

## RESPONDING TO ALLEGATIONS OF ABUSE: ROLE AND RESPONSIBILITIES OF THE LONG-TERM CARE OMBUDSMAN PROGRAM

### OVERVIEW

Provisions in the Older Americans Act (OAA) state that the Long-Term Care Ombudsman Program (LTCOP) shall “identify, investigate and resolve complaints” regarding “action, inaction, or decisions that may adversely affect the health, safety, welfare or rights of the residents” made by, or on behalf of, residents.<sup>1</sup> Complaints may include, but are not limited to, allegations of abuse, gross neglect, and exploitation. Long-Term Care Ombudsman programs provide resident-centered advocacy and are directed by resident goals for complaint resolution. Due to strict federal requirements, resident and complainant information shared with or gathered by the LTCOP is confidential unless consent is obtained (as described below in the federal requirements). Therefore, the Ombudsman program role in investigating allegations of abuse is unique and differs from other entities such as, adult protective services and state licensing and certification agencies.

In 2016, the Administration for Community Living (ACL) published the State Long-Term Care Ombudsman Programs Final Rule which provides more specific guidance regarding investigating allegations of abuse, including how Ombudsman program representatives should respond if they witness abuse.<sup>2</sup>

The purpose of this guide is to discuss how Ombudsman program representatives can respond to allegations and observations of abuse, neglect, and exploitation when the resident does not or cannot give consent to pursue the complaint. In the absence of resident consent, LTCOP representatives can take other actions to adhere to disclosure requirements and work to ensure the resident receives quality care and is protected from harm. This guide reviews the federal requirements regarding complaint investigations and disclosure, highlights statements from the Administration on Aging, and provides advocacy strategies and additional resources.

### KEY POINTS

#### What is abuse?

Since states have different definitions for abuse, neglect, and exploitation, this guide will use the definitions provided in the National Ombudsman Reporting system (NORS) definitions of complaint codes and unless otherwise stated, we use the term “abuse” to include any willful act of “abuse, gross neglect and exploitation” throughout this resource.<sup>3</sup>

#### Administration on Aging Statements

In addition to the program requirements regarding disclosure and complaint investigation outlined in the Older Americans Act and the Rule, the Administration for Community Living/Administration on Aging has responded to questions regarding the role of the Office of the State Ombudsman in investigating allegations of abuse.

#### LTCOP Role in Investigating Allegations of Abuse, Gross Neglect, and Exploitation

The primary responsibility of the LTCOP is to investigate and resolve complaints on behalf of residents, but the LTCO program is unique in that its goal is to resolve the complaint to the “satisfaction of the resident or

<sup>1</sup> Older Americans Act of 1965. Section 712 (a)(3)(A)

<sup>2</sup>Published in the Federal Register, 02/11/2015, Vol. 80, No. 28. LTCOP Final Rule <https://www.federalregister.gov/documents/2015/02/11/2015-01914/state-long-term-care-ombudsman-programs>, correcting document with technical and typographical errors amended published in December 2016 <https://www.federalregister.gov/documents/2016/12/20/2016-30455/state-long-term-care-ombudsman-programs>

<sup>3</sup> Administration on Aging. Administration for Community Living. *Long-Term Care Ombudsman Program Complaint Codes*. OMB. NO.: 0985-0005. Expiration Date: 01/31/2019. [http://ltcombudsman.org/uploads/files/support/Complaint\\_Code2019.pdf](http://ltcombudsman.org/uploads/files/support/Complaint_Code2019.pdf) 2019.pdf

complainant” as opposed to seeking to “substantiate” a complaint by gathering evidence to prove the allegation occurred. <sup>4</sup> This difference means that the LTCO program does not have the same standard of evidence required for complaint investigation and resolution as other entities, such as Adult Protective Services, state survey agency and law enforcement. The investigation by other entities seeks evidence to demonstrate that laws or regulations were broken. Since the LTCOP’s primary goal is to resolve complaints to the satisfaction of the resident, the LTCOP representative seeks resolution “on behalf of a resident regardless of whether violation of any law or regulation is at issue.” <sup>5</sup>

