

STATE LTC OMBUDMAN PROGRAM COMPLAINT PROCESSING AND ABUSE REPORTING

The purpose of this document is to assist states with complaint processing, including access, resident participation, abuse, and disclosure as required by the State Long-Term Care Ombudsman Programs Final Rule.¹

This brief consists of the following sections pertinent to the topic: Implementation, Key Points to Consider, and a List of Authorities.

Implementation, Key Points to Consider

The Rule contains provisions related to numerous aspects of the complaint processing responsibilities of the Office. There are requirements for the establishment of policies and procedures related to standards of promptness in responding to complaints, access to records necessary to investigate complaints, and the disclosure of identifying information of a resident. The Rule clarifies the responsibilities of representatives of the Office² regarding complaint processing on behalf of an individual resident, multiple residents, or all residents of a facility. Abuse reporting and responding to complaints of abuse, neglect and exploitation are included in the provisions related to regulations for disclosure of Ombudsman program information and complaint processing.

The following list includes key elements of the requirements to assist states in assessing and developing policies and procedures and in providing training and guidance to representatives of the Office related to their responsibilities with complaint processing.

**Note: Effective July 1, 2016 the Administration for Community Living (ACL) consolidated their regulations into one subchapter resulting in the LTCOP rule number changing from 45 CFR 1327 to 45 CFR 1324. We are in the process of revising our resources to reflect that change. Information about the consolidation is available [here](#).*

Policies and Procedures

1. Assess the policies and procedures of the Office of the State Long-Term Care Ombudsman (the Office).

- Are there standards for prompt response to complaints?
- Do the standards:
 - Prioritize abuse, neglect, and exploitation and time-sensitive complaints?
 - Consider the severity of the risk to the resident?
 - Consider the imminence of the threat of harm to the resident?
 - Consider the opportunity for mitigating harm to the resident through Ombudsman services?

2. Are there procedures for access to records related to complaint processing? Do they address the following elements?

- Access to review records relating to a resident with informed consent, communicated and documented in accordance with established procedures?
- Access to review records relating to a resident without consent?
 - When access is necessary to investigate a complaint, the resident cannot consent and the resident representative refuses to consent, *and*

¹ Published in the *Federal Register*, 02/11/2015, Vol. 80, No. 28. [LTCOP Final Rule](#)

² In this document, "LTCO" refers to the Ombudsman or representative of the Office. If the term "Ombudsman" is used, it means the State Ombudsman (i.e. the head of the Office of the State Long-Term Care Ombudsman), not the representatives of the Office.

- The Ombudsman representative has reasonable cause to believe that the resident representative is not acting in the best interest of the resident, *and*
- The Ombudsman representative obtains the approval of the Ombudsman.
- Access to a facility's administrative records, policies, documents to which the resident or the general public has access?
- Access to all long-term care facility licensing and certification records maintained by the State?
- Affirmation that HIPAA (Health insurance portability and Accountability Act of 1996 Privacy Rule) does not prevent release of information to the Ombudsman?

3. Do the disclosure procedures include the following?

- Is the disclosure of identifying information of any resident for whom the Ombudsman Program maintains files, records, or information prohibited unless:
 - The resident or the resident representative communicates informed consent in writing or through auxiliary aids and services; *or*
 - The resident or the resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services *and*
 - Such consent is documented, *or*
 - The disclosure is required by court order?
- Is the disclosure of identifying information of any complainant for whom the Ombudsman Program maintains files, records, or information prohibited unless:
 - The complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services *and*
 - Such consent is documented, *or*
 - The disclosure is required by court order?
- Is there an established process regarding how/where to document a complainant's consent when it is not granted in writing?
- Is there a procedure related to responding to court orders for disclosure of identifying information?
- Are the Ombudsman and representatives of the Office (LTCO)³ excluded from abuse reporting requirements?
 - Does the exclusion include when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order?
- Are there procedures for disclosure of resident-identifying information when a resident cannot consent and/or the LTCO witnesses suspected abuse, gross neglect, or exploitation of a resident and the resident cannot consent?
 - Are there time frames for taking action?
 - Are the procedures with the complaint processing provisions in the Rule?
 - Is Ombudsman approval required prior to disclosing resident-identifying information?⁴
 - Is there a time frame in which the Ombudsman is required to communicate approval or disapproval in order to assure that the representative of the Office is able to promptly take actions to protect the health, safety, welfare or rights of residents?
 - If Ombudsman approval is not required prior to disclosure, are representatives of the Office required to promptly notify the Ombudsman of any disclosure of resident-identifying information under specified circumstances?
- Is Ombudsman approval required prior to disclosure of resident-identifying information when⁵:

⁴ Ombudsman approval is not required in the Rule, states may require it in their procedures.

