

CHAPTER 5 CONFIDENTIALITY, CONSENT, AND DISCLOSURE

I. Introduction

In the course of their work, certified Long-Term Care (LTC) Ombudsman representatives have access to residents' personal, medical, and financial information. 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 LTC Ombudsman Program (LTCOP) keeps complaint records and individual identities in strictest confidence. This chapter addresses the basic requirements for confidentiality in the LTCOP.

The provisions for confidentiality, consent, and disclosure apply to abuse investigations as well as other complaint investigations. See Chapter 3, Mandated Reporting and Elder Abuse Investigation, for additional guidance on confidentiality and disclosure in abuse cases.

II. Legal Authority

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

Title 45 Code of Federal Regulations parts 1324.11, 1324.13, and 1324.19

STATE California Welfare and Institutions Code sections 9715, 9724 and 9725

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

III. Documents Referenced

- Consent to Access and Disclose Confidential Information (OSLTCO S201)
- Authorization to Release Confidential Information and/or Testify at a Deposition, Court Hearing, or Trial (OSLTCO S202)

- Long-Term Care Ombudsman Program Request for State Ombudsman Authorization to Access Records and Disclose Information (OSLTCO S203)
- Long-Term Care Ombudsman Program Request for State Ombudsman or Program Coordinator Authorization to Disclose Information for a Resident with no Representative (OSLTCO S204)
- Response to Subpoena for Confidential Records (OSLTCO S205)
- Response to Subpoena for Ombudsman Testimony (OSLTCO S206)
- Statement of Obligation to Protect Confidential Information (OSLTCO S207)
- Authorization for LTC Ombudsman Access to Records for a Resident who Cannot Provide Informed Consent and Has No Representative (OSLTCO S208)
- Complaint from the Long-Term Care Ombudsman (OSLTCO S223)
- Flowchart for Consent to Investigate
- Flowchart for Consent to Access Records
- Flowchart for Consent to Disclose Confidential Information

IV. 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 protecting the identity of all residents and complainants. An Ombudsman representative may need to make several visits 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 overt or very subtle. Acts of willful retaliation, however subtle, are in violation of the law. (California Code of Regulations, 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 LTCOP and relinquish or destroy their certification cards. Refer to Chapter 12 – Information Systems, for more information regarding the confidentiality requirements for electronic communication.

V. Consent to Investigate

With respect to identifying, investigating, and resolving complaints, and regardless of the source of the complaint (resident, facility staff, family member, etc.), Ombudsman representatives serve the residents of long-term care facilities. This means that the Ombudsman representative must support and maximize the participation of the resident throughout the process, including:

- Speaking to the resident privately about the complaint
- Determining the perspective of the resident on the complaint

- Requesting the resident provide informed consent in order to investigate the complaint
- Determining the wishes of the resident with respect to resolution of the complaint

When a resident is unable to communicate informed consent orally, visually, or through the use of auxiliary aids and services, the Ombudsman representative shall request consent to investigate from, and maximize the involvement of, the resident representative.

Resident representatives are individuals who are either designated by the resident, appointed by a court, or determined by law to act on behalf of the resident.

Examples of resident representatives include:

- Agents under Advance Health Care Directives
- Agents (attorneys-in-fact) named in Powers of Attorney
- Court-appointed conservators
- Spouses or registered domestic partners, where there is no designated legal representative
- Children, where there is no spouse, domestic partner, or designated legal representative (Note: in situations where the children do not agree, or there are multiple children without a designated representative, the Ombudsman representative shall seek consent from the State Ombudsman or Program Coordinator as discussed below.)
- Executors or administrators of estates for deceased residents
- Other immediate family members when the resident has no other type of representative

Before relying on an individual to act as resident representative, the Ombudsman representative must review any available documentation to ascertain the extent of authority granted to the resident representative. For assistance with questions about resident representatives, contact the local Program Coordinator or your program's assigned analyst at the Office of the State Long-Term Care Ombudsman (OSLTCO).

Informed consent *to investigate* need not be documented on the OSLTCO S201, which is used for consent to access resident records and disclose confidential information. However, the Ombudsman representative must document consent to investigate in writing at the time the resident (or resident representative) gives consent, and must include that documentation in the case record.

If a resident is unable to communicate informed consent orally, visually, or through the use of auxiliary aids and services, and has no resident representative, the Ombudsman representative shall:

- Take appropriate steps to investigate and work to resolve the complaint to protect the health, safety, welfare, and rights of the resident, *and*
- Determine whether the complaint was resolved to the satisfaction of the complainant, *and*
- Document the circumstances in the case record.

