (A) owns the information; (B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.
(a-1) Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.
(a-2) The definition of 'public information' provided by Subsection (a) applies to and includes any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.
(b) The media on which public information is recorded include:
(1) paper;
(2) film;
(3) a magnetic, optical, solid state, or other device that can store an electronic signal;
(4) tape;
(5) Mylar; and
(6) any physical material on which information may be recorded, including linen, silk, and vellum.
(c) The general forms in which the media containing public information exist include a book, paper, letter, document, e-mail, Internet posting, text message, instant message, other electronic communication, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map, and drawing and a voice, data, or video representation held in computer memory." Tex. Gov't Code Ann. § 552.002(a)-(c).

For purposes of Texas's public records' laws, additional terms are defined as follows:
"(1) 'Governmental body':
(A) means:
(i) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;
(ii) a county commissioners court in the state;
(iii) a municipal governing body in the state;
(iv) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;
(v) a school district board of trustees;
(vi) a county board of school trustees;
(vii) a county board of education;
(viii) the governing board of a special district;
(ix) the governing body of a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code;
(x) a local workforce development board created under Section 2308.253;

(xi) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and
(xii) the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds; and
(B) does not include the judiciary.
(2) 'Manipulation' means the process of modifying, reordering, or decoding of information with human intervention.
(2-a) 'Official business' means any matter over which a governmental body has any authority, administrative duties, or advisory duties.
(3) 'Processing' means the execution of a sequence of coded instructions by a computer producing a result.
(4) 'Programming' means the process of producing a sequence of coded instructions that can be executed by a computer.
(5) 'Public funds' means funds of the state or of a governmental subdivision of the state.
(6) 'Requestor' means a person who submits a request to a governmental body for inspection or copies of public information." Tex. Gov't Code Ann. § 552.003(1)-(6).

For purposes of Texas's public records' laws, key terms for the exception for information maintained by a Family Violence Shelter Center, Victims of Trafficking Shelter Center and Sexual Assault Program, are defined as follows:
"(1) 'Family violence shelter center' has the meaning assigned by Section 51.002, Human Resources Code.
(2) 'Sexual assault program' has the meaning assigned by Section 420.003.
(3) 'Victims of trafficking shelter center' means:
(A) a program that:
(i) is operated by a public or private nonprofit organization; and
(ii) provides comprehensive residential and nonresidential services to persons who are victims of trafficking under Section 20A.02, Penal Code; or
(B) a child-placing agency, as defined by Section 42.002, Human Resources Code, that provides services to persons who are victims of trafficking under Section 20A.02, Penal Code." Tex. Gov't Code Ann. § 552.138(a)(1)-(3).

For purposes of Texas's physician-patient privilege, terms are defined as follows:
"(1) A 'patient' is a person who consults or is seen by a physician for medical care.
(2) A 'physician' is a person licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation.
(3) A communication is 'confidential' if not intended to be disclosed to third persons other than those:
(A) present to further the patient's interest in the consultation, examination, or interview;
(B) reasonably necessary to transmit the communication; or
(C) participating in the diagnosis and treatment under the physician's direction, including members of the patient's family." Tex. R. Evid. 509(a)(1)-(3).

For purposes of Texas's "professional"-patient privilege, terms are defined as follows:
"(1) A 'professional' is a person:
(A) authorized to practice medicine in any state or nation;
(B) licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;
(C) involved in the treatment or examination of drug abusers; or
(D) who the patient reasonably believes to be a professional under this rule.
(2) A 'patient' is a person who:
(A) consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or
(B) is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.
(3) A 'patient's representative' is:
(A) any person who has the patient's written consent;
(B) the parent of a minor patient;
(C) the guardian of a patient who has been adjudicated incompetent to manage personal affairs; or
(D) the personal representative of a deceased patient.
(4) A communication is 'confidential' if not intended to be disclosed to third persons other than those:
(A) present to further the patient's interest in the diagnosis, examination, evaluation, or treatment;
(B) reasonably necessary to transmit the communication; or
(C) participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family." Tex. R. Evid. 510(a)(1)-(4).

For purposes of Texas's body worn camera program, terms are defined as follows:
"(1) 'Body worn camera' means a recording device that is:
(A) capable of recording, or transmitting to be recorded remotely, video or audio; and
(B) worn on the person of a peace officer, which includes being attached to the officer's clothing or worn as glasses.
(2) 'Department' means the Department of Public Safety of the State of Texas.
(3) 'Private space' means a location in which a person has a reasonable expectation of privacy, including a person's home." Tex. Occ. Code Ann. § 1701.651(1)-(3).

