Confidentiality and Coronavirus Contact Tracing: FAQs for OVW-Funded Victim Service Providers

A VRLC Privacy Rights Project Resource

Introduction

The coronavirus disease (COVID-19) pandemic has generated a lot of questions about protecting survivors' personal information. Victim service providers (VSPs)[1] wonder how to protect program participants'[2] confidentiality if a COVID-19 contact tracer asks for personally identifying information. These FAQs address this issue.

Contact tracing can help reduce the impact of COVID-19 by increasing our understanding about how it spreads and by helping people get testing and treatment. It can also reveal how certain individuals or communities are disparately affected by COVID-19 because of race,[3] immigration status, class, gender identity,[4] etc. These are some of the benefits of contact tracing when it is done well.

However, contact tracing presents confidentiality, privacy, and safety concerns as well. Contact tracers ask people to provide information about where they have been and with whom. Contact tracing can reveal that someone was in emergency or transitional housing shelter, saw a counselor, attorney, or advocate, or participated in a support group, etc. Race, ethnicity, immigration status, gender-identity, class, ability, religion, and more factor into the risk of sharing personal information with government-based health care agencies; a risk informed by historical trauma and prior government actions. Survivors of sexual assault, dating and domestic violence, and stalking have many reasons to be concerned about sharing information about themselves with contact tracers.

VSPs who receives funding through the Office on Violence Against Women (OVW) already know that they may only share the personally identifying information (PII) of people who come to them for services (program participants) in three situations:

1. The VSP has a valid release of information from the program participant.
2. A statute requires the VSP to release the PII.

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[1] We refer to programs providing services related to sexual assault, domestic and dating violence, and stalking as victim service providers because that is who is required by the Violence Against Women Act to keep personally identifying information confidential.

[2] In this document, "program participant" includes anyone who requested, received, or was denied a VSP's services related to sexual assault, dating and domestic violence, and stalking. We chose not to use the term "survivors" in this document because we wanted to encompass the broad range of people who come for services including survivors, their friends, partners, and family members. Sometimes we also reference "victims," but this is only when the law being discussed uses the term "victim." For example, within the Violence Against Women Act (VAWA) confidentiality statute, the provisions apply to "victim service providers."

[3] See, for example, https://www.colorlines.com/articles/how-testing-coronavirus-became-rorschach-test-racism and https://www.colorlines.com/articles/documenting-disparity-challenges-collecting-racial-data-coronavirus.

[4] See, for example, https://www.colorlines.com/articles/covid-19s-impact-black-lgbtq-community-creates-new-traumas.

3. A court order or case law requires the VSP to release the PII.[5]

These FAQs will help VSPS think about how the VAWA confidentiality requirements work when a contact tracer asks for a program participant's PII.

The Victim Rights Law Center (VRLC) created these FAQs to help VSPs respond if a health department[6] asks them or program participants to share the PII of someone who has come to the VSP for services. Always feel free to contact us with any confidentiality questions. You can reach us at TA@victimrights.org.

1. What do you mean by "privacy" and "confidentiality?"

Throughout these FAQs,

- We use *privacy* to mean an individual's right to keep personal information to themself.

- We use *confidentiality* to mean the legal or ethical duty of anyone entrusted with someone else's personal information not to share it.

2. What is personally identifying information (PII)?

Contact tracers might ask for the names, phone numbers, email addresses, and physical addresses of anyone with whom the person with COVID-19 came in contact, all of which is personally identifying. Personally identifying information (PII) is a fact, or facts taken together, that reveals a person's identity. PII includes "information that is likely to disclose the location of a victim of domestic violence, dating violence, sexual assault or stalking." (34 USC § 12291.) Examples of PII include someone's name, address, phone number, social security number, birth date, number of children, race, ethnicity, or religion.

Although beyond the scope of this FAQ, jurisdiction-specific confidentiality and professional privilege requirements might be jeopardized by sharing information about program participants with contact tracers.

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[5] For more information about VAWA's confidentiality requirements, see "OVW's Frequently Asked Questions (FAQs) on the VAWA Confidentiality Provision (34 U.S.C. § 12291(b)(2))."
https://www.justice.gov/ovw/page/file/1006896/download
[6] A health department is a part of government (e.g., tribal, state, county agency) that focuses on protecting and promoting the health of the people in its jurisdiction. The role of a health department can be different from one county, for example, to another. We expect that health departments are in charge of any contact tracing. Health departments may contract for some of their work, including contact tracing.

