



## ACCESS TO RECORDS PROTOCOL

### April 15, 2015

The Legal Services Corporation (LSC) uses the following procedures when making requests to review documents that contain information about clients and their cases that may reveal confidential material protected by the attorney-client privilege or the rules of professional responsibility. Nothing in this protocol creates new rights for recipients, and LSC retains full discretion to require access to information as permitted by law and to take enforcement actions as LSC deems appropriate. This protocol does not apply to access to records by the LSC Office of Inspector General. This protocol supersedes the prior LSC Access to Records protocol issued January 5, 2004.

### STATUTORY FRAMEWORK

LSC has the statutory responsibility to ensure that recipients comply with the provisions of the LSC Act and regulations and any other laws, including appropriations provisions, that apply to LSC funds or recipients. LSC Act § 1006(b)(1)(A), 42 U.S.C. § 2996e(b)(1)(A). Section 1008(b) of the LSC Act provides explicit authority for LSC “to prescribe the keeping of records with respect to funds provided by grant or contract” and states further that LSC “shall have access to such records at all reasonable times for the purpose of insuring compliance with the grant or contract or the terms and conditions upon which financial assistance was provided.” 42 U.S.C. § 2996g.

The LSC Act recognizes that some records contain information that is protected by the federal attorney-client privilege. Section 1009(d) of the LSC Act explicitly provides that “neither the Corporation nor the Comptroller General shall have access to any reports or records subject to the attorney-client privilege.” 42 U.S.C. § 2996h(d). In addition, Section 1006(b)(3) includes both a prohibition that LSC “shall not, under any provision of this title, interfere with any attorney in carrying out his professional responsibilities” and an affirmative duty that LSC “shall ensure that activities under this title are carried out in a manner consistent with attorneys’ professional responsibilities.” 42 U.S.C. § 2996e(b)(3). Generally, rules regarding professional responsibilities include protections for client confidences and secrets that are broader than the rules for attorney-client privilege. *E.g.*, California Rule of Professional Conduct 3-100 Confidential Information of a Client. The LSC Act limits LSC’s access to materials that are protected by federal, but not state or local, law. *United States v. Cal. Rural Legal Assistance*, 722 F.3d 424 (D.C. Cir. 2013). Thus, the LSC Act permits LSC to obtain access to information that is not protected by federal law, even if it is protected by state or local laws or rules of professional responsibility. *Id.*

Section 509(h) of the 1996 LSC appropriation, which has been reenacted in each subsequent year, provides that, notwithstanding section 1006(b)(3), LSC auditors and monitors are given explicit access to “financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient . . . except for reports or records subject to the attorney-client privilege.” Pub. L. 104-134, title V, 110 Stat. 1321, 1321-59 (1996) See *United States v. Legal Services of New York City*, 249 F.3d 1077 (D.C. Cir. 2001). In addition, section 504(a)(8)(B) of the 1996 LSC appropriation statute authorizes LSC access to the client “statement of facts.” Pub. L. 104-134, 110 Stat. at 1321-53. Disclosure of information not required by these sections of the 1996 appropriation statute is governed by the LSC Act as explained above.

## PURPOSE

The purpose of summarizing these internal practices is to inform LSC recipients and other interested parties of: (1) the procedures LSC uses to obtain access to records in a manner consistent with the attorney-client privilege and taking into account applicable rules of professional responsibility and (2) the mechanism to resolve disputes about how LSC can obtain such access.

## GENERAL PRINCIPLES

LSC will carry out its statutory responsibilities to ensure compliance with the LSC Act, LSC appropriations provisions, LSC regulations, and any other applicable regulations, requirements, and provisions of law. LSC will do so in a manner that recognizes that its recipients maintain client confidences and secrets that are important to the attorney-client relationship.

LSC recipients are obligated to provide information to LSC under the applicable LSC statutes, regulations, grant terms, grant assurances, and other rules and provisions regarding the receipt and use of LSC funds. For example, upon request, recipients must provide LSC access to all records specified in section 509(h) unless, as provided in section 509(h), the information sought is protected by the attorney-client privilege. In addition, upon request, recipients must also provide LSC access to original unredacted client "statement of facts," as required by section 504(a)(8)(B) and 45 CFR Part 1636. LSC will work with recipients in good faith regarding issues of access to records that may contain information protected by rules of professional responsibility or attorney-client privilege. LSC may, however, require access to information that is otherwise protected by state or local laws or rules but not by federal law, and LSC recipients are obligated to provide such information.