- The resident is unable to communicate informed consent to the LTCO,
- The LTCO has reasonable cause to believe that the representative has taken an action or inaction or decision that may adversely affect the health, safety, welfare or rights of the resident;
- The LTCO has no evidence indicating that the resident would not want a referral to be made; and
- The LTCO has reasonable cause to believe that it is in the best interest of the resident to make a referral?

Complaint Processing—Representatives of the Office

1. Do the policies/procedures, training, and actions of representatives of the Office clearly reflect that LTCO serve the resident of a long-term care facility?

- Regardless of the source of the complaint?
- That resident satisfaction and protecting the health, welfare, and rights of the resident are the purposes of the investigation and resolution?
 - Including complaints related to abuse, neglect, or exploitation?
 - When the resident is unable to communicate informed consent or perspective on the extent to which the matter has been satisfactorily resolved, the LTCO relies on the communication of informed consent and/or perspective regarding the resolution of the complaint of a resident representative so long as the LTCO has no reasonable cause to believe that the resident representative is not acting in the best interests of the residents.

2. Is resident participation maximized regardless of the source of the complaint, including when the source is LTCO?

- The LTCO personally discusses the complaint with the resident or if the resident is unable to communicate informed consent, the resident’s representative to:
 - Determine the perspective of the resident;
 - Request the resident to communicate informed consent for the LTCO to investigate,
 - Determine the wishes of the resident regarding resolution of the complaint including
 - Whether the allegations are to be reported *and*
 - If so, whether the LTCO may disclose resident identifying information or other relevant information to the facility and/or appropriate agencies.
- If the resident is unable to communicate informed consent and has no representative, the LTCO shall:
 - Take appropriate steps to investigate and work to resolve the complaint in order to protect the health, safety, welfare, and rights of the resident; and
 - Determine whether the complaint was resolved to the satisfaction of the complainant.
- In determining whether to rely upon a resident representative⁶ to communicate or make determinations on behalf of the resident related to complaint processing, the LTCO ascertains the extent of the authority that has been granted to the resident representative by:
 - A power of attorney,
 - Another document by which the resident granted authority to the representative, or
 - Under another applicable State or Federal law.

⁵ The LTCOP Rule (§1324.19(b)7(iv))requires approval of the Ombudsman.

⁶ For brevity, when resident is used in this section, it includes resident representative if the resident cannot communicate consent, except when the complaint relates to actions or inactions of the resident representative.

3. Is resident-identifying information protected through complaint processing procedures for disclosure in providing information to another agency in order for such agency to substantiate the facts for regulatory, protective services, law enforcement, or other purposes or remedies?

With informed consent of the resident

- Where the goals of a resident are for regulatory, protective services or law enforcement action, the Office must assist the resident in contacting the appropriate agency and/or disclose the information for which the resident has provided consent for such purposes.
- Where the goals of a resident can be served by disclosing information to a facility representative and/or referrals to another entity, the LTCO may:
 - assist the resident in contacting the appropriate facility representative or entity,
 - provide information on how a resident may obtain contact information, and/or
 - disclose the information for which the resident has provided consent, *consistent with* Ombudsman Program procedures.
- In order to comply with the wishes of the resident, the LTCO shall not report suspected abuse, neglect, or exploitation of a resident when a resident has not communicated informed consent to such a report except as set forth below:.

Without informed consent of the resident

- The LTCO may refer the matter and disclose resident identifying information to the appropriate agency or agencies under the following circumstances:
 - Resident is unable to communicate informed consent;
 - Resident has no resident representative; *or*
 - The LTCO has reasonable cause to believe that the resident representative has taken an action, inaction or decision that may adversely affect the health, safety, welfare, or rights of the resident;
 - The LTCO has reasonable cause to believe that an action, inaction, or decision may adversely affect the health, safety, welfare, or rights of the resident;
 - The LTCO has no evidence indicating that the resident would not wish a referral to be made;
 - The LTCO has reasonable cause to believe that it is in the best interest of the resident to make a referral; *and*
 - The LTCO obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office.

When the LTCO personally witnesses suspected abuse, gross neglect, or exploitation

- The LTCO shall seek communication of informed consent from such resident to disclose resident-identifying information to appropriate agencies.
- Where the resident is able to communicate informed consent or has a resident representative available to provide informed consent, the LTCO follows the direction of the resident or resident representative.
- Where the resident is unable to communicate informed consent and has no resident representative available, the LTCO shall:
 - Open a case with the LTCO as the complainant,
 - Follow the Ombudsman program's complaint resolution procedures, and
 - Shall refer the matter and disclose identifying information of the resident to the management of the facility in which the resident resides and/or to the appropriate agency or agencies for substantiation of abuse, gross neglect or exploitation in the following circumstances:
 - The LTCO has no evidence indicating that the resident would not wish a referral to be made;

- The LTCO has reasonable cause to believe that disclosure would be in the best interest of the resident; *and*
 - The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office.
- The LTCO, following the policies and procedures of the Office regarding disclosing resident-identifying information, may report the suspected abuse, gross neglect, or exploitation to other appropriate agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action.

