

## Local Commissioners Memorandum

### Section 1

<b>Transmittal:</b>	15-LCM-01
<b>To:</b>	Local District Commissioners
<b>Issuing Division/Office :</b>	Office of Legal Affairs Office of Administrative Hearings
<b>Date:</b>	January 9, 2015
<b>Subject:</b>	Records Access
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<b>Attachments:</b>	None
<b>Attachment Available On – Line:</b>	N/A

### Section 2

#### I. Purpose

The purpose of this release is to remind social services districts (SSDs) and emphasize that applicants and recipients and their authorized representatives have the right to access their case records, regardless of whether the applicants or recipients are administrative hearing (i.e. "fair hearing") appellants. This memorandum also provides policy clarification concerning access to case records in connection with a fair hearing request.

#### II. Background

The New York State Office of Temporary and Disability Assistance (OTDA) hereby reiterates the importance of an applicant or recipient's right to access his or her case record, as well as the responsibility of the SSD to provide the requested case record. Parts 354, 357 and 358 of Title 18 of the New York Codes, Rules and Regulations (NYCRR) address the case record, and access to and disclosure of the case record.

With limited exceptions, an applicant or recipient or his/her authorized representative has the right to examine his or her case record, including records stored in electronic format, upon reasonable notice to the SSD. Subject to certain limitations, a fair hearing appellant also has the right to be provided access to the entire contents of his or her case record, including records stored in electronic format, and all documents and records to be used by the SSD at a fair hearing, both prior to and during the hearing.

The "case file" or "case record" for access purposes includes all paper records and machine readable data that can readily be converted to a comprehensible paper record relating to an individual's receipt of Safety Net Assistance, Family Assistance, Supplemental Nutrition Assistance Program (SNAP), Emergency Assistance, the Home Energy Assistance Program (HEAP) or Title XX services. A simple test for whether a particular file is covered is whether it is filed under the name of the requesting individual.

In the case of records that relate generally to a household, eligibility and public assistance payment records must be made available to any member authorized to act on behalf of that household.

Any records maintained by the SSD with respect to an individual are subject to access by that individual whether or not the records are required to be maintained. Medical records contained in the individual's case record, even if marked "confidential," must be made available for review.

The only exceptions to access to an individual's case record are:

- (1) Those materials to which access is governed by separate statute, such as child welfare, foster care, adoption, child abuse or neglect, or any records maintained for the purpose of the Child Care Review Service.
- (2) Those materials maintained separately from public assistance files for the purposes of a criminal prosecution and referral to the District Attorney's office.
- (3) The County Attorney or Welfare Attorney's files.

For purposes of preparing for a fair hearing, and with these limited exceptions, applicants and recipients who are fair hearing appellants are to be provided access to the entire contents of their case record, and all documents and records to be used by the SSD at the administrative hearing, both prior to and during the hearing.

If the case file review is in connection with a fair hearing and documents from a particular file not ordinarily available to the applicant/recipient will be used at the fair hearing by the SSD, then the entire file from which those documents are taken must be provided to the applicant/recipient for inspection. This will enable the applicant/recipient to inspect the file for possible exculpatory evidence. The SSD does not have discretion to determine which records the appellant (applicant/recipient) may look at under these circumstances.

18 NYCRR Subpart 358-4 addresses the rights and obligations of SSDs within the context of a fair hearing. Sections 358-4.2 and 358-4.3 address both the prehearing responsibilities and responsibilities in the fair hearing process.

Fraud files maintained separately from the public assistance files for possible referral to the DA's office shall not ordinarily be available for inspection. However, if the SSD intends to use information from the fraud file in the fair hearing context, the entire file shall be available for review.

Please note that failure to comply with requirements for access to records in connection with a fair hearing may have significant consequences in the fair hearing process, as detailed in Section III (b), below.

### **III. Program Implications**

#### **(a) Procedures for Access to Case Records in Connection with Household, Eligibility and Public Assistance Payments**

If the SSD receives a request for review of a particular file, only that file should be produced. If, however, a general request for review is made with no specificity, **every file pertaining to the requesting individual should be identified and gathered for that individual's review.**

An appointment schedule may be set up for the purpose of case file review. If there are difficulties in locating the file, the applicant/recipient or his/her representative must be called.