If a resident is unable to communicate informed consent orally, visually, or through the use of auxiliary aids and services and has a resident representative who refuses consent to investigate, or if the resident is represented by multiple children who disagree on whether the LTCOP should become involved, the Ombudsman representative may investigate the complaint under the following circumstances:

- The Ombudsman representative 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; *and*
- The Ombudsman representative has no evidence indicating that the resident would not wish the investigation to occur; *and*
- The Ombudsman representative has reasonable cause to believe that it is in the best interest of the resident to investigate; *and*
- The Ombudsman representative obtains the approval of the State Ombudsman using form OSLTCO S203.

If the local LTCOP receives a complaint relating to a deceased resident or former resident who is no longer in the LTC facility, the local Program Coordinator may authorize a complaint investigation under the following circumstances:

- The LTCOP has received consent to investigate from the former resident, his or her representative, or the State Ombudsman as appropriate; *and*
- Resolving the former resident's complaint will benefit current residents of the facility.

For an overview of this section, see the Flowchart for Consent to Investigate that is included with this chapter.

VI. Access to Records

Title 42 United States Code, section 3058g(b) mandates that each state ensure that the representatives of OSLTCO have appropriate access to LTC facilities, residents, resident records, and facility administrative records. Before accessing resident records, an Ombudsman representative must obtain written consent from the resident or, for residents who cannot communicate informed consent, the resident representative. If a resident *can* communicate informed consent orally, visually, or through the use of auxiliary aids and services, but does not have the ability to write, the Ombudsman representative shall document the resident's consent at the time consent is given in the presence of a third party witness. Form OSLTCO S201 is used to document consent and may be found in the "Forms and Templates" folder on the Coordinator Resources Web page. For

more information about resident representatives, see Section IV, Consent to Investigate.

If a resident cannot communicate informed consent in writing, orally, visually, or through the use of auxiliary aids and services, and has no resident representative, 42 U.S. Code section 3058g(b) requires that representatives of the LTCOP be given access to all files, records, and other information concerning a resident. Welfare and Institutions Code section 9724(d) provides that Ombudsman representatives may inspect and reproduce resident records “when there is sufficient cause for inspection.” Section 9724(d) also provides that where there is no resident consent, if asked by the facility, the Ombudsman representative shall produce a statement signed by the Coordinator authorizing the Ombudsman representative to review the records. If asked by a LTC facility, Coordinators may use form OSLTCO S208 or their own template letter on their letterhead for this purpose.

If the resident is unable to communicate informed consent in writing, orally, visually, or through the use of auxiliary aids and services, and the resident representative refuses to give consent for the Ombudsman representative to access resident records, or where the resident has not designated a representative and there are children who disagree on whether to provide access, Title 42 Code of Federal Regulations part 1324.11(e)(2)(iv)(C) provides that Ombudsman representatives may access resident records where:

- Access is necessary to investigate a complaint, *and*
- 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 State Ombudsman.
- Use form OSTLCO S203 to document the pertinent facts and request authorization from the State Ombudsman.

Form OSLTCO S203 contains a third page that can be detached from the form and should be used to show State Ombudsman authorization to access records if requested by LTC facility staff. This page does not contain information about the complainant or the circumstances of the complaint.

As expressed in Information Memorandum AOA-IM-03-01, the United States Department of Health and Human Services has determined that 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 is reaffirmed in Title 42 Code of Federal Regulations part 1324.11(e)(2)(vii). This means that facilities can provide Protected Health Information (PHI) to Ombudsman representatives in the same way that they do to licensing and eligibility agencies without fear of violating HIPAA regulations. While a confidentiality agreement is unnecessary under HIPAA, Ombudsman representatives still need to obtain consent from residents,

resident representatives, the Program Coordinator, or the State Ombudsman, to access resident records as explained above.

For an overview of this section, see the Flow Chart for Consent to Access Records that is included with this chapter.

VII. Disclosure

All files, records, and information maintained by the LTCOP are confidential and may be disclosed only at the discretion of the State Ombudsman or through policies and procedures developed by the State Ombudsman. In addition, the LTCOP is prohibited from disclosing identifying information about any resident with respect to whom the LTCOP maintains files, records, or information without appropriate consent, as detailed below, or a court order.