Complaint Processing and Investigation of Abuse, Gross Neglect, and Exploitation Resources

For examples of how states have addressed this topic, check the NORC website, which has examples State LTCO Program policies and procedures, memoranda of understanding, resources, as well as training curricula. The NORC website will continue to be updated as NORC receives updated resources and processes from States.

List of Authorities

Older Americans Act (the Act) of 1965 as amended 2006

Section 712 State Long-Term Care Ombudsman Program. (a) (3)

The Ombudsman shall... — (A) identify, investigate, and resolve complaints that— (i) are made by, or on behalf of, residents; and (ii) relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents (including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees), of— (I) providers, or representatives of providers, of long-term care services; (II) public agencies; or (III) health and social service agencies; (B) provide services to assist the residents in protecting the health, safety, welfare, and rights of the residents; (C) inform the residents about means of obtaining services provided by providers or agencies... (B); (D) ensure that the residents have regular and timely access to the services provided through the Office and that the residents and complainants receive timely responses from representatives of the Office to complaints; (E) represent the interests of the residents....

(5)(b) PROCEDURES FOR ACCESS.— (1) IN GENERAL.—The State shall ensure that representatives of the Office shall have— (A) access to long-term care facilities and residents; (B)(i) appropriate access to review the medical and social records of a resident, if— (I) the representative has the permission of the resident, or the legal representative of the resident; or (II) the resident is unable to consent to the review and has no legal representative; or (ii) access to the records as is necessary to investigate a complaint if— (I) a legal guardian of the resident refuses to give the permission; (II) a representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident; and (III) the representative obtains the approval of the Ombudsman; (C) access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities; and (D) access to and, on request, copies of all licensing and certification records maintained by the State with respect to long term care facilities.

State Long-Term Care Ombudsman Programs, Final Rule⁷

§1324.11 Establishment of the Office

(e) *Policies and Procedures*

(1) Program administration

(v) Standards to assure prompt response to complaints by the Office and/or local Ombudsman entities which prioritize abuse, neglect, exploitation and time-sensitive complaints and which consider the severity of the risk to the resident, the imminence of the threat of harm to the resident, and the opportunity for mitigating harm to the resident through provision of Ombudsman program services.

(2) Procedures for access

(iv) Access to review the medical, social and other records relating to a resident, if—

- (A) The resident or resident representative communicates informed consent to the access 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; and
- (C) Access is necessary in order to investigate a complaint, the resident representative refuses to consent to the access, a representative of the Office has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the representative of the Office obtains the approval of the Ombudsman;

(v) Access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities;

(vi) Access of the Ombudsman to, and, upon request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities; and

(vii) Reaffirmation that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 CFR part 160 and 45 CFR part 164, subparts A and E, does not preclude release by covered entities of resident private health information or other resident identifying information to the Ombudsman program, including but not limited to residents' medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a State or Federal survey or inspection process.

(3) Disclosure

(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 § 1324.19(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 complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented....; or

⁷ The regulations and sections of the Preamble included in this paper are an excerpt from the Rule, highlighting the most relevant provisions. For complete information refer to the full text of the Rule. [LTCOP Final Rule](#)

(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 § 1324.19(b)(5) through (8); and

§1324.19 Duties of the Representatives of the Office

(b) Complaint processing.

(1) With respect to identifying, investigating and resolving complaints, and regardless of the source of the complaint (*i.e.* complainant), the Ombudsman and the representatives of the Office serve the resident of a long-term care facility. The Ombudsman or representative of the Office shall investigate a complaint, including but not limited to a complaint related to abuse, neglect, or exploitation, for the purposes of resolving the complaint to the resident's satisfaction and of protecting the health, welfare, and rights of the resident. The Ombudsman or representative of the Office may identify, investigate and resolve a complaint impacting multiple residents or all residents of a facility.

Maximize Resident Participation⁸

(2) Regardless of the source of the complaint (*i.e.* the complainant), including when the source is the Ombudsman or representative of the Office, the Ombudsman or representative of the Office must support and maximize residents participation in the process of resolving the complaint as follows:

(ii) The Ombudsman or representative of the Office shall personally discuss the complaint with the resident (and, if the resident is unable to communicate informed consent, the resident's representative) in order to:

- (A) Determine the perspective of the resident (or resident representative, where applicable) of the complaint;
- (B) Request the resident (or resident representative, where applicable) to communicate informed consent in order to investigate the complaint;
- (C) Determine the wishes of the resident (or resident representative, where applicable) with respect to resolution of the complaint, including whether the allegations are to be reported and, if so, whether Ombudsman or representative of the Office may disclose resident identifying information or other relevant information to the facility and/or appropriate agencies. Such report and disclosure shall be consistent with paragraph (b)(3) of this section;

(iii) Where the resident is unable to communicate informed consent, and has no resident representative, the Ombudsman or representative of the Office shall:

- (A) Take appropriate steps to investigate and work to resolve the complaint in order to protect the health, safety, welfare and rights of the resident; and
- (B) Determine whether the complaint was resolved to the satisfaction of the complainant.

