



ATABs, and establishing requirements for provision of services in compliance with Act §§711 and 712, 45 CFR §§1321 and 1327, and 71 P.S. §581-3(a)(21), (24.2) and (29). The AAAs are advised to refer to this APD throughout their planning and processes.

## **BACKGROUND:**

It is the responsibility of the Pennsylvania Department of Aging to protect and improve the quality of care and the quality of life for older Pennsylvanians and to advocate for and empower consumers of long-term care services.

Under the Older Americans Act and in accordance with §2203-A(a)(24.24.2) of the Administrative Code (71 P.S. §581-3(a)(21)(24.2) and (29)) and §§ 201(e), 307(a), and 712-713 of the Act (42 U.S.C. §§3011(e), 3027 and 2058g-3058h, and 45 CFR §§ 1321 and 1327, respectively), the Department of Aging “establishes and administers a State Long-Term Care Ombudsman Program, headed by a full-time State Long-Term Care Ombudsman (the LTC Ombudsman), providing resources to Area Agencies On Aging or other contractors to investigate and resolve complaints related to the health, safety or rights of individuals who are consumers of long-term care services, and to prepare and submit to the General Assembly an annual report containing data and findings regarding the types of problems experienced and complaints investigated”.

## **OMBUDSMAN PURPOSE:**

Pennsylvania ombudsmen are federally mandated, legally-based, and state-certified via standardized trainings to actively advocate and give voice to consumers of long-term care services. Pennsylvania ombudsmen champion the rights of these consumers to achieve the highest quality of life and care wherever they reside. Pennsylvania Ombudsmen are united through an impassioned commitment to listen, educate, investigate, mediate, and empower through a visible presence.

## **I. DEFINITIONS:**

The following are terms and definitions that apply to the Ombudsman Program and as defined under the Act §§711 and 712, 45 CFR §§1321 and 1327, and (71 P.S. §581-3(a)(21),(24.2) and (29)):

**Area Agency on Aging** is defined as the single local agency designated within each planning and service area to administer the delivery of a comprehensive and coordinated plan of social and other services and activities.

**Conflicts of Interest** are defined as both the organizational and individual conflicts that may impact the effectiveness and credibility of the work of the Office of the Long Term Care Ombudsman. Conflicts of interest include, but are not limited to administrative placement of the Local Ombudsman Entity within the Host Agency, or requiring that the Ombudsman or Program Representative perform conflicting activities.

**Consumer:** An individual who has chronic functional impairments and is receiving diagnostic, therapeutic, rehabilitative, supportive, or maintenance services in a variety of care settings, including the home.

**Consumer representative** means any of the following:

- An individual chosen by the consumer to act on behalf of the consumer in order to support the consumer in decision-making; access medical, social or other personal information of the consumer; manage financial matters; or receive notifications;
- A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the consumer in

order to support the consumer in decision-making; access medical, social or other personal information of the consumer; manage financial matters; or receive notifications;

- Legal representative, as used in section 712 of the Act; or
- The court-appointed guardian of a consumer.
- Nothing in this rule is intended to expand the scope of authority of any consumer representative beyond that authority specifically authorized by the consumer, State or Federal law, or a court of competent jurisdiction.

**AoA** or the Administration on Aging is the principal agency of the U.S Department of Health and Human Services designated to carry out the provisions of the Older Americans Act of 1965 (OAA), as amended (42 U.S.C.A. §3001 *et seq.*).

**ACL** or the Administration for Community Living (ACL) was created in order to achieve several important objectives: to reduce the fragmentation that currently exists in federal programs addressing the community living service and support needs of both the aging and disability populations; to enhance access to quality health care and long-term services and supports for older adults and people with disabilities; to promote consistency in community living policy across other areas of the federal government; and to complement the community infrastructure, as supported by both Medicaid and other federal programs, in order to better respond to the full spectrum of needs of seniors and persons with disabilities. AoA is a part of ACL.

**Department** means the Pennsylvania Department of Aging or State Agency. 71 P.S. §581-2.

**Federal Final Ruling** refers to Federal Rule 45 CFR 1321 and 1327 which provides comprehensive regulations for the LTC Ombudsman Program and specifically reporting of abuse, neglect, abandonment, or exploitation.

**Home and Community Based Services** are defined as long-term care services that are provided to consumers outside of the facility-based settings such as older adult daily living centers, independent living programs, senior centers, and domiciliary care. This also includes long-term care services in a consumer's private home.