### State Laws Regarding Mandatory Reporting of Abuse

Most states have mandatory reporting laws that require certain individuals (e.g., facility staff, social workers) to report suspected elder abuse. However, “state law may not require reporting of suspected abuse, neglect or exploitation by the LTCO Program where such reporting violates the Federal requirement that an ombudsman is prohibited from the disclosure of the identity of a complainant or resident without appropriate consent pursuant to Section 712(d) of the OAA.” <sup>6</sup> Additionally, the Rule requires states to develop policies regarding disclosure for the LTCOP that excludes “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).” <sup>7</sup>

Even if a LTCOP representative carries a professional license and is considered a mandatory reporter under their professional license (e.g., a licensed social worker), the representative must adhere to the federal disclosure requirements when acting as a representative and cannot be required to report abuse without appropriate consent. The LTCOP is unique in that it was designed to ensure that “ombudsmen serve as the agent of residents and help residents to achieve what residents believe is in their best interest.” <sup>8</sup>

Additionally, facilities are required to protect residents from all forms of abuse and investigate reports of abuse. Due to the lack of federal regulations for assisted living (e.g., board and care, personal care homes) state laws vary by state, but information regarding the federal regulations for nursing homes is available in the “Resources” section.

## WHAT CAN AN OMBUDSMAN PROGRAM REPRESENTATIVE DO?

Respecting resident confidentiality is critical not only to maintain compliance with program requirements, but also to adhere to the fundamental LTCOP role as resident advocates, maintain the integrity of the LTCOP, and foster trust between the representatives and residents. However, maintaining confidentiality in response to complaints involving abuse is a challenging, complex situation.

The preamble to the proposed rules for the LTCOP states, “the Act [OAA] requires that Ombudsman programs both assist residents in protecting their health, safety, welfare and rights as well as to provide the resident with the option to consent to disclosure of information about his or her complaint.” <sup>9</sup> Therefore, when a resident does not, or cannot, provide consent for a LTCOP representative to pursue an allegation of abuse, there are advocacy strategies that the representative needs to consider to ensure the resident is protected from harm while upholding the disclosure requirements.

<sup>4</sup> Administration on Aging, Administration for Community Living, *Instructions for Completing State Long Term Care Ombudsman Program Reporting Form for the National Ombudsman Reporting System (NORS)*. OMB NO: 0985-0005 EXPIRATION DATE: 01/31/2019. <https://www.acl.gov/sites/default/files/programs/2017-03/Instructions-Final-2019> p. 5 and, in the Rule, page 7729, third column: <http://ltcombudsman.org/uploads/files/library/2015-01914.pdf>

<sup>5</sup> Administration on Aging, Letter to Director Nels Holmgren, Utah Division of Aging and Adult Services. October 31, 2011.

<sup>6</sup> AoA, Letter to Director Holmgren, op.cit.

<sup>7</sup> 1324.11(e)(3)(iv) State Long-Term Care Ombudsman Programs Final Rule. <https://www.federalregister.gov/documents/2015/02/11/2015-01914/state-long-term-care-ombudsman-programs>

<sup>8</sup> The National Long-Term Care Ombudsman Resource Center (NORC), Best Practices: Confidentiality, December 2000.

<sup>9</sup> Federal Register, Notice of Proposed Rulemaking, State Long-Term Care Ombudsman Program, A Proposed Rule by the Aging Administration on June 18, 2013. <https://www.federalregister.gov/articles/2013/06/18/2013-14325/state-long-term-care-ombudsman-program>

The advocacy strategies shared in the following section are not comprehensive but are a few examples of successful LTCOP advocacy in response to this delicate situation. As with all LTCOP work, advocacy strategies in response to allegations of abuse vary depending on the situation (e.g., type of abuse allegation, type and size of long-term care setting, identity of the perpetrator- family member, visitor, facility staff or another resident). For example, a LTCOP representative's approach in response to an allegation of abuse in a small personal care home may differ from their approach in response to a similar allegation in a large nursing home. These approaches were adapted from feedback received from State Ombudsmen and local program representatives and from the Georgia Long-Term Care Ombudsman Program Policies and Procedures manual.

Fear of retaliation is one of the most common reasons residents do not want to pursue a complaint and disclose their identity. Since residents live in the facility and rely on staff for their basic needs their fear of retaliation cannot be overemphasized. It is critical that LTCOP representatives understand how fear of retaliation influences a resident's, or another complainant's, choices regarding complaint reporting and resolution.

