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Confidentiality and Breaches of Confidentiality¹

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Battered immigrant women relay extremely sensitive and private information to the U.S. Citizenship and Immigration Services (CIS, formerly INS)² when seeking immigration relief. A batterer in possession of any of this information might use it to locate the battered immigrant spouse and her children and harm them. If he becomes aware that she is seeking immigration status independently of him or planning on leaving him, he might try to seek revenge and might contact the immigration authorities in an attempt to undermine her case or have her deported. For these reasons, confidentiality rules can serve as a potentially lifesaving protection for the victim and her children.

In 1996, Congress enacted a law to provide confidentiality protection to battered immigrants in two ways.³ First, the CIS or U.S. Immigration and Customs Enforcement (ICE) cannot make a negative decision in the victim's case if the decision is based solely on information from the batterer.⁴ Second, government agencies with access to the victim's personal information cannot share it, and anyone who discloses it will be fined and/or disciplined.⁵ This chapter will outline these two protections and discuss to whom and when they apply.

Adverse Decisions

An alien cannot be deemed inadmissible or deported based solely⁶ upon information from her batterer or,

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² On March 1, 2003, the agency formerly known as the Immigration and Naturalization Service was divided into 3 separate agencies and became part of the Department of Homeland Security. The U.S. Citizenship and Immigration Services (CIS) is the agency responsible for affirmative applications including VAWA self-petitions. The two other agencies are U.S. Immigration and Customs and Enforcement (ICE), the enforcement arm, and the Customs and Border Protection (CBP).

³ Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 § 384; 8 U.S.C. § 1367 (2001). In October 2000, Congress amended § 384 to include confidentiality protection for cases filed under INA §101(a)(15)(U), immigrant crime victim cases (U nonimmigrant visas).

⁴ IIRAIRA § 384(a)(1); 8 U.S.C. § 1367(a)(1).

⁵ IIRAIRA § 384(a)(2); 8 U.S.C. § 1367(a)(2).

⁶ This requirement reduces the batterer's ability to retaliate against the victim, typically by attempting to jeopardize the victim's immigration status.

under certain circumstances, his family members. Furthermore, the CIS cannot deny a VAWA self-petition, U visa, or cancellation of removal application or a family-sponsored immigrant visa petition based on information provided solely by the batterer.⁷ This prohibition applies specifically to information provided by:

- a spouse or parent who has battered or subjected the applicant to extreme cruelty;
- a member of the spouse's or parent's family residing in the same household as the applicant who has battered the applicant or subjected her to extreme cruelty, if the spouse or parent consented to, or acquiesced in, such battery or cruelty;
- a spouse or parent who has battered or subjected the applicant's child to extreme cruelty;
- a member of the spouse's or parent's family residing in the same household as the applicant who has battered the applicant's child or subjected the child to extreme cruelty, if the spouse or parent consented to or acquiesced in such battery or cruelty; or
- the perpetrator of the substantial physical or mental abuse and the criminal activity against a U visa applicant, unless the applicant has been convicted of specific crimes.⁸

If the U.S. Immigration and Customs Enforcement (ICE) initiates removal proceedings against a battered immigrant based solely on statements by her abuser or another individual listed in IIRAIRA Section 384(a)(1), her **attorney**⁹ should move to terminate removal proceedings. The motion should include relevant facts about the abusive relationship, what steps the battered immigrant is taking to remove herself from the abuse, and what information the batterer has supplied that the Department of Homeland Security (U.S. CIS or ICE) has acted upon. Examples of relevant factual information includes:

- dates of any police reports filed;
- the existence of any civil protection order;
- the battered immigrant's application for VAWA relief;
- the battered immigrant's actions to seek help from a shelter;
- what information the batterer has given to the Department of Homeland Security employee;
- the name and position of the Department of Homeland Security employee; and
- what action that employee took.

The relevant portions of IIRAIRA § 384 should be cited and attached for the judge's reference. Providing the immigration judge with a summary of the law's purpose can also strengthen the motion. The law was created so that abusers could not use the immigration system as a weapon against domestic violence victims. When the immigration authorities take action based on information provided by the batterer, they violate the law and contravene the purposes behind VAWA. A 1997 INS memorandum concerning disclosure of information in VAWA cases provides language about the purpose of the law.¹⁰ The memo, in relevant part, states:

...this provision appears to have been enacted in response to concerns from the advocacy community that INS officers have provided information on the whereabouts of self-petitioners or on their pending applications for relief to the allegedly abusive spouse or parent. The VAWA provisions ...were created by Congress so that the battered alien can seek status independent of the abuser. Thus, disclosure of information to the alleged abuser or any other

⁷ See generally IIRAIRA § 384(a)(1); 8 U.S.C. § 1367(a)(1).

⁸ See IIRAIRA § 384(a)(1)(E); 8 U.S.C. § 1367(a)(1)(E). For a list of the applicable crimes, see Immigration and Nationality Act (INA) § 241(a)(2); 8 U.S.C. § 1251(a)(2).

