

PENNSYLVANIA DEPARTMENT OF AGING

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Read in conjunction with

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Office of the State Long Term Care Ombudsman 7. Contact:

LTC Ombudsman Office (717) 783-8975

AGING TECHNICAL ASSISTANCE BULLETIN

SUBJECT:

RELEASE OF OMBUDSMAN RECORDS

TO:

EXECUTIVE STAFF

AREA AGENCIES ON AGING

OMBUDSMAN SUBCONTRACTORS

PA COUNCIL ON AGING

PA ASSOCIATION OF AREA AGENCIES ON AGING

FROM:

RAYMOND PRUSHNOK, ACTING DEPUTY SECRETARY

DEPARTMENT OF AGING

PURPOSE:

To provide assistance to agency program directors and local

ombudsmen to establish procedures for release of ombudsman

records and other confidentiality-sharing issues.

BACKGROUND:

The Pennsylvania State Long Term Care Ombudsman Office

established APD #98-10-01 and APD #02-10-01 outlining requirements for local ombudsman programs. There has been an increase in calls from local ombudsmen and program directors dealing with requests for ombudsman record releases.

TECHNICAL ASSISTANCE:

The content of this Aging Technical Assistance Bulletin (ATAB) is to provide clarification and recommendations to Area Agencies on Aging (AAAs) to ensure local ombudsman records are not released in violation of the standards of the Older Americans Act (OAA).

DEFINITION:

For the purposes of this ATAB, *ombudsman records* encompass information either acquired by the local ombudsman in the course of their work or relayed to the local ombudsman in confidential status from the State Ombudsman's Office, regulatory offices, the Attorney General's Office and the Office of Inspector General. No clear examples occur of information that would be housed by the local ombudsman program that would not be captured under the ombudsman records category.

DISCUSSION:

In the Older Americans Act, the following language addresses ombudsman records under Section 712 under subdivision entitled disclosure as follow:

- (2) **IDENTITY OF COMPLAINANT OR RESIDENT**—The procedures described in paragraph (1) shall—
 - (A) provide that, subject to subparagraph (B), the files and records 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 and records); and
 - (B) prohibit the disclosure of the identity of any complainant or resident with respect to whom the Office maintains such files or records 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 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.

The Office of the State Long-Term Care Ombudsman has been made aware that more requests are being directed to local ombudsman programs for release of these confidential records. It is our goal to provide additional information to local

agencies via this ATAB to facilitate appropriate response to these record requests. Several specific areas are discussed in more detail:

Court Orders for Ombudsman Records: The language in the OAA under §(2)(B)(iii) allows for release of local ombudsman records clearly specifies a *court order* is required if the resident or their legal representative does not consent to release of the records. Any legal document presented to the local ombudsman directly should be relayed to the agency director for legal review by the agency's solicitor. A court order is of a higher legal level than a subpoena. Therefore, any presentation of a subpoena should be refuted by the director of the AAA or contractor housing the ombudsman program.

Whenever the local ombudsman receives a request for disclosure of ombudsman records and the resident is still living, it is recommended that the ombudsman recontact the resident, explain the request made for release of their confidential records and document the newly-obtained authorization or the refusal to provide. A recommended form developed specific to the records release request is attached to this ATAB for local use. If the resident, or the resident's legal representative, denies release of the records, the requester should be informed that consent could not be obtained and the records remain the property of the consumer/resident absent a court order to the contrary. If the release is obtained from the consumer/resident or their legal representative, the records should be examined for any ancillary confidentiality violation (another resident's name in the record), those names should be eradicated and the record relayed to the court or requester forthwith.

If the resident is deceased and had requested strict anonymity treatment of their ombudsman records while living, the ombudsman shall extend that request ad infinitum. If the resident is deceased and a legal representative existed during the ombudsman's work with the prior resident, the ombudsman may attempt to make contact with the legal representative to determine if their new role was extended to executor of the estate. If that legal relationship is established, the same form for release of records can be explored with the legal representative. If the executor's sole role was to close out the estate and the executor had not previously been designated as the legal representative for the client, it is not recommended that the ombudsman extend that restricted authority via any contact.

Ombudsmen are cautioned that a resident's, or legal representative's, authorization to release pertains only to documentation generated by the ombudsman program and does not encompass the release of ancillary documents obtained in the complaint investigation and/or resolution process. Examples of ancillary documents include copies of medical records or documents generated by a regulatory office or a provider. The entity seeking the information would need to secure those documents from the direct source.

When a local program becomes aware of a bona fide effort by a third party to access confidential ombudsman program records, the local program should notify the state office regarding the request and final disposition of the request. With programs who refer the records request to a General Counsel or agency Solicitor for them to dispense of the request, the local program is asked to simply apprise the state office of the request and the referral for disposition to their internal legal avenue.

Court Orders for Ombudsman Testimony: As stated above, the legal document must be examined by an attorney to ascertain if it is a subpoena or a court order. The language of the OAA is determined applicable for any requests that entail the ombudsman providing testimony in a court of law. Also, the recommendations provided above hold constant. If the resident/consumer is still living, the ombudsman should seek formal release from that consumer, or the legal representative, to offer testimony specific to a investigatory case. Absent this consent, the ombudsman may only testify pursuant to court order. If the nature of the ombudsman's testimony is more generic in nature, such as to testify to the ombudsman's normative reception at the facility, quality of care in the facility, and issues to that line, it is recommended the agency's solicitor educate the requested party as to the role of the ombudsman and its limits. The solicitor should further redirect the requesting party to the licensing office as the formal entity charged with oversight and regulation of the facility to include official findings.