**Host Agency** is the agency in which a Local Ombudsman Entity is organizationally located. It is responsible for ensuring that ombudsman activities are carried out in a manner consistent with both federal and state requirements.

**Immediate family**, pertaining to conflicts of interest as used in section 712 of the Act, is defined as a member of the household, or a relative with whom there is a close personal or significant financial relationship.

**Local Ombudsman Entity (LOE)** describes the local ombudsman program and all paid and volunteer staff associated with its operation.

**Long-term Care** is defined as those services designed to provide diagnostic, therapeutic, rehabilitative, supportive, or maintenance services for individuals who have chronic functional impairments in a variety of care settings, including the home.

**Office of the State Long-Term Care Ombudsman (Office)**, as used in sections 711 and 712 of the Act, means the organizational unit in a State or territory, which is headed by a State Long-Term Care Ombudsman.

**OmbudsManager** is the approved data system used to prepare the annual National Ombudsman Reporting System (NORS) report submitted to ACL.

**OmbudsManager Desk Reference** is a comprehensive manual developed by the Office. It provides detailed documentation guidance for users of OmbudsManager, the required reporting software.

**Pennsylvania's Empowered Expert Resident (PEERs)**, are long-term care consumers who are trained by the Office in self-advocacy and empowerment in order to provide support for other long-term care consumers in skilled nursing facilities and personal care homes where they reside.

**PEER Program** is a self-advocacy and empowerment partnership between residents, facility staff, and the local ombudsman.

**Representatives of the Office of the State Long-Term Care Ombudsman, Program Representatives** as used in sections 711 and 712 of the Act, is defined as: the employees or volunteers designated by the State Long-Term Care Ombudsman to fulfill the duties set forth in §1327.19(a).

**State Long-Term Care Ombudsman, or LTC Ombudsman**, as used in sections 711 and 712 of the Act, is defined as the individual who heads the Office and is responsible to personally, or through Program Representatives, fulfill the functions, responsibilities and duties set forth in §§ 1327.13 and 1327.19.

**State Long-Term Care Ombudsman Program, Ombudsman Program, State Office, or Office;** as used in sections 711 and 712 of the Act, is defined as the program through which the functions and duties of the Office are carried out, consisting of the Ombudsman, the Office headed by the Ombudsman, and the Program Representatives.

**Willful interference** is defined as actions or inactions taken by an individual in an attempt to intentionally prevent, interfere with, or attempt to impede the Ombudsman or Program Representative from performing any of the functions or responsibilities set forth in §1327.13, or §1327.19.

## II. ESTABLISHMENT OF THE STATE LONG-TERM CARE OMBUDSMAN

The Office of the State LTC Ombudsman shall be headed by an individual to be known as the State Long-Term Care Ombudsman, who shall be selected from individuals with expertise and experience in the fields of long-term care and advocacy, and who shall have qualifications and demonstrated expertise in long-term care services and supports, and other direct services for older persons or individuals with disabilities; consumer-oriented public policy advocacy; leadership and program management skills; and, negotiation and problem resolution skills. The LTC Ombudsman shall have no conflict of interest with the position as defined in §1327.21 and shall serve on a full-time basis as referenced in §1327.11(b)(c).

The LTC Ombudsman shall, through certified Program Representatives, identify, investigate, and seek to resolve complaints that are made by (or on behalf of cognitively or physically impaired) individuals who are consumers of long-term care services, and relating to action, inaction, or decisions that may adversely affect the health, safety, welfare, or rights of such consumers, including the activities of a guardian or power of attorney. The Office and Representatives of the Office shall inform consumers about the means of obtaining services provided by public agencies and health and social service agencies and ombudsman services that assist in protecting consumer health, safety, welfare and rights. As always, consumers of long-term care services should be encouraged to attempt self-resolution of complaints utilizing established administrative procedures prior to a request for assistance from the local long-term care ombudsman. Governmental officials shall not interfere in the performance of official duties of the Ombudsman or Program Representatives.

### **III. FUNCTIONS AND RESPONSIBILITIES OF THE STATE LONG-TERM CARE OMBUDSMAN**

The State Long-Term Care Ombudsman shall:

Establish policies and procedures, for receiving, investigating, and resolving complaints made by or on behalf of consumers receiving long-term care services; alleging any commission or act or omission to act, practice, policy, or procedure that may adversely affect the health, safety or welfare of any consumer.

