

## CHAPTER 5 CONFIDENTIALITY

### I. Introduction

In the course of their work, certified Long-Term Care (LTC) ombudsman representatives have access to personal, medical, and often financial information regarding residents. Because of this access and the nature of issues handled by ombudsman representatives, federal and State laws require the protection from disclosure of complaint information, including the identities of complainants and residents, through specific confidentiality requirements.

Residents and other potential complainants will not report problems if they feel that their identities may be revealed to others. Their vulnerability may leave them open to retaliation in the form of adverse treatment, abuse, neglect or other repercussions. It is imperative that LTC residents and complainants understand that the Ombudsman Program keeps complaint records and individual identities in strictest confidence. This chapter addresses the basic requirements for confidentiality in the Ombudsman Program.

In the case of abuse reporting, there are some variations in the confidentiality requirements presented in this section. Please see Chapter 3, Mandated Reporting and Elder Abuse Investigation, for guidance on confidentiality in abuse cases.

### II. Legal Authority

**FEDERAL** Title 42 United States Code sections 3058g(b) and (d)

**STATE** California Welfare and Institutions Code sections 9724 and 9725

*Ombudsman Services of Northern California v. Superior Court of Placer County* (2007) 154 Cal.App. 4<sup>th</sup> 1233

### **III. Assuring Confidentiality**

It is the responsibility of ombudsman representatives to assure complainants and residents of the confidentiality requirements and the LTCOP's strong commitment to protect the identity of all complainants. Several visits by an ombudsman may be necessary before a resident or other complainant is willing to divulge information or make a complaint. Fearful complainants are often suspicious of staff and sometimes of other residents. These fears are not baseless. Retaliation against complainants may be very subtle. Acts of willful retaliation, however subtle, are in violation of the law. [Cal. Code Regs., title 22, § 8040(d)]

Ombudsman representatives must maintain confidentiality at all times, even after they have left the program. Upon decertification, former ombudsman representatives must return all case notes to the local Ombudsman Program and relinquish or destroy their certification cards. Please refer to Chapter 12, Information Systems, for more information regarding the confidentiality requirements for personal computers.

### **IV. Access to Records**

Title 42 United States Code, section 3058g(b) mandates that each state ensure that the representatives of the Office of the State Long-Term Care Ombudsman (OSLTCO) have appropriate access to LTC facilities, residents, resident records, and facility administrative records. Access to medical and social records is contingent upon authorization by residents or, when residents lack capacity to consent, their legal representatives. An ombudsman must obtain written consent or oral consent that is documented in writing prior to accessing a resident's records. Form OSLTCO S201 is used to document consent (Exhibit 5-A).

Legal representatives are individuals who are either appointed by a court, designated by a resident, or determined by law to act on behalf of the resident. Examples of legal representatives include:

- Agents under Advance Health Care Directives
- Individuals who have powers of attorney
- Conservators
- Administrators of estates of residents
- Executors of the estates of deceased residents who lived in LTC facilities
- Spouses, where there is no designated legal representative
- Children, where there is no spouse or designated legal representative

If a resident lacks capacity to give consent and has no legal representative, 42 U.S. Code section 3058g(b) requires that representatives of the LTCOP be given access to the resident's medical and social records. Welfare and Institutions Code section 9724(d) specifies that in California, this access is to be provided to full-time employees of the LTCOP and to ombudsmen qualified by "medical

training” with the consent of the State Ombudsman or the Coordinator. The facility may require a statement from the Coordinator authorizing the access.

If the resident is unable to give consent, is under conservatorship, and access to records is necessary to investigate a complaint, the ombudsman representative may access the resident’s records under the following conditions:

- the conservator refuses to give permission, and
- the ombudsman representative has reasonable cause to believe that the conservator is not acting in the best interests of the resident, and
- the ombudsman representative obtains the approval of the State Ombudsman or the Ombudsman Coordinator to gain access to the necessary records.

The law authorizes the OSLTCO and its designated representatives, with consent and in performance of their statutory duties, to have access to the facility records of anyone who has at any time been a resident of a LTC facility. If a complaint is received relating to a deceased resident or former resident, the local Program must receive authorization from the OSLTCO prior to reviewing the records.

As expressed in Information Memorandum AOA-IM-03-01, the United States Department of Health and Human Services has determined that the OSLTCO and its designated entities and representatives are Health Oversight Agencies for the purposes of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (45 C.F.R. § 164.501). This means that facilities can provide Protected Health Information (PHI) to ombudsman representatives in the same way that they do to oversight and eligibility agencies without fear of violating HIPAA regulations. While patient consent is unnecessary under HIPAA, ombudsman representatives still need to obtain consent from residents or their legal representatives to access resident health records.

