

Quick Reference: Access to Records in Financial Exploitation Investigations

It shouldn't be difficult for county social services agencies and law enforcement officials to investigate reports of suspected financial exploitation of disabled adults and older adults. However, these cases often involve significant challenges during the investigative phase. Several years ago, the Administrative Office of the Courts approved a new form (AOC-SP-630) that officials can use to ask a district court judge to issue a subpoena directing a financial institution to provide copies of the adult's financial records. This new subpoena authority was authorized in legislation (S.L. 2014-115, s. 44) that went into effect on October 1, 2014.

It's been almost a decade since this legislation was passed, but many prosecutors still seem unaware of this incredibly helpful tool. Government officials have several tools available to help them obtain access to financial records for exploitation investigations. Each tool is different and one may be more appropriate than another depending on the circumstances. This article will review a few of the options and highlight some of the key differences among them.

In a Nutshell

In North Carolina, it is a crime to financially exploit a disabled adult or an older adult (G.S. 14-112.2). In addition, social services officials have a duty to provide protective services to disabled adults that have been financially exploited and need assistance (G.S. 108A, Article 6 and Article 6A). State law has two basic reporting requirements:

- Any person, including any court officer or judicial official, who has reasonable cause to believe that a disabled adult is being financially exploited must report it to the county social services agency (G.S. 108A-102); and
- Any financial institution that has reasonable cause to believe that a disabled adult or older adult is being financially exploited must report it (1) to law enforcement officials, and (2) to the county social services agency if the adult is disabled (G.S. 108A-115).

If someone suspects that a disabled adult or older adult is being exploited financially, it may be essential for the investigating entity (either law enforcement or social services officials) to obtain access to records maintained by financial institutions. These financial institutions are subject to complex federal and state confidentiality laws and must be cautious when cooperating with these types of investigations.

The investigating officials may try to obtain the consent of the adult or the adult's guardian to access these records. However, obtaining informed consent may be impractical or impossible in some situations. For example, the investigating official may have concerns about the adult's capacity to consent or about the possibility of the adult being coerced by a caretaker who is benefiting from the suspected exploitation.

The Tools

Other than consent, there are three basic tools that are available to help government officials obtain access to records in these financial exploitation cases: a search warrant, a freeze and inspect order, and a subpoena. Below is a brief summary of each tool and some discussion of the differences between them.

Search Warrant (G.S. Chapter 15A, Article 11)

- **Who:** Any applicant (mostly sworn law enforcement officers)
- **What:** May request a search warrant directing a law enforcement officer to seize financial records necessary to investigate suspected exploitation of a disabled adult or an older adult.
- **When:** If the official issuing the warrant finds probable cause to believe that the financial records constitute evidence of the crime of financial exploitation under G.S.14-112.2 or the identity of a person participating in the crime.

Freeze and Inspect Order (G.S. 108A-106(f))

- **Who:** County social services officials.
- **What:** May ask a judge to issue an order (1) freezing the assets of a disabled adult who is a suspected victim of financial exploitation and (2) directing a financial institution to provide access to inspect the disabled adult's financial records
- **When:** If social services has received a report of suspected financial exploitation of a disabled adult and the judge finds there is reasonable cause to believe that the adult (1) is in need of protective services, (2) lacks the capacity to consent to the release of financial records, and (3) is being financially exploited by the adult's caretaker.

Subpoena (G.S. Chapter 108A, Article 6A)

- **Who:** Law enforcement officials investigating alleged financial exploitation of a disabled adult or an older adult, or a county department of social services investigating alleged financial exploitation of a disabled adult.
- **What:** May ask a judge to issue a subpoena directing a financial institution to provide access to the financial records of a disabled adult or older adult who may be the victim of financial exploitation.
- **When:** If the judge finds that (1) the official is investigating a credible report of financial exploitation, (2) the adult's financial records are needed for the investigation, and (3) time is of the essence in order to prevent further exploitation.

Key Differences

There are a few important differences between the tools:

- **The potential victim:** Law enforcement officials may investigate crimes involving both older adults and disabled adults. Social services officials may only investigate reports involving disabled adults. An older adult is, by definition, any person over 65 years of age. A disabled adult is any person 18 years of age or over (or a lawfully emancipated minor) who is physically or mentally incapacitated due to one or more reasons listed in G.S. 108A-101(d), such as physical or mental illness, intellectual disability, accident, advanced age, or substance use.
- **The potential exploiter:** The freeze and inspect order is available only if the suspected exploitation is being committed by a disabled adult's caretaker.
- **Notice:** The freeze and inspect order requires that notice of the order (and opportunity to appear and be heard) must be provided to the adult, the caretaker, and every involved financial institution. With the subpoena, notice to the adult is required but the investigating entity (law enforcement or social services) may request that the court order a delayed notice under circumstances set forth in G.S. 108A-117(b).
- **Consent:** The freeze and inspect order is available only if a disabled adult lacks the capacity to consent. The laws governing the other two tools are silent in that respect.
- **Freezing the Adult's Assets:** The freeze and inspect order is the only one of these tools that authorizes a judge to freeze the adult's assets. In a criminal investigation, the district attorney may ask a judge to freeze the defendant's assets if the defendant is charged with a financial exploitation crime that involves funds, assets, or property valued at more than \$5,000 (G.S. 14-112.2(f)).
- **Confidentiality of Court Records:** The law authorizing the subpoena for financial records provides that records of the proceedings are not a matter of public record, must be maintained separately from other records, and may be examined only pursuant to a court order. Because of this heightened confidentiality requirement, the AOC established this as a Special Proceeding Confidential. The freeze and inspect order and search warrant are not subject to the same level of confidentiality protection. A search warrant becomes a public record once it has been executed and returned to the clerk, unless it is sealed by court order (G.S. 132-1.4(k)).

This is a high-level overview of the tools available to access financial records in exploitation cases involving disabled adults and older adults. Are you interested in learning more about how to protect vulnerable adults in your community? The UNC School of Government is working hard to bring together diverse stakeholders from around North Carolina to begin the process of forming and developing adult protection multidisciplinary teams (MDTs).

The North Carolina Adult Protection Network at the School of Government is expanding its tools and services for counties launching MDTs across North Carolina. Formerly known as the Elder Protection Network, this project now offers a multidisciplinary team Help Desk to provide advising, consultation, and in-person technical assistance to members of the adult protection community.

The Help Desk is free and available to MDTs across the state no matter where they are in the development of their efforts. Whether your local MDT is fully functioning, not yet off the ground, or in need of reinvigoration, the Adult Protection Network is here to support you. To learn more, visit the Network's website at protectadults.sog.unc.edu.

This article was adapted from a blog post authored by Aimee N. Wall on the UNC School of Government's "On the Civil Side" blog. Wall was appointed Dean of the UNC School of Government in February 2023. For questions about the tools described in this article, please contact Meredith Smith, Associate Professor of Public Law and Government at the UNC School of Government, at meredith.smith@sog.unc.edu.