[1] *See Office for Victims of Crime, Ethical Standards, Section I: Scope of Services,* https://www.ovc.gov/model-standards/ethical_standards_1.html.
[2] Additional examples of system-based advocate titles, include: district attorney's office/state attorney's office advocates or victim-witness coordinators; law enforcement advocates; FBI victim specialists; U.S. attorney's office victim-witness coordinators; board of parole and post-prison supervision advocates; and post-conviction advocates.
[3] Examples of community-based advocates, include: crisis hotline or helpline staff; rape crisis center staff; domestic violence shelter staff; campus advocates; and homicide support program staff.
[4] *See* Nat'l Crime Victim Law Inst., *Refusing Discovery Requests of Privileged Materials Pretrial in Criminal Cases*, NCVLI Violence Against Women Bulletin (Nat'l Crime Victim Law Inst., Portland, Or.), June 2011, at 3 n.30 (listing victims' constitutional and statutory rights to privacy and to dignity, respect or fairness).
[5] *See, e.g.*, *Whalen v. Roe,* 429 U.S. 589, 599-600 (1977) (recognizing that the United States Constitution provides a right of personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) ("[A] right to personal privacy . . . does exist under the Constitution.").
[6] There are different levels of privileges: absolute, absolute diluted and qualified. An absolute privilege is one in which only a victim has the right to authorize disclosure and the court can never order the information to be disclosed without the victim's consent. Absolute privileges are rare, however, because privileges are seen to run contrary to the truth finding function of courts.
[7] *See, e.g.,* Ala. R. Evid. 503A(a)(7) ("'Victim counselor means any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims, who is not affiliated with a law enforcement agency or prosecutor's office and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence."); Alaska Stat. Ann. § 18.66.250(5)(B) ("'[V]ictim counseling center' means a private organization, an organization operated by or contracted by a branch of the armed forces of the United States, or a local government agency that . . . is not affiliated with a law enforcement agency or a prosecutor's office[.]"; Haw. Rev. Stat. Ann. § 626-1, Rule 505.5(a)(6) ("A 'victim counseling program' is any activity of a domestic violence victims' program or a sexual assault crisis center that has, as its primary function, the counseling and treatment of sexual assault, domestic violence, or child abuse victims and their families, and that operates independently of any law enforcement agency, prosecutor's office, or the department of human services."; Ind. Code Ann. § 35-37-6-5(2) ("'[V]ictim service provider' means a person . . . that is not affiliated with a law enforcement agency[.]"; Neb. Rev. Stat. Ann. § 29-4302(1) ("Advocate means any employee or supervised volunteer of a domestic violence and sexual assault victim assistance program or of any other agency, business, or organization that is not affiliated with a law enforcement or prosecutor's office whose primary purpose is assisting domestic violence and sexual assault victims[.]"; N.M. Stat. Ann. § 31-25-2(E) ("'[V]ictim counselor' means any employee or supervised volunteer of a victim counseling center or other agency, business or organization that provides counseling to victims who is not affiliated with a law enforcement agency or the office of a district attorney[.]".
[8] Terms that inform the intersection of victim services and HIPPA, FERPA, FOIA or VOCA are "implied consent" and "waiver." "Informed consent" is defined as "1. [a] person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. · For the legal profession, informed consent is defined in Model Rule of Professional Conduct 1.0(e)[;] [or] 2. [a] patient's knowing choice about a medical treatment or procedure, made after a physician or other healthcare provider discloses whatever information a reasonably prudent provider in the medical field community would give to a patient regarding the risks involved in the proposed treatment or procedure." *Informed consent,* Black's Law Dictionary (8th ed. 2004). "Waiver" is defined as "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage . . . ." *Waiver,* Black's Law Dictionary (8th ed. 2004).
[9] *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA), https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Are law enforcement records considered education records?,* https://studentprivacy.ed.gov/faq/are-law-enforcement-records-considered-education-records.
[14] *Id.*