## **V. Disclosure**

Title 42 United States Code section 3058g(d) prohibits an ombudsman representative from disclosing of the identity of a complainant or resident unless the ombudsman representative has written consent from the resident, oral consent from the resident which is documented contemporaneously in writing, written consent from the resident’s legal representative, or a court order requiring disclosure. Confidentiality is also required in Title 42 Code of Federal Regulations part 1321.51, which states that no information about an older person can be disclosed without informed consent, unless disclosure is required by court order or for program monitoring by authorized agencies.

In addition, federal elder abuse prevention law [42 U.S.C. § 3058d(a)(6)(C)] states that all information gathered in the course of receiving reports and making referrals in abuse cases shall remain confidential unless all parties to such

complaint consent in writing to the release of the information. This means the identities of non-resident complainants and witnesses may not be revealed without securing their consent. If consent is given by witnesses, it must be documented in the record.

Furthermore, in *Ombudsman Services of Northern California v. The Superior Court of Placer County* (2007) 154 Cal. App. 4th 1233; 65 Cal. Rptr. 3d 456; 2007 Cal. App. LEXIS 1468, the appellate court held that a patient, resident, conservator or legal representative cannot authorize the disclosure of a third party's identity, statement, or information. Therefore, an ombudsman representative cannot release the identity of the third party without written consent from this person. Written consent from the resident, complainant, or legal representative is applicable only to revealing the identity of the particular resident, complainant, or legal representative and no one else.

Based on the above federal and State laws and regulations, the identity of a resident of a LTC facility cannot be disclosed without the written consent of the resident; or when the resident lacks capacity, the resident's legal representative; or upon receipt of a court order. When written consent is not possible, oral permission may be given in the presence of a third party witness and must be documented contemporaneously [Welf. & Inst. Code § 9725; 42 U.S.C. § 3058g(d)]. The ombudsman representative and third party witness must sign and date this statement to protect all persons involved. Written and oral consent are documented on form OSLTCO S201, included as Exhibit 5-A.

The identities of other residents, complainants, and witnesses also may not be revealed without their consent. Consent from these individuals also needs to be documented in the record.

Disclosure of information about a case to agencies that act as funding sources, including Area Agencies on Aging, umbrella agencies that have oversight for Ombudsman Programs, the news media, attorneys, or any third party, is prohibited unless:

- there is consent to share information about the case from the resident on whose behalf the program was advocating; **and**
- consent from any individual whose identity would be revealed; **or**
- a court order

Confidentiality restrictions should not impair the Ombudsman Program's seeking advice from a Title III/VII-funded program, other Legal Services Programs, or attorneys. Anonymity must be preserved in discussing cases when an ombudsman representative does not have consent to release identifying information. An ombudsman will not show anyone the case records without authorization, but details can be discussed as long as identities are not disclosed. In these situations, extreme caution must be exercised because,

especially in small communities, certain information may indirectly reveal an individual's identity. (For example, there may be only one 85 year old, Hispanic female with diabetes in the facility.)

## **VI. Confidentiality and Complaint Resolution**

There may be times when divulging the resident's/complainant's identity is in the best interest of the resident, especially when complaint resolution is contingent upon identification of the resident. If a resident/complainant tells an ombudsman *not to divulge* information to anyone, the ombudsman representative will not divulge the information, regardless of the impact on problem resolution. If an ombudsman receives permission to release information, the resident should be informed under what circumstances and to whom the information will be made available. These details should be recorded in the ombudsman's case notes. If a resident/complainant limits the disclosure to certain organizations or individuals; that should be recorded on the Consent Form (OSLTCO S201).

## **VII. Confidentiality and Complaint Referral**

An ombudsman representative often has information that is useful to other agencies. This is especially true of investigation and enforcement actions of licensing authorities and law enforcement. Confidentiality requirements still dictate conscientious protection of complaint records and identities. The Ombudsman Program will not refer complaints to other agencies in situations where the affected resident does not wish the complaint to be referred.

When referring complaints to another agency, the approved Complaint from the Long-Term Care Ombudsman, Form CDA 223 (see Chapter 3) indicates that consent to release confidential information has been obtained. Otherwise, all information identifying the resident, complainant, witnesses, and anyone who has not given consent to release information must be omitted before a referral is made. Ombudsman representatives need to be sure that information released to other agencies has been redacted or consent has been granted before releasing any information to other agencies. Some agencies with whom the Ombudsman Program shares information do not have confidentiality requirements and will share information (including any information received from the Ombudsman Program) if subpoenaed.

