

The Florida Senate
COMMITTEE MEETING EXPANDED AGENDA

CHILDREN, FAMILIES, AND ELDER AFFAIRS

Senator Storms, Chair

Senator Rich, Vice Chair

MEETING DATE: Tuesday, October 4, 2011

TIME: 10:45 a.m.—12:45 p.m.

PLACE: James E. "Jim" King, Jr., Committee Room, 401 Senate Office Building

MEMBERS: Senator Storms, Chair; Senator Rich, Vice Chair; Senators Detert, Dockery, and Latvala

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	Introduction of Charles T. Corley, Secretary, Department of Elder Affairs		Discussed
2	Compliance Review of the State of Florida Long-Term Care Ombudsman Program by the U.S. Department of Health and Human Services, Administration on Aging - U.S. Department of Health and Human Services Administration on Aging - Florida Department of Elder Affairs - Florida Long-Term Care Ombudsman		Presented
3	Issue Brief 2012-210 (Review Federal Fostering Connection Implementation in Florida) Presentation		Presented
4	Consideration of proposed committee bill (Mandatory Review 2012-301 - Open Government Sunset Review of Section 409.25661, F.S., Insurance Claim Data Exchange Information): SPB 7000	OGSR/Insurance Claim Data Exchange Information/Past Due Child Support; Amending provisions relating to a public-records exemption for insurance claim data exchange information used for identifying parents who owe past due child support; saving the exemption from repeal under the Open Government Sunset Review Act; removing the scheduled repeal of the exemption, etc.	Submitted as Committee Bill
5	Monitor Project 2012-422 (Interagency Background Screening Workgroup) Presentation		Presented
6	Other Related Meeting Documents		

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

10/4/2011

Meeting Date

Bill Number (if applicable)

Topic Introduction of Secretary Corley & Comments on AoA Compliance Review

Amendment Barcode (if applicable)

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Speaking: For Against Information

Representing Florida Department of Elder Affairs

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

For officially noticed committee meetings, pursuant to s. 11.061, Florida Statutes, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.

If designated employee:

Time: from _____ to _____

This form is part of the public record for this meeting.

S-001 (08/24/11)



October 4, 2011

The Honorable Ronda Storms
Florida Senate
Committee on Children, Families and Elder Affairs
520 Knott Building
404 S. Monroe St.
Tallahassee, FL 32399

Dear Senator Storms:

This letter is in response to your request for information related to the Compliance Review that the Administration on Aging (AoA) recently conducted in Florida related to its Long-Term Care Ombudsman Program. Thank you for this opportunity.

We would like to commend you for your leadership on issues related to services for elders, and, in particular, in your current role as a member of Florida's Assisted Living Workgroup. We note that Florida's State Long-Term Care Ombudsman also serves on this Workgroup. The Ombudsman Program is a key player in addressing concerns of assisted living residents and in advocating for quality services for these residents. It is our hope that this Workgroup's recommendations will result in improved conditions for residents.

AoA is the Federal agency responsible for advancing the concerns and interests of older people and their caregivers. AoA is an operating division within the Department of Health and Human Services (HHS) and is headed by the Assistant Secretary for Aging Kathy Greenlee.

The Older Americans Act (OAA) establishes a nationwide Aging Services Network – including states, area agencies on aging, and other partners -- to carry out the programs and services which AoA administers. In its work with states, AoA provides technical assistance, training and resources to implement the federal programs for which AoA has oversight. When any state chooses to accept OAA funding, it provides a state plan to AoA that indicates its commitment to

provide all OAA core services in accordance with the federal law. The Long-Term Care Ombudsman Program is among these core services.

Every state has a State Long-Term Care Ombudsman. The Ombudsman and his or her designees (who are typically a combination of staff and volunteers) serve residents of nursing homes, board and care homes, assisted living facilities and similar adult care facilities. Among Ombudsmen's primary functions are resolving problems of individual residents and bringing about changes at the facility, local, state and national levels that will improve residents' care and quality of life.

Last winter, our agency received multiple requests to review Florida's compliance related to its Long-Term Care Ombudsman Program. As a result, our Region IV office conducted a review of the program operations. For your information, we are attaching the report, dated September 1, 2011, which fully describes the findings of the review. In summary, the report found three areas for which Florida was found to be out of compliance with the OAA.

1. Designation of local ombudsman volunteers

Federal law states:

In carrying out the duties of the Office [of the State Long-Term Care Ombudsman], the Ombudsman may . . . designate an employee or volunteer to represent the entity.
OAA Section 712(a)(5).

While the OAA clearly indicates that designation is the authority of the State Ombudsman, the Florida Department of Elder Affairs (DOEA) requires that all ombudsman volunteers be approved by the Secretary of the Florida Department of Elder Affairs. The selection and designation of volunteers must be the purview of the State Long-Term Care Ombudsman. The State is therefore not in compliance with section 712(a)(5) the OAA.

2. Legislative advocacy

In enumerating the functions of a State Long-Term Ombudsman, Federal law states:

The Ombudsman shall . . . personally or through representatives of the Office . . .