**NOTE: No more than five working days should elapse between the date of receipt of request for review and notification that either the file is not yet located or the file is available at a specific date, time and place for review.**

At the time of review, proper identification from a person requesting the file must be obtained. If an applicant or recipient requests access to his or her case record, he or she must present some form of identification. If an attorney, paralegal or authorized representative requests access to their client's case record, he or she must present sufficient documentation to establish his or her authority to act on behalf of the applicant or recipient.

The option of allowing the applicant/recipient to make copies of documents from the file rests with the SSD. It is suggested that copying be allowed if the request is reasonable and copying facilities are available. The SSD may charge a fee up to \$.25 per page for copying, unless the documents are requested in association with preparation for a fair hearing (see below).

### **(b) Procedures for Access to Case Records in Connection with a Fair Hearing Request**

#### Documentary Evidence to be introduced by the SSD

Upon oral or written request, including request by telephone, the SSD must provide to the appellant or appellant's authorized representative copies of all documents to be presented by the SSD at the fair hearing. Such copies must be provided at a reasonable time before the date of the hearing. If the request for copies of documents is made less than five business days before the hearing, the SSD must provide the appellant and the appellant's authorized representative such copies no later than at the time of the hearing. Such documents must be provided without charge and must be provided to the appellant or the appellant's authorized representative by mail, if so requested. If there is insufficient time for the documents to be mailed and received before the scheduled hearing date, the documents may be presented at the hearing instead of being mailed.

#### Additional Documents Requested by Appellant

Upon oral or written request, including request by telephone, the SSD must provide to the appellant and appellant's authorized representative copies of any additional documents from appellant's case file which the appellant or the appellant's authorized representative identifies and requests for purposes of hearing preparation. Such copies must be provided at a reasonable time before the date of the hearing. If the request for copies of documents is made less than five business days before the hearing, the SSD must provide the appellant and the appellant's authorized representative the copies no later than at the time of the hearing. Such documents must be provided without charge and must be provided to the appellant and the appellant's authorized representative by mail, if so requested. If, however, there is insufficient time for the documents to be mailed and received before the scheduled date of the hearing, the documents may be presented at the hearing instead of being mailed.

#### Authorized Representative(s)

Except when impracticable to execute a written authorization, where an authorized representative seeks to review an applicant or recipient's case record for purposes of representation of said applicant or recipient at a conference or fair hearing, the SSD must obtain written authorization signed by said applicant or recipient, **unless** the authorized representative is an attorney or an employee of an attorney. An employee of an attorney will be considered an authorized representative if such employee presents written authorization from the applicant or

recipient's attorney or if such attorney advises the SSD by telephone of such employee's authorization.

Once the SSD and the OTDA Office of Administrative Hearings (OAH) have been notified that a person or organization has been authorized to represent the applicant or recipient at a fair hearing, the SSD and OAH must send copies of all correspondence relating to the conference and fair hearing to the authorized representative of the appellant.

#### Obligation to Provide the Record

The SSD must provide complete copies of its documentary evidence to the hearing officer at the fair hearing and also to the appellant or appellant's authorized representative, when such documents were not provided previously to the appellant or appellant's authorized representative in accordance with 18 NYCRR 358-3.7 and 358-4.2(c). Such documents must be provided without charge.

**As detailed at 18 NYCRR 358-3.7(b)(4), if the SSD fails to comply with these records access requirements, "the hearing officer may adjourn the case, allow a brief recess for the appellant to review the documents, preclude the introduction of the documents where a delay would be prejudicial to the appellant, or take other appropriate action to ensure that the appellant is not harmed by the agency's failure to comply with these requirements."**

#### **(c) Necessary Action**

Districts should review their procedures to ensure that there are proper controls and indices in place to provide applicants and recipients, including fair hearing appellants, and their authorized representatives with access to all case records as described above.

An individual or individuals in the employ of the district must be designated as responsible for locating all requested files, subject to the limitations detailed above, setting up appointments for review, apprising the applicants/recipients of the status of file searches, making files available at a designated time and place, and overseeing access.

In the case of imaged documents, the district must designate an individual in the employ of the district to work with the applicant/recipient or authorized designee of the applicant/recipient to retrieve and print documents stored in the electronic repository within a specified timeframe, or, through supervised electronic retrieval, viewing and possible printing of specifically identified requested documents in a secure space at a designated time. In no instance, should an applicant/recipient or their authorized representative be provided with unsupervised electronic access to imaged documents.

#### **Issued By**

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