3. How are OVW-funded VSPs required to protect the confidentiality of PII?

OVW-funded VSPs must protect the confidentiality of anyone who sought, received, or was denied their services. Specifically, grantees and subgrantees shall not "disclose, reveal, or release" PII or "individual client information without the informed, written, reasonably time-limited consent of the person," or if the release of information is required by a statutory or court mandate. See 34 USC § 12291(b)(2) and 28 CFR § 90.4.

4. What is contact tracing?

Contact tracing is the process of identifying people (contacts) who may have come near someone infected with the virus[7] and collecting certain information about the contacts (tracing). The contact would need to have been close and long enough that it might have resulted in infection. The goal of contact tracing is to reduce the number of people with COVID-19 by identifying contacts, testing them for COVID-19, treating them, isolating them while they are infected, and tracing the people with whom they were in contact.

5. What are the two types of contact tracing?

The two types of contact tracing are manual tracing and application program interface (API)-related tracing.

Manual tracing is when a contact tracer communicates with people with COVID-19 and asks them questions about their exposure to the virus and how they may have exposed others to it. Manual tracing is typically done on its own but can also be a follow-up to API tracing. In addition to contact tracers, health department case investigators may also have a role with manual tracing. These FAQs focus primarily on manual tracing.

API tracing is when smart technology (typically through a smart phone) receives and shares information about who has been in contact with someone else using the same API who may have been exposed to the virus. API stand for "application program interface." An API is not an app, but technology that supports an app. See Question 17 for more information about API tracing.[8]

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[7] When we use "the virus," we are referring to "severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2" which is often referred to as the coronavirus and also known by the disease it causes, COVID-19.

[8] For more information about contact tracing, see the CDC's "Principles of Contact Tracing," https://www.cdc.gov/coronavirus/2019-ncov/php/principles-contact-tracing.html; or for a related booklet, https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/principles-contact-tracing-booklet.pdf.

6. Who are contact tracers?

Contact tracers track the spread of COVID-19 for health departments, other governmental agencies, or community-based organizations. Contact tracers are typically working with disease investigators.

Note about contact tracers: People or apps may hold themselves out to be legitimate contact tracers when they are not. Phone numbers may be spoofed and weblinks, emails, and attachments may contain spyware or computer viruses, for example. If in doubt, an online search of the apparent sender to verify their address or website may be a useful precaution. A phone call to the health department could be another way to verify the email source or caller's identity. Legitimate contact tracers should never ask for identifying information, such as a Social Security number, bank account, or credit card information. The attorney general or other governmental leader in VSPs' jurisdictions may have additional information about contact tracing scams. For example, see https://www.doj.state.or.us/media-home/news-media-releases/watch-out-for-imposter-contact-tracers/.

7. How would a health department know if someone tested positive for COVID-19?

Typically, the laboratory that conducted the COVID-19 testing will notify the health department of the positive test results. Test results are also sent to health care providers.

8. How does manual contact tracing work?

Contact tracers may use phone calls, texts, emails, videoconferencing, or in-person visits, ideally in the person's primary language, to talk with contacts. They will typically try to reach a contact remotely before attempting in-person communication (e.g., showing up at the person's home). The manual contact tracing process typically takes a health department three to five days to complete.

Different health departments take various approaches to contact tracing. VSPs might learn how a health department in their service area does its contact tracing through the department's web site or other information it provides. VSPs might consider meeting with their health department to discuss questions about how contact tracing could affect the VSP. Coalitions or member programs might connect with health departments to remind them that, even during this pandemic, VSPs are required to protect program participants' confidential information. A recommended practice, for example, could be that if someone with COVID-19 shares that they are or were at a VSP, the health department contact tracer would not ask that individual to

disclose names of possible contacts at the VSP, but would ask for the name of a VSP staff member to contact for that information. (Whether the VSP would be allowed to share that information is addressed below.)

Contact tracers are not supposed to tell the people they contact the name of a person with COVID-19. They may only tell people that they had contact with someone who has the virus. However, if people contacted only had contact with certain people in certain places, they may have a good idea of who the person who triggered the contact. VSPs may want to ask their health department how they respond to questions about the source of the virus.