(G) (i) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;

(ii) recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and

(iii) facilitate public comment on the laws, regulations, policies, and actions;. . .

OAA Section 712(a)(3)

It further states:

The State agency shall require the Office [of the State Long-Term Care Ombudsman] to . . .

(2) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;

(3)(A) provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding—

(i) the problems and concerns of older individuals residing in long-term care facilities; and

(ii) recommendations related to the problems and concerns; . . .”

OAA Section 712(h)

In other words, the State Ombudsman should have unfettered access to provide you, as legislators, information regarding the impact of legislation or state policy or practice on long-term care facility residents. Federal law requires that you receive this service from your State Ombudsman. When legislators do not hear the interests of residents from the Ombudsman Program, they may lack critical information upon which to base their decisions regarding long-term care.

In AoA’s compliance review, it found that DOEA’s policies and practices improperly control the interactions of the State Ombudsman with the legislature and deny the State Ombudsman permission to register in order to conduct legislative advocacy as is reportedly required under

Florida law. The State is therefore not in compliance with section 712(a)(3)(G) and 712(h)(2)-(3) of the OAA.

3. Information Dissemination

Federal law states:

The State agency shall require the Office [of the State Long-Term Care Ombudsman] to . . . (3)(A) provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding—
(i) the problems and concerns of older individuals residing in long-term care facilities; and
(ii) recommendations related to the problems and concerns; . . .
OAA Section 712(h)

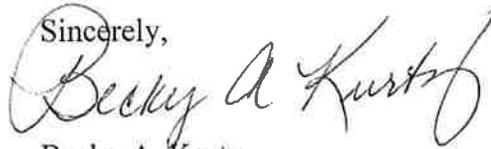
In AoA's compliance review, it found that the State requires the prior approval of Ombudsman Program press releases by the DOEA and, if determined necessary, the Executive Office of the Governor, and historically has used orders and intimidation to ensure the cancellation of press conference activities. Therefore, the State was found not in compliance with section 712(h)(3) of the OAA.

In these areas of non-compliance, AoA requested that the State of Florida submit a plan of correction for AoA review and approval, indicating how Florida plans to bring its policies and practices into compliance with the OAA. We received a response from Florida on September 30, 2011, and we are pleased to see that Florida DOEA has indicated its willingness to take actions to ensure the integrity of the Long-Term Care Ombudsman Program. We look forward to reviewing the proposed revisions to DOEA policies and procedures.

In conclusion, AoA's goal is for the State of Florida to have a Long-Term Care Ombudsman Program with credibility and independence to effectively represent the interest of long-term care residents and that fully complies with Federal law. The State Ombudsman must clearly represent the interests of residents without being seen as biased toward the interests of facility ownership,

regulatory agencies, or any other entity. The Ombudsman Program's effective representation of residents' interests is critically important for legislators to fulfill your duties to your constituents, for facilities to respond to the needs of their residents, and for residents and their families to know they truly have an advocate on their side.

AoA stands ready and committed to support Florida to take the steps needed to come into compliance and support its Long-Term Care Ombudsman Program to fulfill all of the requirements of the OAA.

Sincerely,


Becky A. Kurtz

Director

Office of Long-Term Care Ombudsman Programs

**Administration on Aging
Department of Health and Human Services**

**Compliance Review of the
State of Florida Long-Term Care Ombudsman Program**

September 1, 2011



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EXECUTIVE SUMMARY

In February and March, 2011, the Secretary of Health and Human Services and the Administration on Aging (AoA) received multiple requests for investigation of the actions of the State of Florida, alleging improper interference with the direction of the Florida Long-Term Care Ombudsman Program (LTCOP) which prevented the LTCOP from carrying out its statutory mission under the Older Americans Act (OAA). As a result, AoA conducted this Compliance Review to determine whether the program is in compliance with the OAA.

The review was preceded by extensive periodic and special-purpose Technical Assistance communications and sessions offered to the States including Florida. Additionally, the AoA Regional Offices are available to provide more targeted Technical Assistance as needed or requested by a State.

The compliance review included interviews of employees of the LTCOP, leadership of the Florida Department of Elder Affairs (DOEA), and local ombudsman volunteers including members of the State Long-Term Care Ombudsman Council. Additionally, pertinent documentation was reviewed. The compliance review was met with cooperation across the board.

In the course of conducting interviews and examining documentation, it became clear that the Compliance Review should most appropriately focus on certain overarching compliance issues which prevent LTCOP operations from complying with the OAA requirements. These overarching issues make an effective assessment of the LTCOP's activities, as distinct from DOEA's policies, very difficult due to the LTCOP's lack of independence. The review identified one opportunity for program improvement specific to LTCOP operations that could appropriately be determined despite the overarching issues.