Before disclosing case files, the LTCOP must obtain consent from the resident, resident representative, Program Coordinator, or State Ombudsman as discussed below. Before disclosing information identifying residents or complainants, an Ombudsman representative must obtain consent from each individual whose identity will be disclosed. This is true whether the information is being disclosed to licensing agencies, facility staff, family members, law enforcement agencies, MDT meetings, adult protective services, Area Agency on Aging or other agency staff, the news media, or anyone outside of the LTCOP. In a court case, the court may also order disclosure of LTCOP case files and individual identities.

To obtain resident consent, the Ombudsman representative must discuss the need for disclosure with the resident and, if the resident is able to sign, receive the resident's signed consent to disclose on the "Consent to Access and Disclose Confidential Information" (OSLTCO S201). In talking with the resident, the Ombudsman representative should be specific about what will be disclosed, to whom, and for what purpose. If the resident is able to communicate informed consent orally, visually, or through the use of auxiliary aids and services, but is physically unable to sign, the Ombudsman representative shall document the resident's consent on the OSLTCO S201 at the time consent is given. The Ombudsman representative must sign and date this statement to protect all persons involved. The local LTCOP must include the signed and dated OSLTCO S201 in the case record.

If the resident is unable to communicate informed consent in writing, orally, visually, or through the use of auxiliary aids and services, the Ombudsman representative shall seek consent from the resident representative. For more information about resident representatives, see Section IV, Consent to Investigate.

If the resident is unable to communicate informed consent in writing, orally, visually, or through the use of auxiliary aids and services, and has no resident

representative, or has multiple children or other family at the same level of kinship with no designated representative, the Ombudsman representative may disclose identifying information under the following circumstances:

- The Ombudsman representative has reasonable cause to believe that an action, inaction, or decision may adversely affect the health, safety, welfare, or rights of the resident; *and*
- The Ombudsman representative has no evidence indicating that the resident would not wish the disclosure to be made; *and*
- The Ombudsman representative has reasonable cause to believe that it is in the best interest of the resident to make the disclosure; *and*
- The Ombudsman representative obtains the approval of the local Ombudsman Program Coordinator or the State Ombudsman using form OSLTCO S204.
- If approval is granted by the Program Coordinator, he or she must promptly notify the State Ombudsman of any disclosure.

If the resident is unable to communicate informed consent in writing, orally, visually, or through the use of auxiliary aids and services, and the resident representative refuses to consent to the disclosure of information that would identify the resident, or the resident has not designated a representative and there are children who disagree about whether to disclose information, the Ombudsman representative may still disclose the identifying information under the following circumstances:

- The Ombudsman representative 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; *and*
- The Ombudsman representative has no evidence indicating that the resident would not wish the disclosure to be made; *and*
- The Ombudsman representative has reasonable cause to believe that it is in the best interest of the resident to make the disclosure; *and*
- The Ombudsman representative obtains the approval of the State Ombudsman using form OSLTCO S203.

Ombudsman representatives may not reveal the identities of other residents, complainants, and, under California law, witnesses, without their signed consent or consent provided orally, visually, or through the use of auxiliary aids and services. Consent from these individuals shall be documented at the time consent is given on the OSLTCO S201 and uploaded to the case record.

The addition of witness identities to the confidentiality requirements ensures that an individual with important information pertinent to an investigation will feel more comfortable sharing that information with an Ombudsman representative. However, State law does not define “witness” for this purpose.

In determining whether an individual is a witness for the purpose of protecting his or her identity, the Ombudsman representative should use discretion and rely on the following factors:

- Always lean towards supporting and assisting the resident.
- The identities of LTC facility, hospital, and licensing agency staff are public record and may be disclosed unless the particular individual is a complainant or is providing the Ombudsman representative with good information that he or she would not share without an assurance of confidentiality.
- The Ombudsman representative should not protect the identities of staff or others who are neither residents nor complainants and are using Ombudsman confidentiality to cover up their own “bad acts.”
- Review on a case-by-case basis and consult with your assigned OSLTCO analyst if you have any questions about individual requests.

Confidentiality restrictions should not prevent the local LTCOP from seeking advice from an OAA-funded Legal Assistance program, other Legal Services programs, or attorneys. However, Ombudsman representatives must preserve resident and complainant anonymity when discussing cases unless they have consent to release identifying information. An Ombudsman representative shall 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.)

For an overview of this section, see the Flowchart for Consent to Disclose Confidential Information that is included with this chapter.