(iv) In determining whether to rely upon a resident representative to communicate or make determinations on behalf of the resident related to complaint processing, the Ombudsman or representative of the Office shall ascertain the extent of the authority that has been granted to the resident representative under court order (in the case of a guardian or conservator), by power of

⁸ Subheadings inserted by NORC for reference purposes.

attorney or other document by which the resident has granted authority to the representative, or under other applicable State or Federal law.

- (4) The Ombudsman or representative of the Office may provide information regarding the complaint to another agency in order for such agency to substantiate the facts for regulatory, protective services, law enforcement, or other purposes so long as the Ombudsman or representative of the Office adheres to the disclosure requirements of section 712(d) of the Act and the procedures set forth in §1324.11(e)(3).

(i) Where the goals of a resident or resident representative are for regulatory, protective services or law enforcement action, and the Ombudsman or representative of the Office determines that the resident or resident representative has communicated informed consent to the Office, the Office must assist the resident or resident representative in contacting the appropriate agency and/or disclose the information for which the resident has provided consent to the appropriate agency for such purposes.

(ii) Where the goals of a resident or resident representative can be served by disclosing information to a facility representative and/or referrals to an entity other than those referenced in paragraph (b)(3)(i) of this section, and the Ombudsman or representative of the Office determines that the resident or resident representative has communicated informed consent to the Ombudsman program, the Ombudsman or representative of the Office may assist the resident or resident representative inconsistent with Ombudsman program procedures.

(iii) In order to comply with the wishes of the resident, (or, in the case where the resident is unable to communicate informed consent, the wishes of the resident representative), the Ombudsman and representatives of the Office shall not report suspected abuse, neglect or exploitation of a resident when a resident or resident representative has not communicated informed consent to such reportnotwithstanding State laws to the contrary.

Informed Consent

- (5) For purposes of paragraphs (b)(1) through (3) of this section, communication of informed consent may be made in writing, including through the use of auxiliary aids and services. Alternatively, communication may be made orally or visually, including through the use of auxiliary aids and services, and such consent must be documented contemporaneously by the Ombudsman or a representative of the Office, in accordance with the procedures of the Office;
- (6) For purposes of paragraphs (b)(1) paragraph (3) of this section, if a resident is unable to communicate his or her informed consent, or perspective on the extent to which the matter has been satisfactorily resolved, the Ombudsman or representative of the Office may rely on the communication of informed consent and/or perspective regarding the resolution of the complaint of a resident representative so long as the Ombudsman or representative of the Office has no reasonable cause to believe that the resident representative is not acting in the best interests of the resident.

Referrals/Disclosure when resident cannot consent *and* has no representative

- (7) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by § 1324.11(e)(3), shall provide that the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:

- (i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office;
- (ii) The resident has no resident representative;
- (iii) The Ombudsman or representative of the Office has reasonable cause to believe that an action, inaction or decision may adversely affect the health, safety, welfare, or rights of the resident;
- (iv) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;
- (v) The Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and
- (vi) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.

Referrals/Disclosure when resident cannot consent *and* issue/complaint is against the resident representative

- (7) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by § 1324.11(e)(3), shall provide that, the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:
 - (i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office and ... the Ombudsman or representative of the Office has reasonable cause to believe that the resident representative has taken an action, inaction or decision that may adversely affect the health, safety, welfare, or rights of the resident;
 - (ii) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;
 - (iii) The Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and
 - (iv) The representative of the Office obtains the approval of the Ombudsman.

Procedures for Disclosure: Abuse, Neglect, Exploitation

- (8) The procedures for disclosure, as required by §1324.11(e)(3), shall provide that, if the Ombudsman or representative of the Office personally witnesses suspected abuse, gross neglect, or exploitation of a resident, the Ombudsman or representative of the Office shall seek communication of informed consent from such resident to disclose resident-identifying information to appropriate agencies;
 - (i) Where such resident is able to communicate informed consent, or has a resident representative available to provide informed consent, the Ombudsman or representative of the Office shall follow the direction of the resident or resident representative as set forth paragraphs (b)(1) through (3) of this section; and
 - (ii) Where the resident is unable to communicate informed consent, and has no resident representative available to provide informed consent, the Ombudsman or representative of the Office shall open a case with the Ombudsman or representative of the Office as the complainant, follow the Ombudsman program's complaint resolution procedures, and shall refer the matter and disclose identifying information of the resident to the management of the facility in which the resident resides and/or to the appropriate agency or agencies for substantiation of abuse, gross neglect or exploitation in the following circumstances:
 - (A) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;

- (B) The Ombudsman or representative of the Office has reasonable cause to believe that disclosure would be in the best interest of the resident; and
- (C) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.