*Note: Due to the primary focus of this guide, the advocacy strategies were developed for individual case advocacy, but that does not negate the importance of systemic advocacy to improve the general responsiveness of other entities to allegations of abuse.* <sup>10</sup>

## LTCOP ADVOCACY STRATEGIES

Complaints received by the LTCOP are often more complicated than the examples below; however, the purpose of this guide is to provide advocacy strategies and examples to consider when responding to situations involving abuse, neglect, and exploitation. In addition to the advocacy strategies discussed in this section, program representatives should communicate with their supervisor when they receive an allegation of abuse (e.g., a volunteer consults with their staff LTCOP representative) and follow applicable state LTCO program policies and procedures regarding consultation and communication.

### **Situation #1: A resident informs the LTCOP of an allegation of abuse or financial exploitation but does not give the program representative permission to pursue the complaint.**

Ombudsman program representatives must employ other advocacy strategies when responding to allegations of abuse, where consent is not given, to protect resident confidentiality and do their best to ensure resident safety. <sup>11</sup> When responding to allegations of abuse, representatives should exhaust all possible advocacy strategies for the safety not only of the complainant resident, but for the safety of all residents. Below are some suggested practices for responding to this situation: <sup>12</sup>

- Explore the reason for the resident's reluctance to pursue the allegation of abuse, explain residents' rights and the LTCOP role and responsibilities in supporting residents. Inform the resident of the complaint process, including how not disclosing their identity may impact complaint investigation and resolution, the potential risks of consenting to disclosure as well as risks for not pursuing allegations of abuse. Offer to investigate the complaint without disclosing her name (e.g., reporting the time and dates the incidents occurred without disclosing her name or identifying information). If possible, visit the resident frequently, see if she is interested in seeking supportive

<sup>10</sup> Information regarding systems advocacy related to abuse and communication and information sharing with other entities is available on the NORC [website](#).

<sup>11</sup> NORC. The Problem-Solving Process: Investigation. Resource Material for the NORC Curriculum. April 2006. p. 9. <http://www.ltombudsman.org/sites/default/files/ombudsmen-support/training/Local-Investigation-Curri-cResource-Material.pdf>

<sup>12</sup> These approaches were adapted from the Georgia Long-Term Care Ombudsman Program Policies and Procedures and from discussions with state and local LTCO.

services (e.g., counseling) and encourage her to give permission to report the abuse. Take care to ensure that the resident does not feel that you are pressuring her to give permission to report.

- Ask the resident if she has shared this information with anyone else or if there is someone she trusts to share it with, such as a family member, friend or another staff person and if so, ask if you can talk to that person.
- See if there are other residents with the same issue who are willing to pursue it to resolution. By resolving the issue for others, you might be able to resolve it for the resident who does not want you to proceed on her behalf.<sup>13</sup> Be careful to avoid revealing the identity of the previous resident and to avoid elevating anxiety levels among other residents with whom you speak.
- Investigate to gather information regarding the allegation. If you gain information supporting the allegation, share the information with the facility administrator if it is possible to do so without identifying the resident(s) involved (e.g., “here is information we gathered supporting allegations that the nurse aide, Jackie, on the evening shift is...”). The representative should not recommend that the facility take any specific action against the accused employee, but rather remind the administrator of the facility’s responsibility to investigate and report allegations of abuse. If the facility administrator asks the representative for advice he/she could suggest that they consult the regulations for guidance and contact the state survey agency with questions about how to proceed.
- For complainants other than the resident, inform them of the role of the LTCO program and refer them to the appropriate investigative entity (e.g., state licensing and certification agency, adult protective services, law enforcement). Then speak with the resident regarding the complaint and their options including the advocacy strategies listed above.

**Situation #2: During a facility visit, the LTCOP representative witnesses physical or verbal abuse of a resident.**

While the Older Americans Act (OAA) does not address this specific situation, the Rule describes the actions a representative must take if they personally witness suspected abuse, gross neglect, or exploitation, and when the resident won’t or cannot give consent (see 1324.19(b)(8) under the “List of Authorities” section). If you witness physical or verbal abuse, there is often no time to stop and ask questions of consent as stopping the abuse from happening is the immediate priority and this often involves notifying staff to assist the resident who has been harmed.