[15] Department of Justice Guide to the Freedom of Information Act, at 1, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption6.pdf.
[16] *Id.*
[17] *Office for Victims of Crime, Crime Victims Fund,* https://www.ovc.gov/pubs/crimevictimsfundfs/intro.html#VictimAssist.
[18] *Id.*
[19] *Id.*
[20] *Ethic,* Merriam-webster.com, https://www.merriam-webster.com/dictionary/ethics (last visited July 31, 2019).
[21] *Office for Victims of Crime, Purpose & Scope of The Standards,* https://www.ovc.gov/model-standards/purpose_and_scope.html.
[22] *Office for Victims of Crime, Purpose & Scope of The Standards,* https://www.ovc.gov/model-standards/purpose_and_scope.html. Each of the five sections contain ethical standards and corresponding commentaries, explaining each standard in detail. For "Scope of Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_1.html. For "Coordinating within the Community," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_2.html. For "Direct Services," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_3.html. For "Privacy, Confidentiality, Data Security and Assistive Technology," the ethical standards and their corresponding commentaries can be located at https://www.ovc.gov/model-standards/ethical_standards_4.html. For "Administration and Evaluation," the ethical standard and the corresponding commentary can be located at https://www.ovc.gov/model-standards/ethical_standards_5.html.
[23] *Office for Victims of Crime, Ethical Standards for Serving Victims & Survivors of Crime,* https://www.ovc.gov/model-standards/ethical_standards.html.
[24] *See Weatherford v. Busey*, 429 U.S. 545, 559 (1977).
[25] *See United States v. Agers*, 427 U.S. 97, 106-07 (1976)
[26] *Strickler v. Greene*, 527 U.S. 263, 280 (1999).
[27] *Id.*
[28] *See, e.g., Eakes v. Sexto*n, 592 F. App'x 422, 429 (6th Cir. 2014) (finding that "contrary to the district court's conclusion that the [state] prosecutor was not responsible for failing to disclose the Victim–Advocate report because the Advocate was located 'in a separate part of the District Attorney's office,' the prosecutor is in fact responsible for disclosing all *Brady* information in the possession of that office, such as the Victim–Advocate report, even if the prosecutor was unaware of the evidence prior to trial"); *Commonwealth v. Liang*, 747 N.E.2d 112, 114 (Mass. 2001) (concluding that "the notes of [prosecution-based] advocates are subject to the same discovery rules as the notes of prosecutors[,]" and "[t]o the extent that the notes contain material, exculpatory information . . . or relevant 'statements' of a victim or witness . . . the Commonwealth must disclose such information or statements to the defendant, in accordance with due process and the rules of criminal procedure").
[29] Notably, for advocates/entities that receive VOCA funding, because this disclosure is "compelled by statutory or court mandate," it does not pursuant to statute, require a signed, written release from the victim. Nevertheless, if disclosure is required, VOCA requires that advocates make reasonable attempts to notify the victim affected by the disclosure and take whatever steps are necessary to protect their privacy and safety.
[30] Defendant John Giglio was tried, convicted and sentenced for forgery related crimes. While *Giglio's* case was pending appeal, his attorney filed a motion for a new trial, claiming that there was newly discovered evidence that the key Government witness–"the only witness linking [Giglio] with the crime"– had been promised that he would not be prosecuted in exchange for his testimony. The defense attorney's motion was initially denied, but certiorari review was granted "to determine whether the evidence [that was] not disclosed . . . require[d] a new trial under the due process criteria of" cases, including *Brady v. Maryland,* 373 U.S. 83, 87 (1963), which "held that suppression of material evidence justifies a new trial" whether the prosecutor intended to withhold information or not. "An affidavit filed by the Government as part of its opposition to a new trial confirm[ed] [Giglio's] claim that a promise was made to [the key Government witness]" by the former Assistant United States Attorney "that [the witness] would not be prosecuted if he cooperated with the Government." This promise of leniency was made by the formerly assigned Assistant United States Attorney who did not handle the trial; and the Assistant United States Attorney who handled the trial was unaware of the promise. The Supreme Court held that nondisclosure of material evidence "is the responsibility of the prosecutor"–whether nondisclosure was intentional or not–and that such action is directly attributable to the Government. Addressing the topic of "turnover," principally, the Court explained that "[t]o the extent this places a burden on the large prosecution offices, procedures and regulations can be established

to carry that burden and to [e]nsure communication of all relevant information on each case to every lawyer who deals with it." Giglio's conviction was reversed, and the case was remanded to the lower court.

[31] This section addresses subpoenas directed to system-based advocates. For information concerning community-based advocates and subpoenas, please contact NCVLI for technical assistance.

[32] Terminology for subpoenas varies from jurisdiction-to-jurisdiction. Common examples of subpoenas include: "subpoenas"; "subpoenas duces tecum"; "deposition subpoenas"; and "subpoenas ad testificandum." *See Subpoena,* Black's Law Dictionary (8th ed. 2004).

[33] *See Subpoena,* Black's Law Dictionary (8th ed. 2004) (defining "subpoena" as "[a] writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply"); *subpoena duces tecum,* Black's Law Dictionary (8th ed. 2004) (defining "subpoena duces tecum" as "[a] subpoena ordering the witness to appear and to bring specified documents, records, or things"); *deposition subpoena,* Black's Law Dictionary (8th ed. 2004) (defining "deposition subpoena" as "1. [a] subpoena issued to summon a person to make a sworn statement in a time and place other than a trial[;] [and] 2. [i]n some jurisdictions, [this is referred to as] a subpoena duces tecum").

[34] Attorney work product "is generally exempt from discovery or other compelled disclosure." *Work product,* Black's Law Dictionary (8th ed. 2004).