(iii) In addition, the Ombudsman or representative of the Office, following the policies and procedures of the Office described in paragraph (b)(9) of this section, may report the suspected abuse, gross neglect, or exploitation to other appropriate agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action.

- (9) Prior to disclosing resident identifying information pursuant to paragraph (b)(6) or (8) of this section, a representative of the Office must obtain approval by the Ombudsman or, alternatively, follow policies and procedures of the Office which provide for such disclosure.

Select Public Comment and Response from the Preamble to the LTCOP Rule

Comment: Two commenters disagreed with the proposed language that the Ombudsman program be required to prioritize abuse complaints, indicating that investigation of abuse is a protective services responsibility. One of the commenters indicated that, in their State, where an individual is the victim of abuse or at imminent risk, the Ombudsman program refers to protective services for investigation, indicating that the Ombudsman program will report abuse on certain occasions without resident consent if the allegation would potentially impact the health and safety of the individual and/or other residents. Another commenter requested clarification regarding establishing policy and procedure for the Ombudsman program to respond to abuse complaints, as required in the proposed rule at §1324.11(a)(2)(ii), in light of the fact that the State agency that, in their State, serves as the official finder of fact related to allegations of abuse, neglect and exploitation. (p. 7729)

Response: The Act requires the Ombudsman program to “identify, investigate, and resolve complaints”..... The services of the Ombudsman program are distinct from, and as indicated in §1324.21(c), may even conflict with the responsibilities of protective services. An individual resident, may, for example, have a complaint about protective services or may seek support from the Ombudsman program to realize a goal that is inconsistent with his or her protective services plan.

While the complaint resolution function of the Ombudsman program requires “investigation,” an Ombudsman investigation is not for the same purposes as an investigation by protective services, licensing and regulatory agencies, law enforcement or other entities. This may result in confusion regarding the appropriate investigatory role of such entities. When an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), the goal is to resolve the complaint to the resident’s satisfaction, rather than to substantiate whether the abuse or other allegation occurred. The Ombudsman program does not have a duty to collect sufficient evidence to meet the higher legal standards of proof that protective services, licensing or regulatory agencies, or law enforcement may need to meet their respective purposes. The Ombudsman program investigates solely for the purpose of gathering necessary information to resolve the complaint to the resident’s satisfaction, not to determine whether any law or regulation has been violated for purposes of a potential civil or criminal enforcement action.

With the Ombudsman program fulfilling its duties, the priorities and interests of the individual resident can be supported and advocated for. If the protective services and other government systems charged with taking protective or enforcement actions are not providing the outcomes that serve the health, safety, welfare or rights of residents, the Ombudsman program is available to address the larger systemic problems. Therefore, it is critically important that each of these agencies is able to fully and distinctly fulfill their duties. The provisions related to disclosure of resident identifying information, including exclusion from abuse reporting requirements, are set forth in §1324.11(e)(3).

Comment: Six commenters indicated that the reference in § 1324.17(b)(1) that Ombudsman program investigation includes investigation of abuse complaints conflicts with their State’s requirement to separate the

job duties of protective services from duties of representatives of the Office. Three of these commenters felt that, if the Ombudsman program is responsible for investigation of abuse, this is a conflict of interest. One of these commenters indicated that the provision would negatively impact the integrity of the Ombudsman program as the provision would require the Ombudsman program to substantiate abuse cases in conflict with the State protective services functions and the advocacy function of the Ombudsman program. (p. 7741)

Response: The Act requires the Ombudsman program to “identify, investigate, and resolve complaints that. . . relate to action, inaction or decisions, that may adversely affect the health, safety, welfare, or rights of the residents.” Section 712(a)(3)(A) and (5)(B)(iii) of the Act. Abuse, neglect and exploitation of residents are among the complaints that fall within this purview. AoA requires Ombudsmen to report in NORS the types of complaints processed by the Ombudsman program, specifically including complaint codes and definitions related to abuse, gross neglect and exploitation. “Long-Term Care Ombudsman Program Complaint Codes,” OMB 0985–0005, at pp. 1–3, 17–18.

The services of the Ombudsman program are distinct from, and as indicated in § 1324.21(a), at times may conflict with the responsibilities of protective services. An individual resident, may, for example, have a complaint about protective services or may seek support from the Ombudsman program for a goal that is inconsistent with his or her protective services plan. Some of the functions of the Ombudsman program use the same terms, such as “investigation,” which are not always used for consistent purposes among Ombudsman programs, protective services, licensing and regulatory agencies, or other programs. This may result in confusion regarding the appropriate role of such programs. When an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), its goal is to resolve the complaint to the resident’s satisfaction, but not to substantiate whether the abuse or other allegation occurred. The Ombudsman program does not have a duty to collect sufficient evidence to meet the higher legal standards of proof that protective services, licensing or regulatory agencies, or law enforcement may need to meet their respective purposes. The Ombudsman program investigates solely for the purpose of gathering necessary information to resolve the complaint to the resident’s satisfaction, not to determine whether any law or regulation has been violated for purposes of a potential civil or criminal enforcement action. With the Ombudsman program fulfilling its duties, the priorities and interests of the individual resident can be supported and advocated for. If the protective services and other government systems charged with taking protective or enforcement actions are not providing the outcomes that serve the health, safety, welfare or rights of residents, the Ombudsman program is available to advocate for improvements to the system. Therefore, it is critically important that each of these agencies is able to fully and distinctly fulfill their duties.