If you witness abuse:<sup>14</sup>

- Stop what you are doing, remain calm, and call attention to the situation. For example, if it is a physical altercation (such as a resident to resident assault), don’t physically intervene, but capture the attention of the abuser, the victim, and others. Calling attention to the attack by yelling “stop” or “help” may stop it and attract staff. This is similar to action you would take if you found a resident in distress (such as a resident that fell or was choking).
- Pay close attention to details (e.g., what did you see and hear, what is the room number, who are the individuals involved). Identify other witnesses, especially facility staff since they are mandatory reporters of abuse.
- Following the incident, speak with the resident (or residents) about the incident, explain the role of the program, ask the resident if he/she wants to report the incident to the investigative agency, and inform the resident of the facility staff’s responsibility to report the incident and conduct an internal investigation.

<sup>13</sup> NORC. The Problem-Solving Process: Investigation. Resource Material for the NORC Curriculum. April 2006. <http://www.ltcombudsman.org/sites/default/files/ombudsmen-support/training/Local-Investigation-Curri-cResource-Material.pdf>

<sup>14</sup> Adapted from Washington State LTCO Certification Manual.

- If the resident does not want to report to the investigative entity, the LTCOP representative should explore the resident's concerns, address any fear of retaliation, and discuss what steps can be taken to keep the resident safe (e.g., the advocacy strategies in above scenarios in which the resident does not provide consent).
- If the resident cannot provide consent, in addition to documenting everything and consulting with your supervisor (staff LTCOP representative or State Ombudsman):
  - Find out if the resident has a representative (e.g., family member, power of attorney, guardian) who can speak on behalf of the resident. Inform the representative of the need to involve outside individuals, such as facility staff or the investigative agency and the role of the LTCO program. Work with the individual to develop a plan of action for resolution of the complaint.
  - If the resident does not have a representative, or the representative cannot be reached, or the representative is not acting in the best interest of the resident and the resolution goal is for action by the state licensing and certification agency, adult protective services and/or law enforcement, then the program representative should obtain approval from the State Ombudsman or follow policies and procedures of the Office which provide for such disclosure.
- Document everything and contact your supervisor to report the incident, to debrief, and for support.
- Only after obtaining resident consent, or approval of the State Ombudsman, ask the facility staff to work with the resident to develop a plan to maintain their safety, meet their needs after the incident (e.g., counseling) and prevent future incidents. For example, if this was a physical assault by another resident there are two issues to address immediately, first, how to ensure the safety of the victim of abuse and second, how the facility will ensure the other resident is properly supervised and will not harm anyone else.

**Situation #3: A LTCOP representative receives a complaint regarding abuse or gross neglect and the resident cannot provide consent to pursue the complaint.**

- Find out if the resident has a representative (e.g., family member, power of attorney, guardian) who can speak on behalf of the resident. Inform the representative of the need to involve outside individuals, such as facility staff or the investigative agency and the role of the LTCO program. Work with the individual to develop a plan of action for resolution of the complaint.
- If the resident does not have a representative, or the representative cannot be reached, or the representative is not acting in the best interest of the resident and the resolution goal is for action by the state licensing and certification agency, adult protective services and/or law enforcement, then the program representative should obtain approval from the State Ombudsman and disclose the identity of the resident to appropriate facility staff and the appropriate investigative agency.<sup>15</sup>

**Situation #4: A LTCOP representative receives a complaint regarding abuse via email or phone call from an individual other than the resident.**

As stated earlier, the LTCOP does not investigate complaints (including allegations of abuse) to determine if a law or regulation was violated or to enforce a penalty.

- LTCOP representatives are not the primary investigator, the representative should inform the complainant of the role of the program and provide contact information for the appropriate entity that does investigate to substantiate allegations of abuse (in most states the state licensing agency or adult protective services).
- If it is determined that the caller or email is from a facility staff person, the representative can remind the person that under the federal and state requirements facility staff must make report allegations of abuse to the licensing agency or adult protective services and/or local law enforcement.

<sup>15</sup> Federal Register. Final Rule. State Long-Term Care Ombudsman Programs. op.cit.



- Then the LTCOP representative should visit the resident who may be at risk.
  - If the resident does not give the representative permission to pursue the complaint the representative should consider other advocacy strategies such as those mentioned in response to Situation #1.

