

## Disclosure of Files, Records, and Other Information Maintained by the LTCOP

### **Question**

How do state LTCOPs address disclosure of LTCOP information in program policies and procedures (e.g. determining what information to release, to whom, and under what circumstances, and delegation by the Ombudsman for disclosure)?

### **Response**

The [final rule](#) includes the following requirements for policies and procedures for SLTCOPs regarding disclosure [§1327.11(e)]:

#### **3) Disclosure.**

Policies and procedures regarding disclosure of files, records and other information maintained by the Ombudsman program must include, but not be limited to:

(i) Provision that the files, records, and information maintained by the Ombudsman program may be disclosed only at the discretion of the Ombudsman or designee of the Ombudsman for such purpose and in accordance with the criteria developed by the Ombudsman, as required by § 1327.13(e);

(ii) Prohibition of the disclosure of identifying information of any resident with respect to whom the Ombudsman program maintains files, records, or information, except as otherwise provided by § 1327.19(b)(5) through (8), unless:

- (A) The resident or the resident representative communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;
- (B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or
- (C) The disclosure is required by court order;

(iii) Prohibition of the disclosure of identifying information of any complainant with respect to whom the Ombudsman program maintains files, records, or information, unless:

- (A) The complainant communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;
- (B) The complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or
- (C) The disclosure is required by court order;

(iv) Exclusion of the Ombudsman and representatives of the Office from abuse reporting requirements, including when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order, except as otherwise provided in § 1327.19(b)(5) through (8); and

(v) Adherence to the provisions of paragraph (e)(3) of this section, regardless of the source of the request for information or the source of funding for the services of the Ombudsman program, notwithstanding section 705(a)(6)(c) of the Act.

So essentially, case information and documentation maintained by the ombudsman program should be disclosed only at the discretion of the State Ombudsman in accordance with developed criteria, and with the written consent of the complainant or resident, or their legal representative, or except as required by a court order. Any information that would identify a resident (including information from conversations between a resident and a representative of the State Long-Term Care Ombudsman) is confidential, and should be protected as such. The SLTCO and representatives of the Office are excluded from abuse reporting requirements including when the reporting would disclose identifying information of a resident complainant without consent or court order. Ombudsmen can look to their legal representatives to help ensure they are only providing information specifically required through a court order, or with the written consent of the resident and/or their legal representative.

Excerpts from the “State Long-Term Care Ombudsman Provisions in the Older Americans Act, as Amended in 2000 By Topic, With Policy Interpretations Administration on Aging, Interpretations of the OAA” regarding FOIA requests is available [here](#).

### **State Policies and Procedures**

Here are some examples from states with explicit guidelines around disclosure of information in ombudsman records. Complete policies and procedures manuals/documents are available on the [NORC website](#).

### **Michigan**

#### Program Policy

Upon receipt of a subpoena or inquiry from a lawyer or potential litigant, ombudsman staff shall immediately contact the State Long Term Care Ombudsman (or an Assistant State Long Term Care Ombudsman if the STLCO is unavailable) and shall not provide any information of any kind without further instruction from her.

Ombudsman staff may not disclose whether a complaint has ever been received by or about an individual, the content of a complaint or investigation, or the outcome of a complaint or investigation. Ombudsman staff should simply state their records are confidential and they may not share any information or confirm or deny whether any complaint has ever been received in the relevant matter before contacting the State Ombudsman.

In cases in which a complainant or resident about whom a complaint has been filed is willing to sign a release to permit the ombudsman to release confidential information, the release form must be approved by the State Long Term Care Ombudsman.

In situations in which the SLTCO approves the release of information, pursuant to the Older Americans Act provisions, all documents to be released must be provided to the SLTCO before they are released. Information in the records may, in the SLTCO’s discretion, be redacted (edited by blacking out certain information) to protect the privacy of other residents or for other purposes.

The SLTCO will also review with ombudsman staff whether they have fully complied with the subpoena by providing all records and documents requested in the subpoena. This may include copies of email correspondence, calendar entries, and other documents maintained by ombudsman staff. Ombudsman staff are required to maintain copies of all documents—including emails and informal notes-- pertaining to complaints and investigations.