9. What questions might a contact tracer ask?

The questions a manual contact tracer might ask include:
- What is your age, race, and other demographic information?
- What the names of and contact information for people with whom you have had face-to-face contact for more than a specific time (e.g., fifteen minutes) or who may have had contact with your mucus or saliva?
- When did you have the contact with the other person(s)?
- Have you experienced any COVID-19 symptoms (such as fever or chills, shortness of breath, loss of smell or taste, sore throat, nausea)?
- What treatment have you received?
- What activities have you participated in (e.g., meetings, protests, family gatherings)?
- Where have you been (e.g., grocery stores, restaurants)?

VSPs should know how and to what extent their local health department keeps COVID-19-related information anonymous or deidentified given their database, etc.

10. What might VSPs want to discuss with their health department about contact tracing?

The more VSPs know about how contact tracing is done in their community the better able they will be to answer staff and program participants' questions about it. Some questions VSPs may want to discuss with their health department include:

- What steps does the health department take to protect confidentiality and how will it navigate privacy challenges when the date of an exposure easily reveals who may have exposed a contact to the virus?

- How will the health department respond if a contact is unwilling or unable to be interviewed?
- What happens if a contact cannot be located?
- How will the health department help protect the privacy, confidentiality, and safety of people they contact who cannot safely quarantine at home?
- How is the notification process done if it involves minors, either because the minor has COVID-19 or has been in contact with someone who does?

11. What, if anything, may a VSP tell a contact tracer who asks for program participants' PII?

A VSP may only disclose PII they are authorized to share by a program participant's written and signed release of information or that they are required to release by a statutory or court mandate. If the VSP has a written release of information (ROI), it may share the specific information the program participant authorized them to release. Please remember that releases may not be a requirement for services and should only be used to meet the needs of the program participant, not the VSP.

If a contact tracer asks for information a VSP is not authorized or required to share, the VSP might tell them something like, "I can neither confirm nor deny that that person is here. I will share your name and contact information with anyone who was here during the time in question and let them know about the positive test results. I will let them know how to reach you."

A VSP can also reach out to people who may have had contact with the infected person using ROIs as needed. They may want to let the health department know that they did this. The VSP should not share any unauthorized personal information.

A VSP may want to designate one or more staff members to take health department and contact tracers' calls or train everyone on staff to respond to them. Either way, they may want to have scripts available to all staff to make sure these calls are handled appropriately.

12. Is there a statute or court mandate that requires VSPs to share PII for contact tracing?

VSPs will need to look to the law in their jurisdiction to determine if a statute, standing court order, or case law requires them to report PII about program participants as part of contact tracing. Typically, statutes that require reports about diseases apply to certain professionals

(e.g., physicians or school staff) or facilities (e.g., prisons, hospitals, childcare centers). These reporting laws do not usually apply to VSPs.

Some statutes, however, might require "anyone" in a jurisdiction to cooperate with a health department's communicable disease investigation. Or for "a person" other than a physician or other named professional to permit a local health director to review records in their possession that pertain to a communicable disease outbreak. While a governor's emergency or other executive order, for example, is not a statutory mandate on its own, a statute may require compliance with such an order. For example, a statute may allow a governor to modify a statute during a health care emergency if it conflicts with the protection of public health.

If a statute requires compliance with an emergency or executive order, pay close attention to both the statute and the order itself to make sure that it *requires* the VSP to release the information. The statute and order may require a public health investigator to ask for information, but this does not mean the VSP is required to provide the information.[9] If a VSP thinks a statute or executive order might require them to release PII without a program participant's consent, we strongly recommend that they consult with an attorney who practices in their service area and who knows the VAWA confidentiality requirements. The VRLC TA team is also available to help VSPs navigate the statutory analysis. Feel free to contact us at TA@victimrights.org.

13. How will I know if an executive or emergency order is based on a statutory mandate?

Some questions that might help VSPs analyze relevant statutes and related orders include:

- Does the statute (or order based on the statute) apply to COVID-19?
- Are VSPs on the list of people who are required to share information?
- Is the reporting mandatory or permissive? If the statute says someone "may" or "is encouraged" to report *that is not a requirement to report.*
- If the VSP is required to share information, what exactly must be shared? For example, is the requirement broad (e.g., all information) or narrow (e.g., medical records that pertain to treatment)?

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[9] See https://www.networkforphl.org/resources/disclosure-of-covid-19-information-by-domestic-violence-agencies-or-shelters/.