## PROCEDURES

**1. Applicability:** These procedures apply to requests by LSC for access to records of a recipient that may include information that may be protected by rules of professional responsibility or the law on attorney-client privilege. Such information will hereafter be referred to as privileged or confidential information.

**2. Notice to the Recipient:** Normally, when LSC proposes to review the records of a recipient either through an on-site visit or otherwise, LSC notifies the recipient orally and in writing about the purpose of the visit or review, what activities LSC will conduct, and what specific information and records are within the scope of the review. Each review is an ongoing process that may expand based on information reviewed. As such, LSC will notify the recipient orally and in writing when the scope of the review has changed or expanded and what information and records are further required.

**3. Use of Intermediaries:** LSC may permit recipients to use program staff as an intermediary to review case files (or other records containing privileged or confidential information) and to answer questions from LSC. Recipients and LSC may agree that the use of intermediaries is not necessary in particular situations. Intermediaries need not be used if privileged or confidential information is not subject to the review. The use of intermediaries by recipients is at the exclusive discretion of LSC management.

**4. Flexibility of Approaches:** LSC will work with recipients to develop mutually satisfactory means for obtaining access to information consistent with the applicable rules of attorney-client privilege and professional responsibility and consistent with LSC's need for information to ensure compliance. LSC considers and seeks to accommodate reasonable approaches to access to records proposed by recipients to protect privileged or confidential information so long as such proposed approaches also ensure access by LSC to information it needs to carry out its responsibilities. Such reasonable approaches may include the use of intermediaries as described above and/or unique client identifiers when appropriate.

While no single system of client identifiers fits all recipients' case management systems, LSC offers the following criteria that recipients should meet when devising a client identifier system.

The Unique Client Identifier (UCI) should be capable of producing unduplicated counts of persons served over time. It must be designed so as to enable a record to be identified and the data to be reliably associated with a particular individual.

A UCI is usually a combination of numbers and letters centrally generated by a computer, and used in conjunction with several personal characteristics to assure uniqueness.

Recipients that choose to use a UCI must craft one that has the following characteristics:

- A. *Unique.* Each identifier must be unique to a particular client and must be designed so as to enable a record to be identified and the data associated with a particular individual.
- B. *Reliable.* The UCI must be reliable. The UCI must be capable of producing unduplicated access to information about the same individual across episodes. The UCI must also be reliable in its design.
- C. *Verifiable.* The recipient must be willing and able to permit testing of the UCI design. LSC must have the opportunity to examine the identifier in order to ensure uniqueness and reliability. This examination might include identifying the type of UCI used, the elements, or algorithms, upon which the identifier is based.
- D. *Uniformity.* The use of the UCI by the grantee, its branch offices, and subrecipients should be uniform.

**5. Unique State Ethics Rules:** LSC acknowledges that there may be states where the rules of professional responsibility, ethics rulings, case law or other laws differ from the general framework under the Model Rules of Professional Conduct and where the disclosures sought by LSC may implicate the recipient attorneys' professional responsibilities or other law. Recipients have the responsibility to bring such ethical rulings to the attention of LSC after they have been notified by LSC of an impending request for access to records containing privileged or confidential information.

**6. Questions of Federal Attorney-Client Privilege:** Pursuant to applicable law, including the LSC Act and section 509(h), LSC does not have access to information protected by the attorney-client privilege under federal law. If a recipient notifies LSC that the information sought is, in the recipient's view, protected by federal attorney-client privilege, LSC will not proceed to require access to that information except through means consistent with the federal attorney-client privilege such as those described herein. The recipient must provide LSC with the basis

for the privilege claim and cooperate with exploring alternative approaches to access consistent with the privilege.

