



MEMORANDUM

October 25, 2017

To: Interested Persons

From: Patricia Hunter, MSW
Washington State Long-Term Care Ombuds

RE: ACCESS TO OMBUDS PROGRAM RECORDS, FILES OR TESTIMONY

The long-term care ombudsman programs, including the program in Washington State, were established by Congress in the Older Americans Act at 42 U.S.C. § 3058g. State laws governing the ombudsman program are found at RCW 43.190 and WAC 365-18. The ombuds is an advocate for residents in long-term care facilities, defined as nursing homes, boarding homes, state veterans homes, and adult family homes. Building trust with the residents and maintaining confidentiality is critically important to the integrity of the program.

The ombudsman program is not a government agency, and thus, the state's general public records access law, RCW 42.17, does not govern access to its records. The ombudsman program is a private, non-profit organization, not a state agency as defined by state law. RCW 43.190.030 and Laws 1988, ch. 119 § 1; RCW 42.17.020(1).

Access to ombuds's records and files

Federal law sets forth a procedure governing access to the ombudsman program's records and files, and provides that state law shall be consistent with federal law. 42 U.S.C. § 3058g(d). It is the intent of the state law to be consistent with federal law. RCW 43.190.010 and .900.

Under federal law, "the files and records" of the long-term care ombudsman program: "may be disclosed only at the discretion of the [State] Ombuds (or the person designated by the Ombuds to disclose files and records)." 42 U.S.C. § 3058g(d)(2)(A).

Furthermore, under federal law, the "*identity* of any complainant or resident with respect to whom the [Ombuds] Office maintains such files or records" cannot be disclosed without either consent from the complainant or resident, or from their legal representative, or pursuant to a court order. 42 U.S.C. § 3058g(d)(2)(B). The State Ombuds cannot authorize disclosure of the identities of complainants or residents without their consent, or the consent of their legal representatives, or pursuant to court order. The word "*identity*" is interpreted by the ombudsman program to mean "actual identity and identifying information" about a complainant or resident.



State law at RCW 43.190.030(5) provides similar restrictions on disclosure of records, files and identities:

[The ombudsman program shall] establish procedures to assure that any files maintained by the ombudsman programs shall be disclosed only at the discretion of the ombuds having authority over the disposition of such files, except that the identity of any complainant or resident of a long-term care facility shall not be disclosed by such ombuds unless:

- (a) Such complainant or resident, or the complainant's or resident's legal representative, consents in writing to such disclosure; or
- (b) Such disclosure is required by court order.

RCW 43.190.110 adds "witnesses" to the list of individuals whose identities cannot be disclosed without consent.

The State Ombuds regulations, recently revised and effective May 18, 2000, contain similar restrictions regarding disclosure of the ombudsman program records and files or the identity of complainants, witnesses or residents. WAC 365-18-110.¹

Consent to disclosure by a witness, resident or complainant is not sufficient by itself to authorize disclosure of the ombudsman program records or files. The authorization of the State Ombuds, or his or her designee, is also required. 42 U.S.C. § 3058g(d)(2)(A); RCW 43.190.030(5).

The State LTC Ombuds has developed criteria used to determine whether program records or files may be released. Clearly, consent to disclosure by the witness, resident, or complainant is highly relevant to the State Ombuds's decision about whether to authorize disclosure. In addition, the State Ombuds (or designee) also examines whether disclosure of program records or files would create a reasonable likelihood of:

1. Retaliation against residents, complainants or witnesses;
2. Intimidating individuals from contacting or assisting the ombudsman program;
3. Undermining working relationships between the ombudsman program, facilities, and enforcement agencies;
or
4. Undermining other official duties of the ombudsman program.

¹ WAC 365-18-110 (1) "All records and files maintained by the long-term care ombudsman program shall remain confidential. Any disclosure of long-term care ombudsman program records is subject to the following provisions:
(a) No disclosure shall be made without the prior approval of the state ombudsman or his or her representative.
(b) No disclosure of the identities of complainants, witnesses, clients, or residents shall be made unless one of the following conditions has been met:
(i) The complainant or resident, or their legal representative consents in writing to the disclosure; or
(ii) The complainant or resident gives oral consent, and that consent is documented contemporaneously in writing by a representative of the state office; or
(iii) The disclosure is required by court order.
(c) Nonidentifying information or statistics may be disclosed at the discretion of the state ombudsman or his or her representative."

Access to ombuds testimony

Under state law, communications by the long-term care ombuds are privileged and the ombuds is immune from liability for actions done in good faith. The ombuds is also exempt from being required to testify in court, at administrative hearings, or at depositions as to any confidential matters. RCW 43.190.090; WAC 365-18-110(2).²

In summary, the federal and state laws do not allow disclosure of the ombudsman program records or files without the authorization of the State Ombuds or his designee, and do not permit disclosure of the identities of witnesses, complainants or residents without their consent, consent by their representative, or by a court order.

Individuals seeking access to the records or files of the ombudsman program, or seeking to depose or take the testimony of an ombuds, should send a written request, with the need for this information fully explained to:

Patricia Hunter, State LTC Ombuds
PO Box 23699
Federal Way, WA 98093-0699
Tel: (253) 838-6810 X174
Fax: (253) 253-815-8173
Email: ltcop@mschelps.org

The requests for information will be treated as confidential under the above rules.

² WAC 365-18-110 (2) "All communications by an ombudsman, if reasonably related to the requirements of that individual's responsibilities under this chapter or federal or state statutes and done in good faith, are privileged. That privilege shall serve as a defense to any action in libel or slander. Ombudsmen are exempt from being required to testify in court, administrative hearings, or depositions as to any confidential matters, except as the court may deem necessary to enforce this chapter."