14. What does VAWA require when a VSP must release PII because of a statutory or court mandate?

VAWA states that if a release of PII "is compelled by statutory or court mandate," VSPs must do two things:

1. "Make reasonable attempts to provide notice to victims affected by the disclosure of information," and
2. Take "steps necessary to protect the privacy and safety of the persons affected by the release of the information." 34 U.S.C. §12291(b)(2)(C).

This means that VSPs need to try to safely notify people whose PII they were, or will be, required to release, and make efforts to protect the privacy and safety of people who are impacted because the information is shared. Steps VSPs might take include trying to contact program participants directly or through any authorized emergency contacts or relocate them and their family to a different shelter or motel. Best practice is to make sure that program participants know in advance when a statute or court order might require a VSP to release their information, and that the VSP contacts the person whose PII must be released *before* it is released.

15. How might a VSP inform program participants that they may have had contact with COVID-19 while at the VSP?

VSPs may want to ask program participants during intake and exit interviews if they would like to be notified if the VSP learns that they may have been exposed to COVID-19. For program participants who wish to receive such information, VSPs should confirm how they would like to be contacted. If they want to be notified through a third party, VSPs should be sure to get an ROI that allows them to release any PII that might be required. Alternatively, VSPs could arrange for the program participant to check in with them for COVID-19-related updates.

16. How might VSPs want to discuss with a program participant about contact tracing?

VSPs should make sure that *all* program participants know how they approach contact tracing. Concepts to reinforce include:

- The VSP values program participants' privacy and will do all they can under the law to protect the confidentiality of their PII.
- Program participants are not required to follow the VAWA confidentiality provisions; only VSPs are.
- Any VSP guidelines and agreements about sharing other program participants' information or the VSP location in order to protect everyone's privacy and safety. (These guidelines and agreements can be especially important with support groups, emergency shelters, transitional housing, and other residential services.) If, however, program participants share information with contact tracers, VSPs will not penalize them for this decision.
- The VSP will only release PII if:
     a. The program participant gave the VSP permission through a VAWA-compliant ROI
     b. A statute requires the VSP to release it. (Be sure to discuss statutes that require the VSP to share COVID-19 related information.)
     c. Case law or a court order requires the VSP to release it.
- The VSP will only share program participants' PII if there is a chance that they were exposed, or exposed someone else, to COVID-19.
- Information about how to get tested for COVID-19 and receive other resources.

We encourage VSPs to talk with program participants early and often about COVID-19, contact tracing, and protecting privacy so that program participants are prepared to answer any questions that arise. If a program participant contracts COVID-19 and a contact tracer asks them who they've been in close contact with, they can decide if they want to tell the contact tracer they were at the VSP (they do not need to disclose that they were receiving services). They can offer the name of someone on staff at the VSP – maybe the contact tracing point person – rather than the names of program participants.

17. What more can you tell us about API contact tracing?

API contact tracing is when people use smart technology (typically a smart phone) to receive and share information about who they have been in contact with so the people using the API learn about their possible exposure to the virus.

Each person's device uses Bluetooth to detect other nearby phones and keeps a personal record of the encounters. Instead of personally identifying its owner, each phone uses a temporary, anonymous alias. When two phones come within range of each other, they share their current aliases. https://www.washingtonpost.com/politics/2020/04/28/contact-tracing-apps-can-help-stop-coronavirus-they-can-hurt-privacy/. People who test positive for COVID-19 can indicate this in the app so that those they came into Bluetooth range with will be

notified of potential exposure. People with COVID-19 decide if they will give the health department notice that they have been exposed to the virus.

Apple and Google have developed a contact tracing API, which is a framework that app developers can use to build contact tracing apps. Apple and Google do not plan to develop their own app that uses the API. See https://www.brookings.edu/techstream/inaccurate-and-insecure-why-contact-tracing-apps-could-be-a-disaster/; https://www.brookings.edu/techstream/inaccurate-and-insecure-why-contact-tracing-apps-could-be-a-disaster/; and https://brookingsregister.com/article/tech-privacy-firm-warns-contact-tracing-app-violates-policy for more information about API contact tracing.

Conclusion

Contact tracing of COVID-19 can raise challenges for OVW-funded VSPs given their responsibility to protect personally identifying information. The VRLC hopes these FAQs help VSPs meet them! Let us know how we can support you with contact tracing or any other confidentiality-related issues that come up with your work. You can reach us at TA@victimrights.org. With appreciation for you and your work