**7. Other Privileged or Confidential Information:** If a recipient believes that documents or information requested by LSC contain privileged or confidential information under state or federal laws or rules other than federal attorney-client privilege, the recipient must send written notice to LSC as soon as possible setting forth (1) a full description of the nature of the privileged or confidential information, (2) a statement explaining the basis for determining that such information is privileged or confidential and under which laws or rules, and (3) any recommendations of reasonable approaches to accessing such information such as those described herein. Upon receipt of this notice, LSC will seek to find a mutually satisfactory manner for obtaining access to the information consistent with the applicable rules of attorney-client privilege and professional responsibility and consistent with LSC's need for information to ensure compliance.

**8. Resolution of Access Issues:** If LSC is not able to expediently resolve all outstanding issues of concern, the Director of the LSC office requesting the information will advise the Vice President for Grants Management of the access issues raised and the specific reasons why the proposed alternative methods of access are inadequate. The Vice President for Grants Management will review the concerns raised by the recipient, which may include further follow-up with the recipient. If the Vice President for Grants Management does not agree with the position of the recipient, then LSC will so notify the recipient in writing and proceed with the review. If the recipient continues to refuse to provide the requested information in the format required, then LSC may proceed as described below.

If the Vice President for Grants Management agrees that the recipient has a reasonable claim that the information is privileged or confidential and that LSC does not have a need to directly access the information in the manner it requested, then LSC will further seek to develop a mutually satisfactory manner for obtaining access to the information consistent with the applicable rules of attorney-client privilege and professional responsibility and consistent with LSC's need for information to ensure compliance.

**9. Disputes Between LSC and Recipients:** If, subsequent to the process described above, LSC and the recipient cannot agree on an approach that will give LSC appropriate access to the records it needs and is consistent with the recipient's responsibilities to protect privileged or confidential information, the Director of the office requesting the information may recommend to the Vice President for Grants Management that LSC should take appropriate action with respect to the recipient. The Vice President for Grants Management will review the recommendation and make further inquiry as appropriate.

**10. LSC Enforcement of Access Decisions:** If the Vice President for Grants Management determines at any stage of the process that a recipient has taken an unreasonable position or refused to work in good faith with LSC on these issues, then LSC may take reasonable corrective action in addition to pursuing access to the information in question.

If the Vice President for Grants Management determines that LSC should proceed to take action affecting the recipient, LSC will notify the recipient in writing of the action that is proposed. If the action involves suspension, limited reduction, or termination of funding, LSC will proceed consistent with 45 C.F.R. Parts 1606 or 1623. However, if the action involves a sanction or adverse action other than a termination, limited reduction, or suspension of funding, then LSC may allow a recipient an opportunity to further present its position. Such a process could follow

the following procedure or any other process that LSC determines is appropriate under the circumstances.

The recipient will be given an opportunity to request a meeting with the Vice President for Grants Management to ask for reconsideration of the proposed action. If the recipient requests such a meeting (in person or by other means), the Vice President for Grants Management will convene the meeting and, based on that meeting and any other relevant information, develop a management decision for how LSC should proceed. As soon thereafter as is practical, the Vice President for Grants Management will notify the recipient in writing of the management decision and the reasons therefore. If the recipient does not respond within five days, then LSC will adopt the management decision in writing as final and binding. Alternately, within five days of notification of the management decision, the recipient may request a meeting with the LSC President to ask for reconsideration of the management decision. The recipient will be given the opportunity to provide such additional written information as it believes will assist the President to fully and fairly consider its concerns and objections. Upon such request, the President may also convene a meeting with the authorized representatives of the recipient. As soon thereafter as practical, the LSC President will advise the recipient of the final decision and reasons therefore. The decision of the LSC President will be in writing and shall be final and binding.

If the request for information comes directly from the LSC President, then LSC will give the recipient an opportunity to request a meeting with the President to ask for reconsideration of the proposed action. If the recipient requests such a meeting (in person or by other means), the President will convene the meeting with the authorized representatives of the recipient and, based on that meeting and any other relevant information, develop a final and binding written decision as soon thereafter as practical.

#### **RETENTION OF RIGHTS AND PROTOCOL MODIFICATION PROCESS**

In describing these procedures, LSC does not in any way waive the statutory rights and obligations of LSC or LSC recipients regarding access to and review of LSC recipients' records and information. These procedures do not create new rights or obligations for LSC or LSC recipients and may be modified by the LSC President as promulgated in writing with appropriate notice to the Board and the field programs.