VIII. Confidentiality and Complaint Resolution

There may be times when divulging the resident's or 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 or complainant tells an Ombudsman representative not to divulge information to anyone, the Ombudsman representative *shall not divulge* the information, regardless of the impact on problem resolution.

If an Ombudsman representative receives permission to release information, he or she must inform the resident under what circumstances and to whom the information will be made available. These details must be recorded in the Ombudsman representative's case notes. If a resident or complainant limits the disclosure to certain organizations or individuals, that information must be recorded on the OSLTCO S201.

IX. 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 case records and individual identities. The LTCOP shall not refer complaints to other agencies when the affected resident does not wish the complaint to be referred.

When referring complaints to another agency, the Complaint from the Long-Term Care Ombudsman (OSLTCO S223) indicates that consent to release confidential information has been obtained. Otherwise, before making the referral, the Ombudsman representative must redact all information identifying residents, complainants, and witnesses who have not given consent to release their identities. 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.

X. Subpoenas

Most subpoenas received by the local LTCOPs are subpoenas duces tecum. A subpoena duces tecum requires the local LTCOP to produce documents. Local LTCOPs are frequently served with subpoenas for case files concerning a specific resident, complaint, or facility.

When a local LTCOP receives a subpoena, the Program Coordinator, or his/her designee, must notify the assigned OSLTCO analyst and fax or email a copy of the subpoena to OSLTCO. The OSLTCO analyst will assist the local LTCOP to determine the appropriate action to take. The local LTCOP shall identify the records being subpoenaed and review the case file to determine if the residents, complainants, or witnesses have given consent to release information to the party requesting the records. Use the "Authorization to Release Confidential Information and/or Testify at a Deposition, Court Hearing or Trial" (OSLTCO S202) for that purpose. The information cannot be released unless identifying information for residents, complainants, and witnesses who have not consented is redacted from the file.

A subpoena is not a court order, but it is a legal mandate that requires a response. The local Program Coordinator shall send a subpoena response letter to the party requesting Ombudsman documents. A template for this letter (Response to Subpoena for Confidential Records – OSLTCO S205), which specifies the parameters under which the LTCOP can release confidential records, is located in the "Forms and Templates" folder on the Coordinator Resources web page. 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 a local LTCOP receives a subpoena to appear, an Ombudsman representative must appear in court. The Ombudsman representative must bring the records identified in the subpoena to court but shall 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 shall bring a copy of the original records and another copy with all non-consenting residents', complainants', and witnesses' 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 (OSLTCO S207), found on the Coordinator Resources web page, can be presented to the judge in the event that an Ombudsman representative is required to reveal confidential information.

XI. 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. The court reporter will record or transcribe the deposition, 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 resident(s), complainant(s) and/or witness(es), or, for those who cannot communicate informed consent, their representatives; *or*
- For individuals who cannot communicate informed consent and have no resident representatives, the State Ombudsman has authorized disclosure; *or*
- There is a court order demanding the release of information by the Ombudsman representative.

The local Program Coordinator shall send a deposition response letter to the party requesting the Ombudsman representative to testify/appear in a court hearing or deposition. For a template, use language from Response to Subpoena for Ombudsman Testimony (OSLTCO S206), which is posted in the "Forms and Templates" folder on the Coordinator Resources web page.

If an Ombudsman representative is testifying and the judge tells the Ombudsman representative to divulge confidential information, this is a court order and the Ombudsman representative must provide the information even when the parties involved have not given consent.

XII. Declarations

A declaration is a written summary of first-hand knowledge about a case. The declaration is written and sworn to by the Ombudsman representative who prepares it. Because securing a court order requires lengthy legal justification, an Ombudsman representative can sometimes provide the information needed by another agency in the form of a declaration without including any confidential information. As with other disclosure, the Ombudsman representative may reveal confidential information and identities only after receiving consent from the affected residents, complainants, witnesses, or their representatives or, if an individual is unable to communicate informed consent and has no representative, when authorized by the State Ombudsman.

XIII. Withholding Identification of Residents, Complainants, and Witnesses

With the consent of the affected resident or, if the resident is unable to communicate informed consent, his or her resident 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.

Sometimes an Ombudsman representative will inadvertently reveal an individual's identity by providing information that is not common knowledge and is available from only one source. Providing titles may also lead to the identification of the witness, complainant, resident or other parties. Ombudsman representatives must carefully avoid these situations.