⁹ Generally only an attorney or accredited representative recognized by the Board of Immigration Appeals may represent an immigrant before the immigration authorities or in removal proceedings.

¹⁰ Memorandum from INS Acting Executive Associate Commissioner Paul Virtue, "Non-Disclosure and Other Prohibitions Relation to Battered Immigrants: IIRAIRA § 384," May 5, 1997.

family member was inappropriate even prior to the new law. With enactment of section 384, however, such inappropriate conduct is now also grounds for disciplinary action or fine, or both.

The brief supporting a motion to terminate removal proceedings should include a demand that agency in question (ICE or CIS) prove it obtained independent corroborative information before it acted. The 1997 memorandum states: “If an INS employee receives information adverse to an alien from the alien’s U.S. citizen or lawful permanent resident spouse or parent, or from relatives of that spouse or parent, the INS employee must obtain independent corroborative information from an unrelated person before taking any action based on that information.”¹¹

It is also possible to move to suppress evidence that comes from the abuser and the independent corroborative sources.

Confidential Information

The law encourages battered immigrant women to apply for immigration relief by alleviating any fear that the batterer could obtain information that she provides on the application. It prohibits anyone from the U.S. Department of Justice or Homeland Security from disclosing information regarding a battered immigrant woman or child who is applying or has applied for immigration status under VAWA, such as a VAWA self-petition or cancellation of removal. Anyone who releases this information will be subjected to disciplinary measures and a \$5,000 maximum fine.¹²

There are some limited exceptions to this confidentiality rule. Information about the victim can be disclosed in the following instances:

- for law enforcement purposes, and, if then, only to law enforcement officials;
- in the regular course of adjudicating cases, and through the appeals process;
- if the victim consents to share the information;¹³ or
- if the information is being disclosed to federal, state, or local public or private agencies that provide benefits.¹⁴

How to Complain of a Confidentiality Violation

Before the creation of the Department of Homeland Security in 2003, all immigration authorities were part of the Department of Justice (DOJ). The DOJ has a procedure in place for advocates and attorneys to file a complaint with the its Office of Professional Responsibility to report activities in violation of IIRAIRA § 384. However, the immigration authorities are now generally part of the Department of Homeland Security, and a complain should be filed with that agency if an employee of the U.S. CIS or ICE violates Section 384.¹⁵ The DOJ procedure may still be used if an immigration judge violates the confidentiality rules because the immigration courts are still part of the DOJ. The Office of Professional Responsibility investigates such allegations of misconduct and, if proven, they can take action against the employee who engaged in this conduct. To file a complaint, write a letter to:

¹¹ *Id.* It is also possible to move to suppress evidence that was obtained as a result of a violation of Section 384. This argument is similar to the “fruit of the poisonous tree” doctrine in criminal law, which precludes the introduction of evidence discovered due to information found through an illegal search or other unconstitutional means

¹² “Anyone who willfully uses, publishes, or permits information to be disclosed in violation of this section shall be subject to appropriate disciplinary action and subject to a civil money penalty of not more than \$5,000 for each violation.” IIRAIRA § 384(c); 8 U.S.C. § 1367(c).

¹³ The statute does not provide for a waiver to disclose information about the child.

¹⁴ 8 U.S.C. § 1367(b).

¹⁵ A procedure for filing a complaint for a violation by an official of the Department of Homeland Security is still being developed at the time of publication. For more information, contact the Immigrant Women Program of Legal Momentum at IWP@legalmomentum.org or the National Immigration Project of the National Lawyer’s Guild at gail@nationalimmigrationproject.org.

H. Marshall Jarrett, Counsel
U.S. Department of Justice
Office of Professional Responsibility
10th St. and Pennsylvania Avenue
Washington, DC 20530

The letter should provide the following information in as much detail as possible:

- the name, position and office of the employee;
- the name and alien number of the immigrant victim;
- the specific violation, including a description of any illegally released information; and
- the effect or potential effect of the violation or release of information.

It is critical to describe the confidential information that was disclosed in order for the violation to be thoroughly investigated. If sharing this information would endanger the battered immigrant, then the lawyer should request that the complaint be treated confidentially.

A description of the work of the Office of Professional Responsibility and how to file complaints with that office can be found at 28 Code of Federal Regulations section 0.39.

Tips on Keeping Information Confidential

It is important that an immigrant victim have a safe address to receive mail concerning her immigration case and other correspondence. Many immigration attorneys and advocates allow the immigrant to use their office address for all immigration applications so that the mail will not end up in the hands of an abuser. Other ways to prevent this from happening, whether the victim still resides with the abuser or not, include the following:

- Do not provide the Post Office with a forwarding address. After one year of forwarding, any additional mail will be returned to the sender with a sticker showing the new address.
- Submit a copy of the protective order to the Post Office so that only government officials, law enforcement officers, and individuals with a court order are permitted to obtain the domestic violence victim's address.
- Obtain a post office box. The post office cannot reveal the residential address of a post office box owner.
- If employed, ask the employer if correspondence with the court can be mailed to the work address.
- Request an unlisted phone number and address from the local telephone company.