## **Ohio**

### 173.22 Information; Protection of Confidentiality

(A) The collection, compilation, analysis, and dissemination of information by the office of the state long-term care ombudsman program shall be performed in a manner that protects complainants, individuals providing information about a complaint, public entities, and confidential records of residents or recipients. The identity of a resident or recipient, a complainant who is not a resident or recipient, or an individual providing information about a complaint shall not be disclosed without the written consent of the resident or recipient, complainant, or individual, or his legal representative, or except as required by court order.

[&] The investigative files, including any proprietary records of a long-term care provider contained in the files, of the office are not public records subject to inspection or copying under section 149.43 of the Revised Code. Information contained in investigative and other files maintained by the state long-term care ombudsman and regional long-term care ombudsman programs shall be disclosed only at the discretion of the state ombudsman or the regional program maintaining the records, or if disclosure is required by court order.

(B) No report prepared by the state ombudsman or a regional program shall include any information that violates the confidentiality requirements of this section. Proprietary records of a specific long-term care provider are subject to the confidentiality requirements of this section.

**Texas** *(note that the distinction between confidential and non-confidential information is also detailed)*

### 907.2 Process for Disclosure in Response to a Request for Written Confidential Information from a Person (Other than a Resident or Guardian) Regarding a Resident Who Has a Power of Attorney (POA)

Revision 10-4; Effective December 17, 2010

If a certified ombudsman receives a request for written confidential information from a person (other than a resident or guardian) regarding a resident who has a POA (which could include a subpoena), the certified ombudsman must:

Determine if the resident is able to comprehend information regarding the request;

- if the resident is able to comprehend information regarding the complaint or request for assistance, inform the resident of the request and ask the resident if he or she wants to consent to disclosure of the information; and

- if the resident is unable to comprehend information regarding the complaint or request for assistance, inform the POA agent of the request and ask the agent if he or she wants to consent to disclosure of the information.
- If the resident or POA agent does not consent to the disclosure:
  - the certified ombudsman must notify the SLTCO, in writing, of the resident's or POA agent's decision not to consent and provide the SLTCO with any other necessary information, as requested; and
  - the SLTCO or DADS legal representative denies the request for confidential information, in writing.

If the resident or POA agent consents to the disclosure, the certified ombudsman must:

- do one of the following to document the consent:
  - have the resident or POA agent, as appropriate, complete DADS Form 8624-W, Consent to Disclose Records to the Certified Ombudsman;
  - complete DADS Form 8624-O, Consent to Release Records; or
  - document that consent was given in the certified ombudsman's case notes described in Section 608, Case Documentation, or on Form 8620 or Form 8619, and include the name of the person consenting and the date consent was given;
- retrieve the records that are requested; and
- submit copies of the retrieved records and the documented consent to the SLTCO for review and approval to disclose.

The SLTCO follows the process described in the second bullet of Section 907.1.

The certified ombudsman must follow the process described in the third bullet of Section 907.1.

#### 907.4 Process for Disclosure in Response to a Court Order for Disclosure of Written Confidential Information

Revision 10-4; Effective December 17, 2010

If a certified ombudsman receives a court order for disclosure of written confidential information:

- the certified ombudsman must:
  - inform the resident or guardian of the court order;
  - retrieve the records that are ordered; and
  - submit copies of the retrieved records and the court order to the SLTCO for review and approval to disclose;
- the SLTCO follows the process described in the second bullet of Section 907.1; and
- the certified ombudsman must follow the process described in the third bullet of Section 907.1.

#### Washington

Forms and memos used by the Washington state LTCOP around disclosure that were developed with/by the LTCOP's legal counsel are available [here](#).

## **Best Practices: Confidentiality**

NORC also has a paper on best practices in confidentiality that may be helpful as well. Starting on p. 13 of the document linked below, this resource provides examples from states detailing the processes they use to determine whether or not it is appropriate to disclose information. Further examples and resources can be found in the appendices linked below (the chart in the Georgia example may be particularly helpful).

- [Best Practices: Confidentiality](#)
- [Appendices](#)