The Compliance Review determined that under the Older Americans Act the State of Florida acted improperly with respect to the following issues:

- Designation of local ombudsman volunteers – The State requires that all ombudsman volunteers be approved by the Secretary of the Florida Department of Elder Affairs. The Secretary also de-designates local ombudsman volunteers. The selection and designation of volunteers must be the purview of the State Long-Term Care Ombudsman (LTCO), and it must be clear to the volunteers that they work for and are answerable only to the LTCO on issues related to the LTCOP. The State is therefore not in compliance with section 712(a)(5) the OAA.
- Legislative advocacy – The State (1) controls the interactions of the LTCO with the legislature through the DOEA Office of Legislative Affairs, (2) denies the LTCO permission to register in order to conduct legislative advocacy as is reportedly required under Florida law, and (3) requires that the LTCO receive prior approval from DOEA and the Executive Office of the Governor before making legislative proposals. While we encourage ombudsman programs to have excellent lines of communication with their state agency to avoid blind-side surprises, the LTCO must be able to analyze, comment on and make recommendations on laws, regulations, policies and actions of government entities, in order to advocate for residents and their interests. The State is therefore not in compliance with section 712(a)(3)(G) and 712(h)(2)-(3) of the OAA.
- Information Dissemination – The State (1) requires the prior approval of LTCOP press releases by the DOEA and, if determined necessary, the Executive Office of the Governor, and (2) historically has used orders and intimidation to ensure the cancellation of press conference activities. While we encourage ombudsman programs to have excellent lines of communication with their state agency to avoid blind-side surprises, the

LTCO must be able to communicate with the media in order to advocate for residents and their interests. The State is therefore not in compliance with section 712(h)(3) of the OAA.

In these areas of non-compliance, AoA is requesting that the State of Florida submit within 30 days a plan of correction for AoA review and approval. In the plan, Florida should indicate how the State agency plans to bring its policies and practices into compliance with the OAA.

In addition, the compliance review revealed areas of concern to the AoA for which further guidance to the States is needed. In the following areas, AoA intends to provide additional guidance to States. While AoA determines that the State of Florida did not adhere to the spirit of the OAA, it is not making a compliance determination on the following issues:

- Appointment and Removal of the State Long-Term Care Ombudsman – Florida appears to have used the State’s appointment authority to control determinations which are the independent responsibility of the LTCO, contrary to the spirit of the OAA. This action raised troubling concerns regarding the ability of the LTCOP to independently and effectively advocate on behalf of residents. The “Office of the State Long-Term Care Ombudsman” is to be headed by a “State Long-Term Care Ombudsman” who must be allowed to make determinations as to the most appropriate direction for the program based on the observations, analyses and recommendations of the program. In order to make a compliance finding, however, AoA sees the need to provide additional clarification to the states regarding the concept of the “Office of the State Long Term Care Ombudsman” in relation to the State agency.
- Licensing Rule Promulgation – By placing responsibility for promulgation of facility licensure rules in the agency that is also tasked with the

appointment and removal of the LTCO who in turn is responsible in part for assessing the adequacy of facility licensure rules, Florida has created an organizational conflict of interest. The OAA indicates that the appointment and removal of the LTCO must be free from conflict of interest. However, in order to make a compliance finding, AoA sees the need to provide additional clarification to the states to help states properly identify and remedy conflicts of interest.

The LTCOP itself has an opportunity for improvement that does not rise to the level of a compliance issue as follows:

- Program Coordination – The LTCOP conducts only episodic coordination with other advocacy organizations and law enforcement. The LTCOP should coordinate with these entities through more regular consultation and mutual education on respective issues of these organizations.

This report concludes that the State of Florida, as openly asserted by DOEA leadership, does not support the spirit of the OAA that the LTCO has the independence to take positions representing the interests of long-term care facility residents which may be contrary to the positions of DOEA, sister agencies or the Governor. As a result, the LTCOP has been severely limited in its ability to carry out its mission under the OAA to advocate for residents and their interests. AoA contends that the Act establishes the LTCOP to be an independent advocate with the sole focus of residents and their interests without “willful interference, retaliation and reprisals.”

This review finds the State is not in compliance with the OAA in the specific areas of volunteer appointment and removal, legislative advocacy and information dissemination as discussed in more detail herein. This review highlights the need to provide states with additional guidance regarding the meaning of “Office of the State Long Term Care Ombudsman” and regarding conflicts of interest to ensure the independence, credibility, and integrity of the LTCO.

FLORIDA LONG-TERM CARE OMBUDSMAN

COMPLIANCE REVIEW

INTRODUCTION

In February and March, 2011, the Secretary of Health and Human Services and the Administration on Aging (AoA) received multiple requests for investigation of the actions of the State of Florida, alleging improper interference with the direction of the Florida Long-Term Care Ombudsman Program (LTCOP) which prevented the LTCOP from carrying out its federal statutory mission.¹ As a result, AoA conducted this Compliance Review to determine whether the program is in compliance with the Older Americans Act (OAA).²

The review was preceded by extensive periodic and special-purpose Technical Assistance communications and sessions offered to the States including Florida. This included National Association of States United for Aging and Disabilities (NASUAD) membership training,³ Region IV LTCOP training,⁴ communication of relevant Technical Assistance provided to other states, and Region IV quarterly calls with both State Units on Aging (SUAs) and LTCOPs. Additionally, the AoA Regional Offices are available to provide more targeted Technical Assistance as needed or requested by a State.

