



CONFIDENTIALITY PROTECTIONS FOR SURVIVORS OF DOMESTIC VIOLENCE, HUMAN TRAFFICKING AND OTHER CRIMES

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Because survivors of domestic violence, sexual assault, and other crimes are among the most vulnerable populations in the immigration legal system, numerous federal and state laws and policies have been enacted to protect the confidentiality of their information and restrict the disclosure of that information. One source of important protections is codified at 8 U.S.C. § 1367 (Section 1367), which restricts identification of survivors with humanitarian relief claims and disclosure of their information.¹

This practice advisory discusses the ways in which federal law has been designed and implemented to protect information concerning abused immigrants, the policy laid out by U.S. Department of Homeland Security (DHS) agencies,² and what advocates can do when the protection provisions are violated.

¹ For more information on the history of these protection provisions, see Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections* at https://www.lsc.gov/sites/default/files/LSC/pdfs/10.%20%20Appendix%20IX%20%20CH%203%20SA_Confidentiality_Final.pdf.

² Most recently, U.S. Immigration and Customs Enforcement (ICE) issued “ICE Directive 10036.2: Implementation of Section 1367 Protections for Noncitizen Victims of Crime,” on March 16, 2022 (March 16, 2022 ICE Memo), establishing ICE policy to protect noncitizen crimes survivors who are beneficiaries of pending or approved T nonimmigrant status (T visa), U nonimmigrants status (U visa), Continued Presence, and relief or benefits under the Violence Against Women Act (VAWA). This directive supersedes ICE Policy No. 10036.1, “Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (Jan. 22, 2007).” Implementation of the March 16, 2022, ICE directive is supposed to be developed and issued through implementing guidance within 12 months of its issuance.

I. Confidentiality Provisions under 8 U.S.C. § 1367

Section 1367 contains three major provisions to protect abused immigrant applicants and recipients of certain forms of immigration relief. In this context, abused immigrants include:

- Survivors of a severe form of human trafficking who cooperate with law enforcement authorities (T visa, U visa, and/or Continued Presence);
- Noncitizens who have suffered substantial physical or mental abuse as the result of qualifying criminal activity and who cooperate in the investigation or prosecution of that activity (U visa); and/or
- VAWA-protected noncitizens.³

A. Restrictions on the Use or Disclosure of Protected Information

First, immigration authorities⁴ may not use or disclose information (other than to an employee of the U.S Department of Homeland Security, Department of State, or Department of Justice) related to an individual applicant for a T visa, U Visa, Continued Presence, or VAWA benefits. This includes an individual with a pending application, an approved application, or where ICE has a reason to believe the individual may have a pending or approved application. Information in those situations cannot be used, published, or disclosed to any third-party and may only be used by or disclosed to sworn DHS, DOS, or DOJ department or agency officers or employees for legitimate department, bureau, or agency purposes.⁵

³ VAWA-protected noncitizens include those who are eligible for VAWA self-petitioning, VAWA cancellation, or VAWA suspension, conditional resident spouses or children of abusive U.S. citizens or lawful permanent residents (LPRs), spouses or children of noncitizens eligible for relief under the Cuban Adjustment Act, the Haitian Refugee Immigration Fairness Act, or the Nicaraguan Adjustment and Central American Relief Act, and abused nonimmigrants spouses applying for employment authorization on Form I-765V. See DHS Directives System, *Instruction Number: 002-02-002, Implementation of Section 1367 Information Provisions in the Processing of Freedom of Information Act and Privacy Act Requests* (Sep. 2, 2021).

⁴ DHS policy, including the March 16, 2022, ICE directive, lays out that immigration personnel include ICE employees, contractors, designated immigration officers, special agents, and warrant service officers.

⁵ See 8 U.S.C. §§ 1367(a)(2), (b).

What Constitutes Protected Information?

Protected information that cannot be disclosed includes:

- Confirming the identity of a noncitizen by acknowledging existence of the information or records such as the filing of a T, U or VAWA application;
- Any information about a noncitizen contained in a DHS database;
- Information that has not yet been included in a database, such as the location of the noncitizen;
- Information about the beneficiaries of the primary applicant listed on a pending or approved application.

This protection is retroactive and covers all records previously collected. It does not end if the relief is granted, and otherwise lasts until the application has been denied and all opportunities to appeal have been exhausted.