Regardless of how the complaint is received (e.g., via email, mail, phone or in-person) the representative should follow the fundamental LTCOP complaint investigation process for every complaint and always seek resident permission before pursuing the complaint and then proceed accordingly. For example, the LTCOP should not forward a complaint received via email directly to the investigating entity before visiting the resident since LTCOP work is always resident-directed, even in cases involving allegations of abuse.

Whether or not a resident chooses to pursue a complaint regarding abuse, a representative should support the resident as much as the resident wants them to be involved. For example, if a resident says she was abused and wants to file a complaint with the agency that serves as the state's "official finder of fact," such as the state licensing and certification agency, the LTCOP representative should support the resident during that agency's investigation to "assist the resident in voicing and realizing his or her goals." Additionally, the representative could support the resident by following up with the resident and making sure she is aware of available support services (e.g., facility social worker, victims' services, counseling).

For additional advocacy strategies and tips for effective communication in response to a variety of complaints (including allegations of abuse by a family member) consult the NORC guide and webinar titled, *Working with Families: Tips for Effective Communication and Strategies for Challenging Situations*.<sup>16</sup>

**SHARE YOUR EXPERIENCE**

The examples of LTCO program practices and advocacy strategies provided in this guide are not comprehensive. We encourage you to share your policies, practices, training, and activities regarding this topic by sending an email to [ombudcenter@theconsumervoice.org](mailto:ombudcenter@theconsumervoice.org).

**LIST OF AUTHORITIES**

**Older Americans Act Provisions**

Under federal law, "the files and records" of the long-term care ombudsman program "may be disclosed only at the discretion of the [State] Ombudsman (or the person designated by the Ombudsman to disclose files and records)." <sup>17</sup> Furthermore, the "identity of any complainant or resident with respect to whom the [Ombudsman] Office maintains such files or records" cannot be disclosed without either consent from the complainant or resident, or from their legal representative, or pursuant to a court order. <sup>18</sup> The State Ombudsman cannot authorize disclosure of the identities of complainants or residents without their consent, or the consent of their legal representatives, or pursuant to court order, or in circumstances when the resident cannot consent and has no known legal representative.

The Older Americans Act provisions regarding LTCOP disclosure are as follows:

(d) DISCLOSURE. —

(1) IN GENERAL. —The State agency shall establish procedures for the disclosure by the Ombudsman or local Ombudsman entities of files, records, and other information maintained by the program, including records described in subsection (b)(1) or (c).

<sup>16</sup> *Working with Families: Tips for Effective Communication and Strategies for Challenging Situations*. NORC. <http://www.ltombudsman.org/ombudsman-support/training/conference-calls/family-members>

<sup>17</sup> 42 U.S.C. 3058g(d)(2)(A)

<sup>18</sup> 42 U.S.C. § 3058g(d)(2)(B)

- (2) IDENTITY OF COMPLAINANT OR RESIDENT. —The procedures described in paragraph (1) shall—
- (3) (A) provide that, subject to subparagraph (B), the files, records, and other information described in paragraph (1) may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose the files, records, and other information);
- (B) prohibit the disclosure of the identity of any complainant or resident with respect to whom the Office maintains such files, records, or other information unless—
- (i) the complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure and the consent is given in writing;
  - (ii) (I) the complainant or resident gives consent orally; and (II) the consent is documented contemporaneously in a writing made by a representative of the Office in accordance with such requirements as the State agency shall establish; or
  - (iii) the disclosure is required by court order; and
- (C) notwithstanding subparagraph (B), ensure that the Ombudsman may disclose information as needed in order to best serve residents with limited or no decision-making capacity who have no known legal representative and are unable to communicate consent, in order for the Ombudsman to carry out the functions and duties described in paragraphs (3)(A) and (5)(B) of subsection (a).

**State Long-Term Care Ombudsman Programs, Final Rule <sup>20</sup>, excerpts**

**§ 1324.19 Duties of the representatives of the Office**

(b) Complaint Processing

- (3) 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).
- 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 report except as set forth in paragraphs (b)(5) through (7) of this section, notwithstanding State laws to the contrary.
- (4) 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;
- (5) 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.
- (6) 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;

<sup>20</sup> Federal Register. Final Rule. State Long-Term Care Ombudsman Program. op.cit.

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.

(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 has no resident representative, or 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 Ombudsman obtains the approval of the Ombudsman.