The compliance review included interviews of employees of the LTCOP, leadership of the Florida Department of Elder Affairs (DOEA), and local ombudsman volunteers

¹ E.g., Voices for Quality Care Letter, February 14, 2011; National Association of State Long-Term Care Ombudsman (NASOP) Letter, February 17, 2011; The National Consumer Voice for Quality Long-Term Care Letter, February 18, 2011; Brian Lee E-mail, March 1, 2011; Long-Term Care Ombudsman Council, Executive Committee Letter, March 9, 2011

² 42 U.S.C. Sections 3001 et seq.

³ September 2010

⁴ November 2010

including members of the State Long-Term Care Ombudsman Council. Additionally, pertinent documentation was reviewed. The compliance review was met with cooperation across the board.

In the course of conducting interviews and examining documentation, it became clear that the Compliance Review should most appropriately focus on certain overarching compliance issues which prevent LTCOP operations from complying with the OAA requirements. These overarching issues make an effective assessment of the LTCOP's activities, as distinct from DOEA's policies, very difficult due to the LTCOP's lack of independence. The review identified one opportunity for program improvement specific to LTCOP operations that could appropriately be determined despite the overarching issues.

In these areas of non-compliance, AoA is requesting that the State of Florida submit within 30 days a plan of correction for AoA review and approval. In the plan, Florida should indicate how the State agency plans to bring its policies and practices into compliance with the OAA.

I. ORGANIZATION & STRUCTURE

The State of Florida has established and operates the Long-Term Care Ombudsman Program (LTCOP) directly through the Florida Department of Elder Affairs (DOEA), a constitutionally established cabinet level agency reporting to the Governor and led by a Secretary appointed by and serving at the discretion of the Governor.⁵ The LTCOP is established as a bureau of the DOEA headed by the LTCO and who reports to the Director of Internal and External Affairs who in turn reports to the Secretary.⁶ Other administrative divisions within DOEA, pertinent to this report, include the Office of the General Counsel, the Bureau of Legislative Affairs and the Communications Bureau.

⁵ Florida Constitution, Article IV, Section 12

⁶ Appendix: Florida Department of Elder Affairs Organizational Chart

The LTCOP organizational chart⁷ reflects the following four direct reports to the LTCO:

- Deputy State Ombudsman for Operations
- Senior Attorney
- Community Program Manager
- Deputy State Ombudsman for Advocacy & Policy

The Senior Attorney was the Acting LTCO from February 7, 2011, through May 2, 2011. The position of Deputy State Ombudsman for Advocacy & Policy is vacant at the time of this review. The central office of the LTCOP in Tallahassee Florida consists of 17 positions of which 8 (42%) are vacant.

The state is divided into 3 regions designated as North, Central and South Regions. These regions are headed by three Regional Ombudsman Managers (ROM) that are located in their respective regions. Each of the three regions is divided into 5 or 6 districts for a total of 17 districts each headed by a District Ombudsman Manager (DOM). Of the 17 DOM positions, 2 are vacant for a total of 15 DOMs. The 17 Districts are allocated a total of 36 positions of which 19 positions are vacant. This results in 17 District support staff or 1 support staff per District. A total of 258 volunteers serve as local ombudsmen across 17 districts.⁸

II. STATE AGENCY ROLE AND RESPONSIBILITIES

The LTCOP has a unique function. It is intended to give a voice to residents who might otherwise have no voice or might feel incapable of addressing issues of grave concern to them and their wellbeing. The ombudsman concept is designed to function within a system whose primary purpose is not necessarily aligned with that of the ombudsman's

⁷ Appendix: Florida Long-Term Care Ombudsman Organizational Chart

⁸ Appendix: Florida Long-Term Care Ombudsman Volunteer Counts

mission but which will provide the ombudsman with the administrative support it requires to function.

There are certain absolutely essential and generally recognized characteristics of any ombudsman program:

- *Independence*
- *Impartiality in conducting inquiries and investigations, and*
- *Confidentiality.*⁹

The OAA recognizes and incorporates these principles as foundational to the LTCOP.¹⁰ These principles are required to adequately address potential conflicts between the program and the parent organization, as well as to reassure people of confidentiality when they seek to access the LTCOP. The State's responsibilities under the OAA consist of creating and maintaining the environment within which the LTCOP operates. The State's responsibilities are designed to facilitate the program's operation in part by insulating it from outside influences so that the LTCOP may advocate with a focus solely on residents and their interests. The State's responsibility to ensure the program's independence is a fundamental prerequisite to the viability of the program. In pertinent part, the OAA recognizes that it is the State's responsibility to:

- Appoint a LTCO with experience and expertise in long-term care and advocacy
- Establish and operate the program directly or by contract
- Establish policies and procedures for monitoring local ombudsmen
- Ensure ombudsman access to facilities, residents and records by establishing procedures
- Establish a statewide reporting system
- Establish procedures for disclosure of sensitive information

⁹ *Standards for the Establishment and Operation of Ombuds Offices*, American Bar Association, August 7, 2001

¹⁰ OAA Section 712

- Ensure the absence of conflicts of interest
- Establish and specify in writing mechanisms to identify and remove conflicts of interest
- Ensure adequate legal counsel is available to the program and legal representation to ombudsman when carrying out their duties
- Ensure that willful interference shall be unlawful.¹¹

Correspondingly, the OAA places in the LTCOP responsibility for the direction of the program including in terms of individual advocacy, issue advocacy and strategy. In these matters, the direction in which the program proceeds is determined by the LTCOP's determination of the most appropriate approach to advocating for residents and their issues. In pertinent part, the OAA requires the LTCOP carry out the following duties, among others, within the protective environment required to be created by the State:

- Analyze, comment on and monitor the development and implementation of laws
- Recommend changes in laws, regulations, policies and actions
- Represent the interests of residents before governmental agencies and seek administrative, legal and other remedies
- Designate and train local ombudsmen
- Identify, investigate and resolve complaints
- Provide services to assist residents in protecting their health, safety, welfare, and rights.
- Inform residents about means for obtaining services
- Ensure regular and timely access to ombudsman services
- Provide administrative, technical assistance and training to local ombudsmen
- Promote the development of citizen organizations to participate in the program
- Provide technical support for the development of resident and family councils.¹²

¹¹ OAA Section 712(a), (c), (d), (f), (g), and (j)

¹² OAA Section 712(a)(3), (h)

The OAA envisions the State to set up the field of play and then step back to allow the LTCOP “team” to independently call the plays within the boundaries set forth by the statute. The direction of the program is the responsibility of the LTCO once the State has established the requisite protections such as those related to LTCOP independence and adequate legal counsel without conflict.

A. FINDINGS OF NON-COMPLIANCE

1. DESIGNATION OF LOCAL OMBUDSMAN VOLUNTEERS

Local ombudsman volunteers who dedicate their time and effort to giving back to their community are the backbone of Florida’s ombudsman program. Using their specific training under the oversight of the LTCO the volunteers are the local face, eyes and ears of the program. Under the OAA, the designation of local ombudsman entities and representatives, who may be employees and/or volunteers, is the responsibility of the LTCO.¹³ Volunteer selection and designation by the LTCO is critical to independent and unbiased participation by volunteers as well as to maintaining the volunteers’ clarity of purpose and program direction.

The designation of volunteer ombudsmen in the Florida LTCOP is coordinated by a LTCOP coordinator who is a direct administrative report to the LTCO. Following the completion of a Volunteer Application, Conflicts Check and Criminal Background Check the LTCO forwards the application to the Secretary of DOEA for review and approval of the application. A volunteer cannot become a local ombudsman without approval by the Secretary of DOEA. Upon certification by the DOM that the applicant has completed the initial training the LTCO approves the volunteer as qualified to carry out ombudsman activities on behalf of the Office of the State Long-Term Care Ombudsman.

¹³ OAA Section 712(a)(5)(A)

On April 28, 2011, the Secretary of DOEA de-designated at least one local ombudsman volunteer who served on the State Long-Term Care Ombudsman Council for an exchange of e-mail correspondence with another ombudsman volunteer without prior public notice.¹⁴ The basis for the removal was described as a violation of Florida's "Sunshine Law."¹⁵ This Compliance Review addresses the basis for the removal only to the extent of expressing grave concern about the compliance issues raised by a LTCOP structure which, if DOEA has correctly interpreted the referenced statute, would prohibit local ombudsmen from communicating with each other about issues germane to the LTCOP without first providing advance public notice of the intent to have the discussion. The method of de-designation is discussed below.

The Secretary of DOEA effectively serves as a gatekeeper for volunteers who apply to become local ombudsmen, leading volunteers to believe that the Secretary of DOEA is the ultimate authority for their participation in the LTCOP. This perception is further reinforced by the practice of the Secretary of DOEA acting to de-designate ombudsman volunteers as discussed above. These practices usurp the authority and responsibility of the LTCO to designate local volunteers and undermine the representative relationship between the LTCO and local ombudsman representatives, including local ombudsman volunteers.

The State fails to be in compliance with the local ombudsman designation requirements of section 712(a)(5) of the OAA by (1) requiring that all volunteers be approved by the Secretary of the DOEA, (2) allowing the Secretary to de-designate volunteers and (3) maintaining a LTCOP structure which DOEA has asserted has the effect of prohibiting local ombudsmen serving on the State Long-Term Care Ombudsman Council from communicating with each other about LTCOP issues without prior public notice of their intent to communicate. The designation of volunteers, including de-designation of

¹⁴ Appendix: Florida Department of Elder Affairs Letter to Lynn Dos Santos, April 26, 2011

¹⁵ Florida Statutes Section 286.011

volunteers, must be the purview of the LTCO and it must be clear to the volunteers that they work for and are answerable only to the LTCO for LTCOP activities. Finally, serious viability and effectiveness concerns are raised by a local ombudsman structure that creates conditions in which local ombudsmen are prohibited from communicating with each other about LTCOP issues outside of a Council meeting without providing advance public notice of the intent to communicate.