Media Inquiries/Requests for Ombudsman Information: Any contact of this nature is recommended to be forwarded to the ombudsman's supervisor, agency director, press officer, or other protocol as pre-established by the local program. Ombudsman records are confidential under federal law; this precludes the ombudsman providing summaries of facility or consumer-specific findings. pertains to the facilities, media requests should be re-directed to the licensing offices; their records and findings are public records and are available on their websites. An explanation should be provided for any consumer-specific, or groups of consumer-specific information. For example, a local director requested information on the number or percentage of resident accidents attributed to another resident's action was correctly refused in providing that information. This is not to say that local ombudsmen can not be a means to educate the public, including the media, about the type of problems encountered by consumers living in long-term care facilities. However, education must be done in generalities with care not to inadvertently violate any consumer-confidential information. Care must also extend to any information created via the Pennsylvania's Empowered Expert Residents (PEER) program. All information gathered from PEERs or their advocacy actions within the facilities falls within the parameter of the confidentiality standards under the Older American's Act.

Requests for Ombudsman Action Summaries: Action summaries were established by the PA Department of Aging as an internal communication between the local ombudsman and the State Ombudsman's Office. The intent, when database was not live, was to permit time-sensitive information to be relayed to the State office in a confidential manner transmitted via the email system. Action summaries may contain information on a specific client case, a licensure sanction that places the facility in a "high risk" status, a response under the state's PEIRS system, or any incident or occurrence that may garner media attention. Action summaries are a private communication between workers and the contractual entity, being PDA. As such, these communications are confidential and any requests for them should be referred to the State Ombudsman's Office.

Bankruptcy Actions: In October 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 went into effect. One of the provisions of this new law is a provision for the appointment of an ombudsman to act as a patient care advocate when a health care business files for bankruptcy. If the health care business provides long-term care services, the State LTC Ombudsman may be appointed by the Bankruptcy Court as the "Patient Care Ombudsman." The role of the patient care ombudsman is to "monitor the quality of patient care and represent the interests of the patients." All records and communications between the local ombudsman program and the State Ombudsman's Office pertaining to facilities under bankruptcy action and with the patient advocate appointment are confidential and are restricted to the sole purpose and use as identified in the federal law.

Local Ombudsman Electronic Communications: Emails or facsimile messages received or sent by local ombudsman pertaining to consumer cases are a by-product of the case investigatory process. As such, emails are covered by the same confidentiality protections as the rest of the ombudsman files. Because of their format and ease of distribution, ombudsmen are reminded to treat all electronic messages with caution to safeguard confidentiality. Consumer names should never be used in entirety but should be coded for confidentiality. In addition, all electronic or facsimile messages should be protected with a confidentiality clause cover. An example of a standard cover clause is: "This email or fax message and any attachments are intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. You are hereby notified that any use or disclosure of this information is strictly prohibited. If you have received this communication in error, please reply to the sender so that proper delivery can be arranged, and please delete the original message and any attachments from your mailbox. Thank you for your cooperation."

Ombudsman Work Products: As much of the local ombudsman's work occurs in facilities within the AAA's planning and service area, a by-product of activity may be hand-written or in the form of other informal notes. These notes are generally time-limited and exist only until the ombudsman is able to access the OmbudsManager database system and formally record those activity and/or case findings. As a rule of practice, all informal work products should be immediately destroyed upon their entry into the formal system. This would also encompass communications from or to volunteer ombudsmen and PEERs. If an agency elects to retain hard-copy notes and other work products, please understand that these items will be encompassed in a records release request.

SUMMARY:

Under the Older Americans Act and as expanded under Pennsylvania law, the ombudsman program was established to "investigate and resolve complaints related to the health, safety, and rights of older individuals who are consumers of long term care services..." A critical component to ensure the ombudsman program upholds the "rights" of the consumers it serves is the confidential protection of all information related to the ombudsman's work identified in law. Without that confidentiality, the program would violate the very rights of the persons it has been tasked to protect.

Recent years have brought increased requests for ombudsman case files. In most cases, we believe that the requests reflect an inaccurate understanding of the philosophy of the ombudsman program and the nature of information that would be contained in ombudsman case files. Ombudsmen, under the Older Americans Act, seek an informal resolution of problems experienced. Ombudsmen have no punitive authority under the law. Ombudsmen findings are not definitive findings of fault. In June 1999, Judge Katherine Platt issued a ruling to quash a subpoena brought by Genesis Eldercare Network Services, Inc. against an ombudsman subcontractor in Philadelphia, CARIE. In this ruling under the Court of Common Pleas, Judge Platt's statement in part said, "the clear legislative intent is to permit disclosure where necessary only to promote, safeguard or manage resident care. Redaction of complainants' identities is... insufficient in light of the regulatory provision. The public policy of honoring the confidentiality of these records/information far outweighs the need of a private litigant to discover them in connection with its civil suit for breach of contract."

In conclusion, failure of the ombudsman program to protect and preserve the confidentiality of its records is the ultimate violation of the consumers' rights the program was established to uphold.

PENNSYLVANIA'S LONG-TERM CARE OMBUDSMAN PROGRAM AUTHORIZATION FOR RELEASE OF CONFIDENTIAL RECORDS TO A THIRD-PARTY

I,	(consumer name), do authorize and consent to the cords pertaining to care received at the facility
release of confidential Ombudsman re	cords pertaining to care received at the facility
mentioned hereto	during the period of
	d, the purpose of the record release. This Release is res as of (date). I understand that writing, at any time.
SIGNATURE OF CONSUMER: _	
DATE:	
-	OR
SIGNATURE OF LEGAL REPRES	SENTATIVE: (If Applicable)
DATE:	(II Applicable)
NATURE OF LEGAL RELATION	SHIP:
COUNTY:	
SIGNATURE OF OMBUDSMAN:	
DATE:	
SIGNATURE OF WITNESS:	
	(If Desired)
DATE:	