Comment: One commenter indicated that the proposed language is suited to States where the Ombudsman program is the finder of fact for abuse. The commenter recommended that we add language to include that the Ombudsman program should report abuse to the State entity which is the finder of fact for abuse complaints. (p. 7742)

Response: We intend, through this rule, to clarify that the Ombudsman program is not appropriately the finder of fact for abuse complaints. The requirements related to Ombudsman program referral of abuse complaints to other agencies for substantiation of the facts are set forth in §1324.19(b)(3)–(8).

Comment: Several commenters recommended that we add an objective framework for determining “best interest.” (p. 7743)

Response: We agree that, where evidence exists of a resident’s previous expressions of values and choices or evidence of what the resident would have wanted, a “substituted judgment” standard is preferable. In light of this comment, in both §1324.19(b)(6) and (7), we have added the language: “The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made.” However, when the Ombudsman or representative of the Office has no evidence to rely on, and has no resident representative available or appropriate, we believe that the Ombudsman or representative of the Office must consider what action is in the “best interest” of the resident.

Comment: Four commenters recommended that we require that the Ombudsman or representatives of the Office report suspected abuse. One of these commenters indicated that the Ombudsman program has a duty to all residents of a facility, not only one resident. Two commenters indicated that reporting could protect other residents in some circumstances. One commenter indicated that, by not reporting, the representative of the Office would be subject to liability if the suspected abuse put other residents at risk. One commenter indicated deep concern if the Ombudsman program is unable to fulfill its very purpose where the representative of the Office is aware of allegations of abuse but is forced to be silent if informed consent is not obtained. (p. 7744)

Response: Through the strict disclosure limitations within the Act at section 712(d)(2)(B), Congress has indicated its intent for the Ombudsman program to be a safe place for residents to bring their concerns, knowing that their information will not be disclosed without their consent (or the consent of their representative). Through numerous reauthorizations of the Act, Congress has never chosen to provide an exception for abuse reporting in the Act. While we have provided, in § 1324.19(b) of the final rule, limited exceptions for reporting resident-identifying information where residents are unable to communicate informed consent, we do not believe that the Act provides us with the authority to promulgate a rule that would permit reporting of a resident's identifying information when the resident (or resident representative) who is able to communicate informed consent has not done so. Nor would we support a rule that would permit such reporting, as a matter of policy.

Residents reaching out for assistance on an abuse, neglect or exploitation complaint may well want their information conveyed by the Ombudsman program to protective services, the licensing and regulatory agency, and/or law enforcement; indeed, the final rule clarifies that the Ombudsman program has a duty to make such a referral when requested by the resident (see § 1324.19(b)(3)(i)). The Ombudsman program may inform complainants who report suspected abuse that they may (and, under some circumstances, must) report the complaint information to protective services, the licensing and regulatory agency and/or law enforcement. The Ombudsman program may advise the resident of the appropriate role and limitations of the Ombudsman program, assist the resident in understanding his or her options, and encourage the resident to report—and/or consent to the Ombudsman program referral—to protective services, the licensing and regulatory agency and/or law enforcement.

However, the Ombudsman program is designed to represent the interest of the resident (and not necessarily the interest of the State) in order to support the resident to make informed decisions about the disclosure of his or her own information. Residents may be concerned about retaliation if their concern is known or have other reasons why they do not want the Ombudsman program to share their information. While Congress intends for the Ombudsman program to resolve complaints related to the health, safety, welfare and rights of residents, and while that intent logically includes protection from abuse, Congress provided the resident—and not the Ombudsman program—with the authority to make the decision about when and where the resident's information can be disclosed.