2. ISSUE ADVOCACY

The OAA requires a LTCOP to pursue issue advocacy in addition to individual advocacy.¹⁶ The Older Americans Act sets forth the respective responsibilities of the State agency and the LTCO with regard to issue advocacy. As discussed above, though carrying out issue advocacy is solely the responsibility of the LTCO, the State must affirmatively require the LTCOP to carry out issue advocacy¹⁷ and logically may not simultaneously erect barriers to the advocacy.

From an operational perspective, compliance by the State agency that houses the LTCOP is a critical precondition to the LTCO being able to carry out issue advocacy, including legislative advocacy and information dissemination, under the OAA. A state's support is especially important in states where state employees would be required to register as a lobbyist under state law to conduct legislative issue advocacy and would need the state's cooperation for that registration.¹⁸

In pertinent part, the LTCOP is required to conduct analysis, commentary and monitoring of the development and implementation of:

- Federal laws
- State laws

¹⁶ OAA Section 712(a),(h)

¹⁷ OAA Section 712(h)

¹⁸ See Florida Statute Sections 11.045 and 11.061

- Local laws
- Regulations
- Other government policies and actions

Which pertain to the State's:

- Long-term care facilities and services
- Resident health
- Resident safety
- Resident welfare
- Resident rights.¹⁹

Legislative Advocacy

As discussed in detail above, the OAA explicitly requires the LTCOP to monitor, analyze and comment on the development and implementation of state laws.²⁰ Furthermore, the OAA requires that the LTCOP make recommendations to legislators.²¹

The State of Florida has a bicameral legislature that meets annually in Tallahassee a few miles from the DOEA. The DOEA Bureau of Legislative Affairs is a sister-bureau to the LTCOP. The licensing agency for Nursing Homes, Assisted Living Facilities and Board & Care Homes is the Florida Agency for Health Care Administration (AHCA) a cabinet-level sister agency to DOEA. Interviewees, including DOEA management, were in general agreement that Florida law considers legislative issue advocacy of the type required by the OAA to be lobbying²² and requires that anyone, including state employees, conducting such activities register as a lobbyist.²³

¹⁹ OAA Section 712(a)(2)(G)

²⁰ OAA Section 712(h)(2), 712(a)(3)(G)(i)

²¹ OAA Section 712(h)(2), 712(a)(3)(A)

²² Florida Statutes Section 11.045(1)(f)

²³ Florida Statutes Section 11.045(2)

The DOEA has an explicit policy prohibiting the LTCO from conducting legislative advocacy at the State Legislature including on issues pertaining to “long-term care facilities and services, and to the health, safety, welfare, and rights of residents” despite OAA requirements that the LTCO has a duty to perform activities such as making recommendations to legislators. DOEA justified this policy by stating that “no Governor’s Office has ever permitted the LTCO to lobby.” While legislative advocacy is a mandatory requirement of the OAA regardless of state decisions to the contrary, it is worth noting that LTCOP Annual Reports from 1994, 1999 and 2000 indicate that legislative advocacy at some level did occur during those years.

Multiple interviewees from DOEA and the LTCOP indicated that in the recent past at least one DOEA Secretary had prohibited the LTCO from ever being present at the Legislature at any time. Current practice appears to be that the presence of the LTCO at the Legislature is subject to the approval of the DOEA legislative staff. Testimony before legislative committees is likewise subject to whether the DOEA legislative staff determine such testimony is in the interests of DOEA.

It is the policy of the DOEA that any legislative proposal by the LTCOP must first be reviewed and approved by DOEA and Governor’s Office before the proposal can receive further exposure. This process makes very clear that the State does not see any conceptual or procedural separation between the legislative interests and actions of the LTCOP and those of DOEA. In order for any LTCOP legislative proposal to receive exposure outside of DOEA, it must be approved by DOEA and the Governor’s Office, and must not “reflect badly” on DOEA. The end result of this process is that legislative proposals which the LTCOP determines, based on experience and expertise, are in the best interests of the health, safety, welfare and rights of residents may never reach the attention of the legislature.

LTCO staff indicated that current practice is that, at the discretion of DOEA legislative staff, the LTCO will occasionally be present in the gallery of legislative committee

meetings. Similarly, testimony by the LTCOP before legislative committees occurs only at the discretion of DOEA legislative staff. The LTCOP's lack of independence to determine when it should provide testimony can result in legislative committees hearing from the industry and the facility licensing agency but not from the LTCOP on issues pertaining to "long-term care facilities and services, and to the health, safety, welfare, and rights of residents." When DOEA permits the LTCOP to testify it is invariably in support of DOEA's position or at the very least deemed to be consistent with the interests of DOEA. Consequently legislative advocacy on behalf of residents and their interests is not conducted by the LTCO as required by the OAA.