Designate, refuse, suspend, or remove designation of Local Ombudsman Entities and Program Representatives pursuant to 712(a)(5) of the Act and the policies and procedures set forth in §1327.11(e)(6).

Determine the disclosure and release of files, records and other information maintained by the Ombudsman Program.

Develop and provide final approval of an annual report as set forth in section 712(h)(1) of the Act.

Lead state-level coordination, and support appropriate Local Ombudsman Entity coordination, between the Ombudsman Program and other entities with responsibilities relevant to the health, safety, well-being or rights of consumers receiving long-term care services.

The Ombudsman, as head of the Office, shall provide a Compliance Manual for the Ombudsman Program to be utilized by the AAAs and Program Representatives. The manual will describe procedures to avoid conflicts of interest as defined under the 2015 Final Rules 45 CFR §§1321 and 1327 including:

- Organization of the State Long-Term Care Ombudsman Office
- Organization of Local Programs/Subcontractors
- Functions and Responsibilities of Program Representatives
- Conflicts of Interest Policies and Procedures
- Personnel and Programmatic Oversight

The LTC Ombudsman shall also provide an OmbudsManager Desk Reference to provide specific guidance on activity documentation parameters and data collection.

### **IV. STATE AGENCY RESPONSIBILITIES RELATED TO THE OMBUDSMAN**

The Pennsylvania Department of Aging, as the State Agency, shall ensure that all provisions listed in the Act, and 45 CFR §§1321 and 1327, are adhered to regarding the Ombudsman Program, specifically changes under §1327.21.

The State Agency has established the Office, known as the Ombudsman Office. The Office is a separately identifiable, distinct entity located within the State Agency. The Department, through the State Long-Term Care Ombudsman, shall have supervisory and accountability responsibility for the Ombudsman Program.

The Department will ensure that the Ombudsman meets minimum qualifications, which shall include, but not be limited to, demonstrated expertise in:

- Long-term services and supports or other direct services for older persons or individuals with disabilities;

- Consumer-directed public policy advocacy;
- Leadership and program management skills; and
- Negotiation and problem resolution skills.

## **V. RESPONSIBILITIES OF THE LOCAL OMBUDSMAN ENTITIES (LOE)**

The Ombudsman Program, through the Department, will continue to contract with local Area Agencies on Aging (AAAs) to provide either directly or by subcontract local ombudsman services to individuals who are consumers of long-term care as provided under §§§1327.15, 1327.17 and 1327.19. This contract shall likewise assure adequate legal representation for the local Program Representatives.

## **VI. COMPONENTS OF AN EFFECTIVE LTC OMBUDSMAN PROGRAM**

The LOE shall demonstrate all compliance components as outlined below:

### **1. System to Receive, Record, and Resolve Complaints**

- Current poster/contact Information is available in licensed/certified long-term care facilities and in other long-term care locations including: domiciliary care homes, older adult daily living centers, and senior centers.
- Information is made available to the community regarding the services of the LTC Ombudsman Program and how to contact the local Program Representatives via fairs, senior expos, newsletters, etc;
- An intake process that ensures direct referral of Act 13, Act 28, and Act 79 complaints to a Protective Services worker separate from the Program Representatives to avoid creating a conflict of interest;
- An intake process that ensures direct referral to other long-term care or community services;
- Intake information on incoming complaints is recorded clearly, concisely, completely in OmbudsManager and relayed for assignment to a Program Representative following the timeframes indicated in the OmbudsManager Desk Reference;

### **2. Degree of Visibility**

- Maintenance of current data on licensed/certified long-term care facilities and occupied beds;
- Educational services/in-service presentations are provided to staff of long-term care facilities related to resident rights, quality of life, and other long-term care issues impacting residents.
- Attendance at resident council and/or family council meetings, when requested by the consumers.
- Availability of one full-time equivalent (1 FTE) paid Program Representative to every 2,000 long-term care beds and 1 FTE for every 20 - 40 volunteers. (Self-Evaluation and Continuous Quality Improvement Tool for State Long-Term Care Ombudsman Programs: Measurements of OAA § 712 (a)(1)(2)(3); 712(a)(5)(A)(B)(C)(D); 712(b); 712(c); 712(d); 712(f)(4); 712(h) Compliance: Program Management: Staffing Levels)