B. Restrictions on Use of Information from Prohibited Sources

Second, immigration authorities must verify any information provided by prohibited sources associated with the crime or abuse and may not make an adverse determination of admissibility or deportability using information furnished solely by those prohibited sources, unless the noncitizen has been convicted of a crime listed in the criminal inadmissibility or deportation grounds. Unfortunately, this protection is substantially weakened by 1) the limitation on using information provided *solely* by a prohibited source and 2) the exception for survivors with inadmissible convictions.

What Constitutes a Prohibited Source?

The prohibited sources of information include:

- A spouse or parent who has abused the noncitizen or subjected the noncitizen to extreme cruelty;
- A member of the abusive spouse's or parent's family residing in the same household as the noncitizen who has abused the noncitizen or subjected the noncitizen to extreme cruelty when the spouse or parent consented to or acquiesced in such abuse or extreme cruelty;
- An abusive spouse or parent who has abused the noncitizen's child or subjected the noncitizen's child to extreme cruelty (unless the noncitizen actively participated in the abuse or extreme cruelty);
- A member of the abusive spouse's or parent's family residing in the same household as the noncitizen who has abused the noncitizen's child or subjected the noncitizen's child to extreme cruelty when the spouse or parent consented to or acquiesced in such abuse or extreme cruelty and the noncitizen did not actively participate in such mistreatment or extreme cruelty;
- In the case of a noncitizen who is applying for a U visa, the perpetrator of the substantial physical or mental abuse and the criminal activity; and
- In the case of a noncitizen who is applying for a T visa or has been granted Continued Presence, the trafficker or perpetrator.

ICE should treat information from these prohibited sources as “inherently suspect” and must not act on information from them without an independent source of corroboration.⁶ ICE also should generally not act on tips from anonymous sources unless there are “special circumstances or aggravating factors.”⁷

C. Certification of Section 1367 Compliance at Specified Locations

Third, under INA § 239(e)(2), when taking action to place a noncitizen in removal proceedings, ICE personnel must complete a required certification when the action takes place in specified

⁶ See March 16, 2022 ICE Memo at page 2.

⁷ *Id.*

locations.⁸ This certification must be included with the Notice to Appear (NTA) certifying that ICE complied with Section 1367 non-disclosure and prohibited source provisions.

What Constitutes a Specified Location?

The specified locations where Section 1367 certificate of compliance is required include:⁹

- domestic violence shelters;
- rape crisis centers;
- supervised visitation centers;
- family justice centers;
- victim services or victim services providers;
- community-based organizations; and
- courthouses (or in connection with the appearance of the noncitizen at a courthouse).¹⁰

If the certificate of compliance is not contained in an NTA, advocates should contend that the respondent may move to strike the NTA and terminate the proceedings.

Under a separate policy, effective October 27, 2021, DHS established that ICE and Customs and Border Protection (CBP) enforcement actions should not be taken in or near “protected

⁸ In addition to the additional requirements related to enforcement activities at specified locations, ICE also announced a new “victim-centered” approach to immigration enforcement based on an August 2021 directive, including who qualifies as a victim and which ICE actions are covered. For more information, see ILRC’s practice advisory, *Overview of ICE’s Victim-Centered Directive*, available at <https://www.ilrc.org/overview-ice%E2%80%99s-victim-centered-directive>. As part of this new approach, ICE officers and agents are instructed to look out for, and in various circumstances exercise prosecutorial discretion in favor of, noncitizen survivors of crime as part of their decisions to arrest, detain, release, and refer noncitizens.

⁹ INA § 239(e)(2)(A).