## **VIII. Subpoenas**

Most subpoenas received by the local LTCOPs are subpoenas duces tecum. A subpoena duces tecum requires a witness to bring documents to court. Ombudsman Programs are frequently served subpoenas for case files covering a specific complaint and/or facility.

When a local LTCOP receives a subpoena, the Coordinator, or his/her designee, must notify the assigned OSLTCO analyst and fax a copy of the subpoena to the

State Office. The OSLTCO analyst will assist the local office to determine the appropriate action to take. The local ombudsman should identify the records being subpoenaed, and review the case file. The local LTCOP should determine if the complainant, legal representatives, witnesses or others have given consent to release information to the party requesting the records. Consent from a resident or legal representative (if appropriate) to release confidential information to any organization, attorney, or others in a civil matter should be documented on the Authorization to Release Confidential Information and/or Testify at a Deposition, Court Hearing or Trial, form OSLTCO S202 (Exhibit 5-E). If consent has not been received from everyone mentioned in the file, the information cannot be released unless identifying information for anyone who has not consented is redacted from the file.

A subpoena is not a court order, but it is a legal mandate that requires a response. A subpoena response letter should be sent by the local LTCOP to the party requesting ombudsman documents. The letter specifies the parameters under which the Ombudsman Program can release confidential records. (An example is included as Exhibit 5-B.) A call from the local LTCOP Coordinator to the entity generating the subpoena is often enough to cause the entity to withdraw the subpoena once the ombudsman confidentiality requirements are reviewed.

If an Ombudsman Program receives a subpoena to appear, the Coordinator should send a response letter. (An example is included as Exhibit 5-C.) If the subpoena is not withdrawn, the ombudsman representative must appear in court. When a subpoena is served, the ombudsman must bring the records identified in the subpoena to court, but will not release the records without consent or a court order. **Please note that records cannot be altered or destroyed after a subpoena is received or if the local LTCOP is aware that there is a lawsuit involving the case.** The ombudsman representative should bring a copy of the original records and another copy with all non-consenting parties' identifying information redacted.

In court, the ombudsman representative must inform the judge of ombudsman confidentiality laws that require a court order for the release of files [Welf. & Inst. Code §§ 9715(d) and 9725]. The formatted "Statement of Obligation to Protect Confidential Information" (Exhibit 5-D) can be presented to the judge in the event that an ombudsman representative is required to reveal confidential information.

## **IX. Testimony and Depositions**

An ombudsman representative may be subpoenaed for deposition. A deposition involves being questioned under oath by an attorney about the circumstances in a given situation. A deposition is usually taken in an attorney's office with a court reporter and lawyers from both sides present. A deposition will be tape recorded or transcribed by the court reporter and the final typed document is then signed by the witness under oath. The person being deposed has a right to correct any

errors of fact or typographical errors in the transcription before signing the final copy.

In situations that might reveal a specified individual's identity, an ombudsman representative may not testify unless one of the following circumstances applies:

- Consent to release confidential information has been secured from the affected individual(s); resident(s), complainant(s) and/or witness(es).
- There is a court order demanding the release of information by the ombudsman representative.

A deposition response letter should be sent to the party requesting the ombudsman representative to testify/appear in a court hearing or deposition. (See the sample response included as Exhibit 5-C).

If an ombudsman is being deposed and the judge orders confidential information to be divulged at the hearing, this action is a court order and the ombudsman must provide the information even when the parties involved have not given consent.

## **X. Declarations**

A declaration is a written summary of first-hand knowledge about a case that includes all relevant information on a given situation without revealing confidential information. The declaration is written and sworn to by the ombudsman representative who prepares it. Confidential information may be revealed only if consent has been received from the affected individuals. A declaration is an alternative that may meet the needs of another agency while preserving confidentiality. Because securing a court order requires lengthy legal justification, an ombudsman can sometimes provide the information needed by another agency in the form of a declaration.

## **XI. Withholding Identification of Complainants, Witnesses, and Residents**

With the consent of the affected resident or if the resident is incapacitated, his or her legal representative; an ombudsman representative may freely provide information or testimony in situations in which the identity of other non-consenting residents, complainants or witnesses will not be revealed or compromised. The local LTCOP may protect confidentiality by copying documents and redacting all identifying information.

Situations where identity is inadvertently revealed because the information provided is not common knowledge and is available from only one source must be avoided. Providing titles may also lead to the identification of the witness, complainant, resident or other parties. These situations must be handled with discretion.