Comment: Eight commenters indicated that obtaining approval from the Ombudsman for disclosure in §1324.17(b)(6)-(8) might delay referrals to law enforcement, adult protective services or the facility and suggested elimination of this requirement...One of the commenters indicated that it is not practical, necessary or efficient to require approval of the Ombudsman for such disclosure. (p. 7746)

Response: We believe that the circumstances in which disclosure is made without resident or resident representative permission, as described in § 1324.19(b)(6)–(8) of the final rule, should be made with great caution. Ideally, the Ombudsman would be made aware of these circumstances and provide or deny approval. However, we understand that, particularly in States with large resident populations, this requirement could foreseeably create delays that could inhibit the ability of the representative of the Office, as well as other appropriate agencies, to protect the health, safety, welfare or rights of residents. Therefore, we have added the option, in §1324.19(b)(6) and (8), for the representative of the Office to follow the relevant policies and procedures of the Office regarding disclosure and added a new paragraph at § 1324.19(b)(9) to provide additional clarity related to these policies and procedures of the Ombudsman program disclosure approval process. The final rule maintains the requirement for Ombudsman approval, however, in § 1324.19(b)(7) in circumstances where the resident has a resident representative who is not acting in the best interest of the resident. This requirement

is maintained because it is consistent with the statutory requirement for the representative of the Office to obtain Ombudsman approval prior to accessing resident records when a resident's guardian is not acting in the resident's best interest. Section 712(b)(1)(B)(ii) of the Act. Since these circumstances are likely to be less frequent, and since the provision related to records access already exists in the law so should be the current practice in States, we do not believe that this provision will be burdensome, even to States with large resident populations.

Comment: Seven commenters recommended that the final rule should require implementation of policies that require the representative of the Office who witnesses abuse, gross neglect, or exploitation to report the observation. Several of these commenters indicated that, if any representative of the Office personally witnesses an event and takes no action, it gives the perpetrator permission to continue the behavior, and that the witness has the responsibility to report as a firsthand observer of the incident. One of the commenters indicated that reporting is not a violation of the Act since, by witnessing the event, the representative of the Office has not been provided information from a third party. (p. 7747)

Response: Both the proposed language and the final rule clarify that the procedures for disclosure shall provide that—where the Ombudsman or representative of the Office personally witnesses suspected abuse, neglect or exploitation of a resident—the representative of the Office shall follow the direction of the resident or resident representative. We believe this approach is consistent with the Act which permits disclosure of resident identifying information only with consent or in other very limited situations.

The Act is silent on how to best handle this situation when the Ombudsman or representative of the Office personally witnesses an incident and the resident at issue is unable to communicate informed consent (and has no resident representative available to do so). In these cases, we have described the circumstances in the final rule, at § 1324.19(b)(8), that the Ombudsman or representative shall refer the matter and disclose the identifying information of the resident to the facility and/or appropriate agency for substantiation of abuse and may refer the matter to other appropriate agencies.

Comment: Five commenters indicated that the proposed language at §1324.17(b)(8) appears to require representatives of the Office to be mandatory abuse reporters, at least in certain circumstances. One of these commenters described this as contrary to their State law. Two of these commenters indicated mandated reporting runs counter to the principles of the Ombudsman program and its unique role as resident advocate under the Act. Two of these commenters requested clarification to ensure that representatives of the Office are not mandated reporters in facilities where the resident has the ability to grant or deny consent. One commenter expressed that personally witnessing abuse versus being told or otherwise discovering evidence of abuse is an artificial distinction. (p. 7747)

Response: In the final rule at §1324.19(b)(8), we describe circumstances when an Ombudsman or representative of the Office has personal knowledge of circumstances that others may not have. This information is likely relevant to the ability of the facility to protect the resident and to the ability of the official finder of fact to determine whether the alleged abuse, gross neglect or exploitation can be substantiated. When an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), its goal is to resolve the complaint to the resident's satisfaction, but not to serve as the official finder of other allegation occurred. In most States, the substantiation decision is made either by adult protective services and/or the licensing and regulatory agency. By contrast, when a report has been made to the Ombudsman program or when a representative of the Office discovers information through review of resident records, someone else is necessarily aware of the circumstances and can (and in many instances is mandated to) report this information to the agency which is responsible for substantiating abuse. Therefore, absent an indication from the resident or resident representative that there is not consent for this information to be shared, we believe that the representative of the Office should be required to disclose such information.

ACL/AoA Program Instructions, Correspondence, Reports with Applicable Sections/Comments

AoA-IM-03-01: “Under the Privacy Rule, the LTCOP is a ‘health oversight agency.’ Therefore, the Privacy Rule does not preclude release of residents’ clinical records to the LTCOP, with or without authorization of the resident or resident’s legal representative. Also, since the LTCOP is a ‘health oversight agency,’ nursing homes and other ‘covered entities’ may, in response to appropriate ombudsman inquires, share other information without fear of violating the Privacy Rule.

State agencies on aging are required under the OAA to ensure appropriate ombudsman access to residents’ records.

Nursing homes which participate in Medicare and Medicaid are required to provide ombudsmen access to residents’ records with the permission of the resident or the resident’s legal representative, consistent with state law.