- Ombudsman Program Representatives shall conduct facility coverage visits to all long-term care facilities. Facility Coverage Visits include but are not limited to the following components:
  1. Visitation to a diverse group of residents;
  2. Purposeful observation throughout the facility;
  3. Distribution and discussion of Residents Rights and Ombudsman contact information;
  4. Regular contact with facility administrators and staff.
- A minimum of one (1) non-complaint related facility coverage visit per calendar quarter to each long-term care facility in the service area. In Pennsylvania, this includes skilled nursing facilities, personal care/assisted living facilities and domiciliary care homes.
- Older Adult Daily Living Centers require a minimum of one facility coverage visit annually.
- The State Office has the authority to request increased visits to certain facilities that have been sanctioned by an enforcement agency or for other reasons. Circumstances that may warrant an increase in the total number of visits include, but are not limited to:
  - Poor practices in the delivery of services and providing care
  - Poor annual surveys by the regulatory agency
  - High staff turnover rates
  - Inconsistent quality of care
  - History of frequent and/or extreme resident rights violations
  - Six or more Ombudsman complaints per year
  - Four or more reports of need for Protective Services per year
  - Sanctions by the regulatory agency
  - Bankruptcy

### **3. Consumer Confidentiality**

The identity of any complainant, consumer on whose behalf a complaint is made, or individual providing information on behalf of the consumer or complainant relevant to the investigation of a complaint shall be confidential and may be disclosed only with the express permission of such person. The information produced by an investigation may be disclosed by the Ombudsman only if the identity of any such person is not disclosed by name or inference. If the complaint becomes the subject of a judicial proceeding, such investigative information may only be disclosed for the purpose of the proceeding in accordance with applicable laws.

- Uphold confidential information at the request of the consumer;
- Ensure that the intake process protects consumer confidentiality;
- Adherence to confidentiality when speaking with facility administrators/staff/families;

### **4. Volunteer Utilization**

- Recruitment and retention of a trusted, well trained team of volunteers;
- Ongoing support and recognition for volunteers including:
  - a. An orientation to assess existing skills, training needs, and availability;
  - b. Training that begins within thirty (30) days of orientation;

- c. Assignment to a long-term care setting reflective of their interests, time commitment and level of training;
  - d. Access to participation in regional networking meetings and the annual ombudsman conference;
  - e. Performance recognition on an ongoing basis, both formally and informally;
  - f. Opportunities to attend enhanced trainings;
  - g. Provide leadership opportunities for volunteers to serve as trainers at local, regional, and State Ombudsman workshops;
- Ability for volunteers to perform any and all Ombudsmen functions based on level of training and demonstrated competency;
  - Current information on all active volunteers in the staff/users section of OmbudsManager, including training received and dates completed;

## VII. OMBUDSMAN REPORTING SYSTEM

The State Office is required by state and federal laws to prepare an annual report on Ombudsman Program activities.

OmbudsManager is the approved data system used to prepare the annual National Ombudsman Reporting System (NORS) report submitted to ACL.

All Local Ombudsman Entities and their subcontractors are required to use OmbudsManager to record ombudsman activity to ensure accurate documentation and meet reporting requirements.

Program Representatives must complete the State Office pre-requisites and successfully complete approved training prior to receiving access to OmbudsManager.

### Documentation Requirements

Local Ombudsman Entities, including its subcontractors, must document Program Representatives case and program activities in a timely manner to ensure that consumers are properly managed, cases are properly investigated, accurate data is provided to the State Office, and subsequently to the AoA.

Documentation timeframes:

Within 24 hours

- High Profile Media Requests and Legislative Inquiries

OmbudsManager/NORS Category: Work with Media and via email notification to the State Office and/or Regional Ombudsman Specialist

- Facility Closure and Relocation:

OmbudsManager/NORS Category: Facility Closing and Resident Relocation and via email notification to the State Office and/or Regional Ombudsman Specialist

Within Five (5) Business Days

- High Profile licensing agency enforcement actions, Department of Human Services (DHS) violation reports, alerts, and sanction notices, Department of Health (DOH) immediate



jeopardy, civil monetary penalties, special focus facilities, and U.S. Bankruptcy Court actions, and other circumstances impacting resident rights.

OmbudsManager/NORS Category: Monitoring/Work on Laws, Regulations, Government Policies, and Actions. Documentation occurs again within five (5) days after facility visit and/or follow-up action.

- All resident complaints documented by uncertified Program Representatives must be referred to a Certified Ombudsman in sufficient time to allow action to occur within 5 days.