¹⁰ Courthouses are included if the noncitizen is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking in which the noncitizen has been battered or subject to extreme cruelty or if the noncitizen is the beneficiary of a pending or approved T or U visa.

areas.”¹¹ These areas are protected for all noncitizens, not just abused immigrants, because they provide essential services or activities and include, but are not limited to:¹²

- Schools, including licensed daycares, pre-schools, and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; vocational or trade schools; as well as scholastic or education-related activities or events;
- Medical treatment and healthcare facilities, such as hospitals, doctor’s offices, health clinics, vaccination and testing sites, urgent care centers, sites that serve pregnant individuals and/or community health centers;
- Mental healthcare facilities;
- Places of worship or religious study, such as churches, synagogues, mosques, and temples, and temporary facilities or locations where worship or religious study take place;
- Places where children gather such as playgrounds, recreation centers, childcare centers, before- or after-school care centers, foster care facilities, group homes for children, or school bus stops;
- Social services establishments such as crisis centers, domestic violence shelters, victims services centers, child advocacy centers, supervised visitation centers, family justice centers, community-based organizations, facilities that serve disabled persons, homeless shelters, drug or alcohol counseling and treatment facilities, or food banks, pantries, or other establishments distributing food or other essentials to people in need;
- Disaster or emergency response and relief centers, including evacuation routes, shelters, emergency food or water distribution centers, registration centers for disaster-related assistance, or family reunification sites;
- Religious or civil ceremonies or observances, such as funerals, graveside ceremonies, rosaries, weddings or other religious or civil ceremonies or observances;
- Public demonstrations, such as parades, demonstrations, or rallies.

¹¹ U.S. Department of Homeland Security, *Guidelines for Enforcement Actions in or Near Protected Areas Memo* (Oct. 27, 2021) at <https://www.dhs.gov/publication/guidelines-enforcement-actions-or-near-protected-areas-memo>.

¹² This list is a compilation of examples included in the Oct 27, 2021 DHS memo referenced in Footnote 11 above and the DHS press release, “Secretary Mayorkas Issues New Guidance for Enforcement Action at Protected Areas” (Oct 27, 2021).

For more information on these protected areas as well as exceptions and limitations on the scope of these protections, see the DHS memo referenced in Footnote 6 below.

II. Exceptions to the Section 1367 Confidentiality Provisions

Although Section 1367 provides protections, there are instances where DHS disclosure of protected information may be allowed or even mandated by court order or constitutional requirement.¹³ These include:

- Disclosure in the same manner and circumstances as census information, which allows for the sharing of statistical compilations;
- Disclosure to law enforcement officials to be used solely for a legitimate law enforcement purpose, provided that disclosure is made solely and in furtherance of the Department's or the recipient's legitimate law enforcement purpose;
- Disclosure in connection with judicial review of a determination in a manner that protects the confidentiality of such information;
- Disclosure pursuant to a written waiver where adults who may be applicants or beneficiaries in the case have waived the disclosure restrictions by signing a waiver explicitly waiving Section 1367 protections;
- Disclosure to Federal, State, and local public and private agencies providing benefits, to be used solely in making determinations of eligibility for welfare and public benefits under 8 U.S.C. § 1641(c);
- Disclosure of closed cases, (e.g., application for relief has been denied and all opportunities for appeal have been exhausted) to the chairmen and ranking members of the House and/or Senate Committees on the Judiciary in their oversight capacities;
- Disclosure to nonprofit, nongovernmental victim services providers with the prior written consent of the victim, for the sole purpose of assisting victims in obtaining victim services; and
- Disclosure to elements of the U.S. Intelligence Community, other Federal departments or agencies possessing a counterterrorism function, or foreign governments to be used solely for a national security purpose, provided that disclosure is made in furtherance of the recipient's authorized National Intelligence or counterterrorism function and the information provided is used only for the authorized purpose for which it was provided.

¹³ 8 U.S.C. § 1367(b).

III. How to Address Violations of Section 1367

Section 1367(c) lays out penalties for violations of the confidentiality provisions. Anyone who willfully uses, publishes, or permits information to be disclosed in violation of Section 1367 or who knowingly makes a false certification under Section 239(e) shall be subject to disciplinary action and subject to a civil money penalty of not more than \$5,000 for each such violation. The Office for Civil Rights and Civil Liberties (CRCL) is statutorily obligated to review and assess information concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion by DHS employees and officials.¹⁴

In determining whether a violation has occurred, note first whether the case has been denied. If so, have all appeals been exhausted? If the case has been denied **and** all appeals have been exhausted, the information may no longer be protected under Section 1367. Note also whether any of the exceptions in the above section could apply or whether an argument can be made that they do not apply.