To ensure that all facilities covered by the program, including nursing homes which do not participate in Medicare and Medicaid and board and care, assisted living and similar facilities, provide access to records under all the circumstances outline in Section 712(b) of the OAA..., state agencies on aging must ensure that the state has in place a statutory, regulatory or policy requirement sufficient to ensure that the facilities provide such access.” p. 2

Becky Kurtz & Leslie Green, ACL/AoA Letter to B. Duke, Pennsylvania, 10/31/13: Long-Term Care Ombudsman Services to Victims of Abuse: “...we have learned that the LTCO Program routinely refers abuse and other “imminent danger” complaints to protective services, rather than opening a case and providing ombudsman services to the victim. The LTCO Program is authorized by federal statute to receive, investigate and work to resolve complaints independently and on behalf of long-term care facility residents, including but not limited to, complaints related to abuse, neglect and exploitation...

The role of the LTCO Program in responding to complaints related to abuse, neglect, or exploitation is distinct from the role of protective services, as well as that of licensing and survey agencies. Its work should not be duplicative of the work of these agencies, but should be coordinated at both the state and community levels for the benefit of long-term care residents.

Confusion regarding duplication may stem in part from the use of the same terms, including ‘complaint,’ ‘investigation,’ and resolution,’ which are not always used for consistent purposes among these agencies. Specifically, AoA/ACL defines these terms with respect to the LTCO Program...” pp. 2 - 3

Disclosure of Resident Identity without Consent: “...the OAA requires that the State agency establish procedures for disclosure by the LTCO Program that prohibit the disclosure of the identity of any complainant or resident without consent, unless disclosure is required by court order. Disclosing the identity of a resident or complainant without consent can violate the trust that the resident or complainant has in confiding information to the LTCO Program. In fact, confidentiality is among the essential characteristics of any ombudsman service, not only the LTCO Program under the OAA.

...Ultimately, however, the LTCO Program must work on behalf of the resident, even if the resident refuses to consent to a recommended referral. Moreover, the LTCO Program may not disclose the identity of the resident or complainant at issue without appropriate consent. State law may not require reporting of suspected abuse, neglect or exploitation by the LTCO Program where such reporting violates the Federal requirement that the LTCO Program is prohibited from the disclosure of the identity of a complainant or resident without appropriate consent pursuant to the OAA.” p. 4

Edwin Walker, AoA Letter to J. Rodrigues, 12/29/11: ...”the Information Memorandum [AoA-IM-03-01] addresses questions regarding the Privacy Rule’s implementation of HIPAA and its impact on access to residents’ records and

other information by representatives of the Long-Term Care Ombudsman Program. Please be advised that AoA-IM-03-01 is still in effect and has not been superseded by any subsequent issuance from this office.”

Norman Thompson ACL/AoA Letter to L. Alexander, Michigan, 08/2/2001: ...”We wish to point out that Section 712(d)(2)(B) of the OAA requires client consent for the complainant or resident’s identity to be disclosed, not for the initiation of investigation and resolution of a complaint. If a complainant did not want his or her identity disclosed or did not want to provide his or her SSN, the ombudsman would still investigate (unless the resident indicated that (s)he did not want the problem investigated) and attempt to resolve the complaint, to the degree this would be possible without revealing the client’s identity.”

p. 3

Edwin Walker, AoA Letter to S. Ward, Maryland, 08/28/98: “There are three separate confidentiality provisions in Title VII of the OAA...Chapter 2, at section 711 et seq., deals with ombudsman programs. Section 712(d) makes strict provision for confidentiality and, unlike Chapters 1 and 3, there is no exception for the release of information to law enforcement and similar agencies. The statute expressly provides that the identity of the complainant or resident may not be disclosed without either written consent or oral consent documented in writing. Particularly in light of the express exception in Chapters 1 and 3, we must conclude that the omission of a like exception in Chapter 2 was intentional on the part of Congress...

The Maryland legislation...requires the reporting of alleged elder abuse with no explicit exception for the ombudsman. To the extent that the legislation is interpreted to require reporting by the State Ombudsman, it conflicts with the confidentiality requirements of OAA Section 712...Accordingly , we must conclude that Maryland should either modify its legislation in order to provide an express exception, or adopt an official interpretation, either by regulation or opinion of its Attorney General, excepting the ombudsman from this requirement in the event that it is not possible to obtain the consent of the alleged victim.” pp. 1 -2

William Benson, AoA Letter to J.A. Thomas, Connecticut, 09/23/97: “Responsibility for abuse investigations and enforcement of nursing home responsibilities are assigned, under the federal Nursing Home Reform Law (OBRA 1987), to the state nursing home licensing and certification agency. Assignment of these protective services functions to ombudsmen creates a conflict in roles for the ombudsmen.

Also, since federal law supersedes state law, in investigating reports of patient abuse, ombudsmen must follow the prescribed confidentiality requirements in the OAA (Section 712[d]) and should not be required to follow state abuse reporting protocols which might conflict with these requirements.”

“I strongly recommend that responsibility for investigating reports of abuse and any other protective services functions be removed from the purview of the ombudsman program and assigned to the facility licensing agency or other appropriate agency, with the proviso that ombudsmen may refer such complaints to the responsible agency, in accordance with the confidentiality requirements of the federal statute.” p. 4

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