The legislative advocacy environment created by DOEA for the LTCOP all but ensures that legislative proposals introduced at the behest of other interest groups are not subject to independent advocacy by the LTCOP. As a result of the DOEA's prohibitions against an independent LTCO presence at the Capitol, the LTCOP is required by DOEA to rely on the DOEA's legislative staff to be alerted to relevant proposals introduced by other interests. DOEA's legislative staff is independent of the LTCOP and the staff is tasked with representing the interests of the DOEA and the legislative platform approved by the Governor's Office.

The OAA requires the LTCO to monitor, analyze, comment on and ultimately make recommendations to legislators on the development and implementation of state laws.²⁴ The State fails to comply with the legislative advocacy requirements of section 712(a)(3)(G), and 712(h)(2)-(3) of the OAA by:

- Prohibiting the LTCO from carrying out its mandate to conduct issue advocacy with legislators.
- Prohibiting the LTCO from complying with the Florida law requirement that the LTCO register as a lobbyist before it may begin conducting legislative advocacy.

²⁴ OAA Section 712(h)(2),(3)

In order to be in compliance with the OAA, the State must allow the LTCO to:

- Conduct issue advocacy with legislators.
- Register as a lobbyist so long as Florida law requires registration to conduct legislative advocacy as defined in the OAA.

In addition, we remind the State of Florida of the technical assistance provided to Iowa by AoA on this issue in 2010, including the following guidance:

“The State agency does not have the right to approve the communications that the Ombudsman’s Office chooses to make to policy makers, including a State legislature. However, the OAA does not prohibit you from adopting a policy requiring proposed testimony from being shared in advance, or circulated for comments or in-put, provided that in the end the Ombudsman retains the absolute right to decide what finally should be presented by that Office. Such cooperation and advance communication are implicit in the regulatory provisions which provide that the State agency has the responsibility to ensure that the Office of the State Long-Term Care Ombudsman performs its functions, and may establish policies for, and monitor the performance of, that Office. 45 C.F.R. §§ 1321.9(d); 1321.11. Such cooperation ensures that the SUA and the Ombudsman’s office would not needlessly duplicate their efforts. The SUA may also have valuable information as well as recommendations to contribute which the Ombudsman might decide to accept. Finally, even where the SUA and Ombudsman’s Office ultimately disagree, such advance notice and consultation permit both entities to coordinate their reports to the State legislature, thereby furthering a truly informed debate to the benefit of the legislature and other policy makers.”²⁵

²⁵ Appendix: AoA Region V Memorandum to Iowa State Agency, April 26, 2010

Since that guidance was provided, AoA Region IV has provided training and guidance on multiple opportunities to Florida and other states in Region IV on the issue of LTCO involvement in issues advocacy.

Information Dissemination

Depending on the issue, information dissemination is often one of the most effective ways for the LTCO to conduct issue advocacy on behalf of residents and their interests as well as to provide valuable information to the public. Information dissemination can take the form, for example, of responding to media inquiries or initiating media contact through press releases and press conferences. Effectively conducting information dissemination depends upon the program's ability to freely respond to media inquiries, issue press releases and hold press conferences.

Interviewees from the LTCOP staff and from DOEA leadership pointed to one particular incident in December 2009 as defining the information dissemination environment within which the LTCOP operates. The incident involved attempts by the LTCOP to improve resident living conditions in a particular facility in which the program had determined based on its experience and expertise that conditions were considerably substandard. The LTCOP made attempts to coordinate with the facility licensing agency to address the issues but after some time the LTCO concluded that both the efforts and the results were inadequate. At that point the LTCO determined the most appropriate next step was to pursue information dissemination on the issue. A press conference was scheduled to address the issue. According to several interviewees, including DOEA management and LTCOP staff, the DOEA Secretary ordered the LTCO to cancel the press conference and insisted that it was not to go ahead under any circumstances. According to the interviewees, the reason given for the instruction to cancel the press conference was that going ahead would be embarrassing to the facility licensing agency. The press conference was cancelled. Senior DOEA managers have described the instruction to cancel as being "intimidating" and that it would be reasonable for the

LTCO to have concluded that his job was on the line if the press conference went ahead.

We were unable to identify any effort to correct the effects of the described intimidation which ensured that the former LTCO only carry out his statutory mandate if it would not reflect badly on the DOEA or other sister state agencies.

The current Media Policy continues to make clear that press contacts which could have “potentially negative and/or Department-wide impact” are mandatorily subject to consultation with the DOEA Director of Communications.²⁶ While we strongly encourage LTCOs to make every effort to ensure that the parent agency is not blindsided by the actions of the LTCOP, an effective LTCO is able to determine the approach that best serves the advocacy needs of residents. We find that the content and method of information dissemination would ideally be determined by the LTCOP in the best interests of residents and a mandatory “consultation” with DOEA in advance of responding to media inquiries should not be used to control such information dissemination content or methods.