If a violation of Section 1367 has occurred, submit a written complaint. To do so, you may either 1) download and complete the fillable complaint form available on the DHS website at <https://www.dhs.gov/file-a-civil-rights-complaint>, or 2) provide a written description of the pertinent events. With either option, you will need to provide the following:

- **Contact information.** Full name; date of birth; “Alien” registration number, if applicable; phone number; mailing address; and e-mail address, if available.
- **A written description of the circumstances.** This should include date, time and location; name(s) and contact information of any witness(es); and name(s), job title, and agency or component of the individual(s) alleged to have committed the Section 1367 violation, if available. Please be as specific as possible in describing the circumstances surrounding the violation.
- **Relevant documents.** Copies of any paperwork related to the complaint or its circumstances.
- **A summary of other steps taken, if any, to try to resolve this complaint.** For example, include if you have communicated with any DHS agency regarding your complaint, or sent correspondence to the DHS Office of Inspector General.
- **Complaints filed on behalf of a third party.** If you are writing on behalf of someone else (such as a client) and wish to receive information which relates to them or their complaint, you must provide express written consent from that individual authorizing DHS to share

¹⁴ See 6 U.S.C. § 345; 42 U.S.C. § 2000ee-1.

information with you about the complaint. You must also provide your name, organization (if any), and contact information.

Written complaints are accepted in all languages. The DHS website includes links to fillable complaint forms in Arabic, Chinese, French, Haitian Creole, Portuguese, Russian, Somali, Spanish, and Vietnamese. For other languages, a written description will be accepted without use of the fillable complaint form.

You may submit the complaint via email, fax, or postal service. Below is the contact information.

- **E-mail:** CRCLCompliance@hq.dhs.gov (Although you are not required to submit the complaint via email, this is the fastest way to submit your complaint)
- **Fax:** (202) 401-4708
- **Package/Overnight Delivery:** Please contact CRCL for information on sending a package.
- **U.S. Postal Mail:** (DHS claims this method can take up to 20 business days)

U.S. Department of Homeland Security
Office for Civil Rights and Civil Liberties
Compliance Branch, Mail Stop # 0190
2707 Martin Luther King Jr Ave SE
Washington, DC 20528-0190

If you have questions about submitting a complaint, you may also contact CRCL by telephone:

- **Local:** [202-401-1474](tel:202-401-1474)
- **Toll Free:** [1-866-644-8360](tel:1-866-644-8360)
- **Local TTY:** [202-401-0470](tel:202-401-0470)
- **Toll Free TTY:** [1-866-644-8361](tel:1-866-644-8361)

Although Section 1367 specifically provides for a \$5,000 civil penalty for breaches of confidentiality regarding survivors, and the Office for Civil Rights and Civil Liberties (CRCL) accepts and investigates complaints, as recently as 2019, DHS' own research found that many of their agencies had no process for tracking violations of Section 1367.¹⁵ While DHS seems to be attempting to remedy this somewhat by having its agencies issue updated policies and timelines for implementation, advocates contend that Section 1367 may not provide strong enough protections without clear consequences for officers and agents who violate law or policy,

¹⁵ See DHS, *Privacy Compliance Review of the Privacy Incidents Affecting Individuals Protected by Section 1367* (Feb. 4, 2019) at <https://www.dhs.gov/sites/default/files/publications/1367%20PCR%20Report%20FINAL%2020190204.pdf>.

no entity designated nor mechanism described for assessing the \$5,000 penalty for confidentiality violations, and no process outlined whereby those impacted can clearly access redress. Nevertheless, while advocates continue to suggest and fight for these improvements to protect immigrant survivors, we recommend submitting complaints to the CRCL to ensure a record of violations as they occur.

IV. Conclusion

The federal statutes and policies discussed in this advisory can be an important tool for advocates to use to try to protect their immigrant survivor clients from DHS confidentiality breaches as well as enforcement. In addition to these statutes and policies, many states have laws that offer further confidentiality protection against disclosure by non-federal actors, such as state government, including district attorneys and police officers. For more information on state laws for immigrant survivors, see ILRC's advisory, *A Guide to State Laws on U Visa and T Visa Certifications*,¹⁶ and for California-specific laws, *California State Laws on the U Visa*.¹⁷



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¹⁶ <https://www.ilrc.org/guide-state-laws-u-visa-and-t-visa-certifications>.

¹⁷ <https://www.ilrc.org/california-state-laws-u-visa>.