Within Ten (10) Business Days

- Intake Summary
- Facility notes
- Journal entries
- Supervisory/2<sup>nd</sup> Party Review
- OmbudsManager/NORS Category: Case Documentation

Staff, Volunteers, and the Pennsylvania Empowered Expert Residents (PEERs) activities are documented under the following general NORS categories:

1. Training for Ombudsman Staff, Volunteers
2. Technical Assistance to Local Ombudsmen and Volunteers
3. Training for Facility Staff
4. Consultation to Facilities
5. Information and Consultation to Individuals
6. Facility Coverage
7. Participation in Facility Surveys
8. Work with Resident Councils
9. Work with Family Councils
10. Community Education
11. Work with Media

Program Representatives shall consult the OmbudsManager Desk Reference for detailed guidance on activity documentation.

Staff, Volunteers, and PEER Demographic Data, including full-time equivalency (FTE), must be documented in the Staff/Users section of OmbudsManager.

Facilities participating in the PEER Program must be documented in the Facilities section of OmbudsManager.

#### Record Retention

Individual consumer records are required to be retained for at least three (3) years following closure of a case or activity unless the records are relevant to ongoing litigation, claims or audits. All records are considered the property of the State Office.

## **VIII. CONFLICT OF INTEREST IDENTIFICATION AND REMEDIATION**

### Organizational

Hosting agencies shall follow all provisions as outlined under the new federal regulations 1327.21 as follows:

The Long-Term Care Ombudsman, the host agency, and Program Representatives shall consider both the organizational and individual conflicts of interest that may impact the effectiveness and credibility of the work of the Office. In so doing, the LTC Ombudsman, the host agency and/or LOE, and Program Representatives shall be responsible for identifying actual and potential conflicts and, where a conflict has been identified, to remove or remedy such conflict.

The host agency and/or the LOE, through internal policy, shall ensure that no Program Representative:

- Is responsible for licensing, surveying, or certifying long-term care facilities;
- Is a member of an association (or an affiliate of such an association) of long-term care facilities or of any other residential facilities for older individuals or individuals with disabilities;
- Has any ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility;
- Is a governing board member or has any ownership, investment or employment interest in long-term care facilities;
- Provides long-term care to residents of long-term care facilities, including the provision of personnel for long-term care facilities or the operation of programs which control access to or services for long-term care facilities;
- Provides long-term care coordination or case management for residents of long-term care facilities;
- Sets reimbursement rates for long-term care facilities;
- Provides adult protective services;
- Is responsible for eligibility determinations regarding Medicaid or other public benefits for residents of long-term care facilities;
- Conducts preadmission screening for long-term care facility placements;
- Makes decisions regarding admission, transition, or discharge of individuals to or from long-term care facilities; or
- Provides guardianship, conservatorship or other fiduciary or surrogate decision-making services for consumers of long-term care.

Furthermore, the host agency and/or LOE shall:

- Take reasonable steps to avoid internal conflicts of interest;
- Establish a process for review and identification of internal conflicts;
- Take steps to remove or remedy conflicts;
- Ensure that no individual, or member of the immediate family of an individual, involved in selecting or terminating the Program Representative is subject to a conflict of interest; and

- Assure that the Program Representatives have disclosed such conflicts, either personal or professional, and described steps taken to remove or remedy conflicts as part of the regular reporting process.
- Where a host agency is unable to adequately remove or remedy a conflict, it shall carry out the Ombudsman Program by contract or other arrangement with a public agency or nonprofit private organization.

### Individual

Individual conflicts of interest for Program Representatives and members of their immediate family include, but are not limited to:

- Direct involvement in the licensing or certification of a long-term care facility;
- Ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility;
- Employment of an individual by, or participation in the management of, a long-term care facility in the service area or by the owner or operator of any long-term care facility in the service area;
- Receipt of, or right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility;
- Accepting gifts or gratuities of significant value from a long-term care facility or its management, a consumer or a consumer representative of a long-term care facility in which the representative of the Office provides services (except where there is a personal relationship with a consumer or consumer representative which is separate from the individual's role as a Program Representative.);
- Accepting money or any other consideration from anyone other than the Office, or an entity approved by the LTC Ombudsman, for the performance of an act in the regular course of the duties as a Program Representative without approval;
- Serving as guardian, conservator or in another fiduciary or surrogate decision-making capacity for a consumer of a long-term care facility in which the Program Representative provides services; and
- Serving consumers of a facility in which an immediate family member resides.