(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.

(i) Where the policies and procedures require Ombudsman approval, they shall include a time frame in which the Ombudsman is required to communicate approval or disapproval in order to assure that the representative of the Office has the ability to promptly take actions to protect the health, safety, welfare or rights of residents.

(ii) Where the policies and procedures do not require Ombudsman approval prior to disclosure, they shall require that the representative of the Office promptly notify the Ombudsman of any disclosure of resident-identifying information under the circumstances set forth in paragraph (b)(6) or (8) of this section.

(iii) Disclosure of resident-identifying information under paragraph (b)(7) of this section shall require Ombudsman approval.

### **ACL Frequently Asked Questions on the LTCOP Rule** <sup>20</sup>

#### **Q: Does the Rule prohibit an Ombudsman or representatives of the Office from being mandated reporters under state abuse reporting laws?** <sup>21</sup>

A: Yes. Both the Older Americans Act and the Rule prohibit reporting of resident-identifying information without the resident's consent. By logical extension, this precludes mandated reporting of suspected abuse which discloses such information.

Through the strict disclosure limitations within the Act, Congress has indicated its intent for the Ombudsman program to be a safe, person-centered place for residents to bring their concerns. Residents can be assured that their information will not be disclosed without their consent, the consent of the resident representative, or court order. (OAA Section 712(d)(2)(B)). Despite numerous Congressional reauthorizations of the Act, Congress has never provided an exception for abuse reporting in the Act.

Therefore, Ombudsman program policies and procedures must exclude the Ombudsman and representatives of the Office from abuse reporting requirements when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order. (45 CFR 1324.11(e)(3)). 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.

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 response to and protection from abuse, Congress provided the resident – and not the Ombudsman program – with the authority to make the decision about when and where their information can be disclosed by the Ombudsman program. That is as it should be.

#### **Q: Does the Rule prohibit Ombudsman programs from investigating abuse complaints?**

A: No. Both the Older Americans Act and the Rule require 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." (OAA Section 712(a)(3)(A), (a)(5)(B)(iii); 45 CFR 1324.13(a)(1), 1324.19

<sup>20</sup> The LTCOP Frequently Asked Questions (FAQs) by the Administration for Community Living (ACL) referenced in this paper are excerpts to highlight the most relevant language. The complete FAQs are available on the ACL website: <https://www.acl.gov/programs/long-term-care-ombudsman/long-term-care-ombudsman-faq>

<sup>21</sup> ACL's LTCOP FAQs includes a question about how the Ombudsman program should address the conflict of an Ombudsman or representative of the Office holding a professional license which compels reporting of certain information (e.g., mandatory abuse reporting).

(a)(1),(b)). Abuse, neglect and exploitation of residents are among the complaints that fall within this purview.

However, Ombudsman programs are not appropriately the official substantiator (or, finder of fact) for abuse complaints on behalf of the state or other governmental entity. Ombudsman programs represent the interests of residents, rather than the interests of the state or other governmental entity. (See OAA Section 712(a)(3)(E), (a)(5)(B)(iv); 45 CFR 1324.13(a)(5), 1324.19(a)(4)).

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 that represent the state or other government entity in determining whether abuse occurred. In most states, substantiation determinations are made by adult protective services and/or the state’s licensing and regulatory agency, not by the Ombudsman program.

In contrast, when an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), it investigates solely for the purpose of gathering necessary information to resolve the complaint to the resident’s satisfaction. It does not investigate in order to officially determine whether any law or regulation has been violated or for purposes of taking official protective, regulatory, or enforcement action. The goal of the investigation 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 in order to fulfill their respective purposes. With appropriate consent, the Ombudsman program makes a referral to the appropriate protective service, regulatory, or law enforcement entity to investigate for its respective purpose.



## RESOURCES

### Abuse, Neglect, and Exploitation

NORC Elder Abuse/Elder Justice Issue Page

<http://ltombudsman.org/issues/abuse-neglect-and-exploitation-in-long-term-care-facilities>

### Federal Requirements

Long-Term Care Ombudsman Programs Final Rule

[http://ltombudsman.org/library/fed\\_laws/ltcop-final-rule](http://ltombudsman.org/library/fed_laws/ltcop-final-rule)

Older Americans Act

<http://ltombudsman.org/issues/older-americans-act>.



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