



## Privilege FAQ for System Partners Professionals

### Basic Questions around Privilege

Q. Why do victims need privilege?

A. Safety must stand at the forefront of any victim and their families' needs. Confidentially seeking services represents a critical component to feeling safe and provides the circumstances for a victim to feel comfortable & share intimate details without having to worry about them later being revealed. Victims fleeing intimate partner violence and family violence centers need build trust together so survivors can feel comfortable in sharing details about their experience. Privilege supports that help seeking and trust.

Q. Where can we locate the language of the statute?

A. Chapter 93 of the Texas Family Code. You can access the statute online at [www.statutes.legis.state.tx.us/](http://www.statutes.legis.state.tx.us/). Please review this to specifically reference the definitions of "victim," "advocate," "confidential communications," "family violence center," and all other key components of this statute.

Q. How is privilege different than the current confidentiality?

A. The National Network to End Domestic Violence (NNEDV) and the Confidentiality Institute offer a great synopsis of these distinctions. In its most basic terms, confidentiality is a responsibility to protect someone else's choices about disclosure, whereas privilege is a legal requirement prohibiting disclosure against someone's will.<sup>1</sup>

Q. How does a victim exert privilege?

A. The victim "holds" the privilege and can exert it at any time. In the absence of a waiver of the privilege by the victim, system partners should expect that the confidential communications between the family violence advocate and victim will be privileged.

Q. Is there a civil or criminal liability if a victim's privilege is accidentally or purposely breached by a program or individual advocate? What is the ramification to the disclosure and use of the information?

A. Above all else, a disclosure of a victim's privileged information could serve to compromise the victim's safety and security. In addition, civil liability for the family violence center and the individual advocate could arise from such a disclosure particularly if harm to the victim results.

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<sup>1</sup> [http://nnedv.org/downloads/NNEDV\\_CI\\_Primer\\_on\\_Privilege\\_2015.pdf](http://nnedv.org/downloads/NNEDV_CI_Primer_on_Privilege_2015.pdf)

- Q. Is any program that serves domestic violence able to exert privilege?
- A. No, according to 93.001(2) of the Family Code, the program must either be a funded family violence center or otherwise meet the service requirements described by Section 51.005(b)(3), Human Resources Code.
- Q. How does a victim's privilege affect mandatory reporting of child abuse or neglect?
- A. Privilege does not affect your responsibility related to mandatory reporting. In Texas, everyone is a mandatory reporter of child abuse/neglect & adult abuse, neglect, and exploitation. As such, you must make the mandatory report and such disclosure serves as an exception to privilege and *not* as a waiver.
- Q. How does a victim's death affect privilege?
- A. Although there is yet to be a clear answer on this question, the best practice would be that in the event of a victim's death, the privilege can be claimed by a personal representative or legal guardian of the victim.
- Q. What if the information involves a matter of life or death?
- A. Without additional context on the specific matter, it seems likely you could protect privileged or confidential communications and take necessary action. A resource to be reviewed for these types of circumstances is the NNEDV's Victim Confidentiality Considerations for Domestic Violence and Sexual Assault Programs When Responding to Rare or Emergency Situations.<sup>2</sup>

## **Working with Local Domestic Violence Programs**

- Q. What kind of information can domestic violence program share with our office?
- A. Any attempt to obtain privileged communications should be taken with caution. If you are able to locate information elsewhere that would be the best practice to best support the critical relationship that exists between a victim and an advocate. Absent a properly executed release of information signed by a victim who has consented to the privilege disclosure, the privilege attaches to all confidential communications and the advocate/family violence center must not disclose them. One key exception is mandatory reporting or child abuse/neglect and adult abuse/neglect/exploitation. Aside from this, only a handful of other exceptions exist:
- In the event of a proceeding under Article 38.49 of the Code of Criminal Procedure, there may be an in-camera review by a judge to assess if the family violence center holds a specific document that proves forfeiture by wrongdoing. This exception should be rare and if it arises in your community, consider contacting TCFV for specialized technical assistance.

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<sup>2</sup> <https://www.techsafety.org/victim-confidentiality/>

- Another exception may occur if an advocate serving as an expert witness reviews confidential communication and then derives an opinion based on the review of that information.
- If the victim waives privilege and asks the Family Violence Center to disclose privileged communication to one side in litigation for the purpose of a criminal or civil proceeding, then the family violence center must disclose the information to all parties. This only applies in instances where it is the Family Violence Center releasing the information and it is directly for the purpose of a proceeding.

Q. What if a law enforcement officer has a warrant for a victim?

A. If a law enforcement officer attempts to serve a warrant, all confidentiality and privilege laws still apply. A warrant is not a required exception.

### **Working with Privilege**

Q. How does privilege interact with the Michael Morton Act?

A. There is no explicit interaction between privilege and the Michael Morton Act. The victim and advocate at the family violence center have the privileged relationship. The only scenario where there may be an intersection is in the instance of a waiver by the victim to prosecution, one of the disclosure exceptions outlined in the statute. In those instances, a prosecutor with information would still be bound by the Michael Morton Act.

Q. How can we still use expert witnesses while maintaining a victim's privilege?

A. Expert witnesses represent a critical tool in supporting victims in court. TCFV recommends that courts rely on expert witnesses rather than fact witnesses. For more information on expert witnesses, please see resources from the [Institute on Domestic and Sexual Violence \(IDVSA\)](#) and the University of Texas (UT) at Austin. If you have questions on how best to foster expert witness testimony without inadvertently coming within an exception to privilege, consider contacting TCFV's Policy team or UT's IDSVA for specialized technical assistance on this topic.

Q. When can our office ask for an in camera review of the case file?

A. In the event of a proceeding under Article 38.49 of the Code of Criminal Procedure, there may be an in-camera review by a judge to assess if the family violence center holds a specific document that proves forfeiture by wrongdoing. This exception should be rare and if it arises in your community, consider contacting TCFV for specialized technical assistance.