Furthermore, the Program Representative shall:

- Take reasonable steps to avoid internal conflicts of interest; and
- Disclose such conflicts, either personal or professional.

### Other

The LTC Ombudsman and Program Representatives shall perform duties so as not to create a conflict of interest that impairs the Office's ability to act impartially in the best interests of its mission. No employee, certified representative, or individual who acts as a support resource of the Office shall have an un-remedied conflict of interest, and shall be subject to Governor's Code of Conduct,

Executive Orders 1980-18 and 2015-1, 4 Pa. Code §§7.151 *et seq.*. An un-remedied conflict of interest creates competing interests or duties that can make it difficult for an employee, certified representative and individual who acts as a support resource to fulfill his or her duties impartially. A conflict of interest statement shall be provided for each paid and unpaid Program Representative to complete. That document is to be kept on file at the LOE indicating that the individual does not have a conflict of interest as outlined in §1327.21.

## **IX. REPORTING ABUSE**

Regardless of the source of the complaint (i.e. the complainant), including when the source is the Ombudsman or the Program Representative, the Ombudsman or Program Representative shall support and maximize consumer participation in the process of resolving the complaint to the satisfaction of the consumer (or consumer representative, where applicable), in accordance with Section 712 (a)(3) and (d), 42 U.S.C. §3058g.

Where the consumer is unable to communicate informed consent, and has no consumer representative, the Ombudsman or Program Representative may:

- (A) Take appropriate steps to resolve the complaint in order to protect the health, safety, welfare and rights of the consumer; and
- (B) Provide evidence that steps taken were for the purpose of resolving the complaint, consistent with those which would have been taken had the consumer been capable of communicating consent.

## **X. OMBUDSMAN RECORDS**

Ombudsman records shall not be released in violation of the standards of the Older Americans Act (OAA).

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.

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

- (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.

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 host agency of the ombudsman program.

## Other Requests for Disclosure of Ombudsman Records

### Living Consumers

The Program Representative shall contact the resident, explain the request made for release of their confidential records and document the newly-obtained authorization or the refusal to provide.

If the resident, or the resident's legal representative, denies release of the records, the requester shall 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 shall be eradicated and the record relayed to the court or requester forthwith.

### Deceased Consumers

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 Program Representative's work with the prior resident, release of records can be explored with the legal representative. The records should be examined for any ancillary confidentiality violation (another resident's name in the record), those names shall be eradicated prior to release.

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 Program Representative extend that restricted authority via any contact.

Program Representatives 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 third party effort to access confidential ombudsman program records, the local program should notify the State Office regarding the request and final disposition of the request. Local programs that refer the records request to a General Counselor, Agency, or Solicitor should inform the state office of the request and the referral for disposition.

### Court Orders for Ombudsman Testimony

If the resident/consumer is still living, the Program Representative should seek formal release from that consumer, or the legal representative, to offer testimony specific to an investigatory case.

Absent this consent, the Program Representative 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 Program Representative'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 Program Information

Any contact of this nature should be directed to the Program Representative's supervisor, agency director, press officer, or other protocol as pre-established by the local program. As pertains to the facilities, media requests shall be re-directed to the licensing offices;

#### Bankruptcy Reports

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 provides 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.

## **XI. RETALIATION AGAINST CONSUMER AND INTERFERENCE WITH OMBUDSMAN PROHIBITED**

No person shall discriminate or retaliate in any manner against any consumer or relative or guardian of a consumer, any employee of a long-term care facility, or any other person because of the making of a complaint or providing of information in good faith to the Ombudsman Office. No person shall willfully interfere with the Ombudsman or any Program Representatives in the performance of his or her official duties.

## **XII. LIABILITY**

Notwithstanding any other provision of applicable law, no person providing information, including, but not limited to, consumer records, to the Ombudsman shall be held, by reason of having provided such information, to have violated any criminal law or to be civilly liable under any law unless such information is false and the person providing such information knew or had reason to believe that it was false. Any person who, in good faith, makes a complaint or provides information as authorized in this Aging Program Directive shall incur no civil or criminal liability therefor. The Ombudsman or any Program Representative who, in good faith, performs his or her official duties, including but not limited to, making a statement or communication relevant to a complaint received

or an investigative activity conducted under applicable law and this Aging Program Directive shall incur no civil or criminal liability therefore.

**XIII. TECHNICAL ASSISTANCE**

Questions related to this APD should be directed to the Office of the State Long-Term Care Ombudsman (717) 783-8975.