The current “Florida’s Ombudsman Program Communications Procedures” reinforces the concept that press releases by the LTCOP require prior approval by individuals outside the LTCOP up to and including the Executive Office of the Governor.

“The CPM (LTCOP Community Program Manager) is responsible for writing and releasing statewide releases or advisories and an official approval process is followed prior to release. Always included in the approval process are the State Ombudsman, Division Director and Communications Director. When necessary, additional approval is sought

²⁶ Appendix: Florida’s Ombudsman Program Communications Procedures

from the Secretary of Elder Affairs and/or Executive Office of the Governor through the Communications Director.”²⁷
(parenthesis added)

The State fails to be in compliance with the information dissemination requirements of section 712(h)(3) of the OAA by (1) requiring the prior approval of press releases by the DOEA and, if determined necessary, the Executive Office of the Governor, and (2) the use of orders and intimidation to ensure the cancellation of press conference activities. While we encourage LTCOPs to have excellent lines of communication with their state agency to avoid blind-side surprises, the LTCOP must be able to freely and without the need for prior approval communicate with the media in order to advocate for residents and their interests.

B. ISSUES FOR WHICH AOA PLANS TO PROVIDE FURTHER CLARIFICATION

1. APPOINTMENT AND REMOVAL OF LONG-TERM CARE OMBUDSMAN

It has been alleged that the State of Florida has improperly interfered with the direction of the LTCOP and prevented the program from carrying out its statutory mission, related to the circumstances surrounding the departure of former LTCO Brian Lee from employment with DOEA. Allegations of impropriety have been made by Mr. Lee, the State Long-Term Care Ombudsman Council, and various advocacy groups.²⁸ It is noteworthy that the membership of the Council consists of Ombudsman representatives that were personally reviewed and approved by a sitting Secretary of DOEA, as discussed in more detail below.

²⁷ Id.

²⁸ E.g., Voices for Quality Care letter, February 14, 2011; National Association of State Long-Term Care Ombudsman (NASOP) Letter, February 17, 2011; The National Consumer Voice for Quality Long-Term Care Letter, February 18, 2011; Brian Lee E-mail, March 1, 2011; Long-Term Care Ombudsman Council, Executive Committee Letter, March 9, 2011

The following facts, related to the appointment and removal of the LTCO were established through documentation and interviews with current and former staff of DOEA and the LTCOP.

- On December 27, 2010, the Florida Assisted Living Association sent correspondence to Governor Rick Scott supporting a specific individual for the position of State Long-Term Care Ombudsman at the time that the position was filled by the incumbent LTCO Mr. Brian Lee.²⁹
- On January 27, 2011, LTCO Mr. Lee issued a letter to Florida Nursing Homes requesting ownership information.
- On February 7, 2011, the Executive Office of the Governor advised DOEA that it was time for Mr. Lee “to go” and for the LTCOP to “go in a new direction.” DOEA told Mr. Lee his services were no longer required and that he had until the end of the day to resign or be fired. Mr. Lee resigned and the LTCOP’s Senior Attorney was designated as the acting LTCO.
- On February 9, 2011, DOEA leadership indicated to the AoA that DOEA was unaware why LTCO Mr. Lee resigned.
- Subsequent to the departure of Mr. Lee, the Acting LTCO was advised by DOEA leadership that the fact that the January 27, 2011, letter requesting ownership information was sent out needed to be “fixed.” The Acting LTCO reversed the LTCOP’s direction by issuing a retraction on February 16, 2011.³⁰
- On March 9, 2011, the State Long-Term Care Ombudsman Council, Executive Committee, issued a letter “requesting an investigation by federal and state

²⁹ Appendix: Florida Assisted Living Association Letter, December 27, 2010

³⁰ Appendix: Florida Long-Term Care Ombudsman Program Retraction Letter, February 16, 2011

authorities related to acts of retaliation and willful interference against the former State Long-Term Care Ombudsman, Mr. Brian Edwin Lee, and the Office of the State Long-Term Care Ombudsman.” The letter alleged that “the Governor’s office, the Department of Elder Affairs and long-term care industry representatives have blatantly interfered with [Mr. Lee’s] duties.”³¹

- On March 23, 2011, during AoA’s onsite compliance review, DOEA leadership amended the description given to AoA of Mr. Lee’s departure to acknowledge that it had received instructions from the Executive Office of the Governor (EOG) indicating that “it was time for the Ombudsman Program to go in a new direction” which required a new LTCO.
- On April 5, 2011, the Acting LTCO reversed the LTCOP position taken by former LTCO Mr. Brian Lee on Florida House HB1117, testifying in support of the legislation. Previously, Mr. Lee had opposed the legislation as not being in the interests of facility residents.
- On April 26, 2011, DOEA appointed a replacement LTCO effective May 2, 2011.

The onsite compliance review established the following regarding the circumstances of the departure of the former LTCO:

- The Executive Office of the Governor (EOG) directed DOEA to find a new LTCO, explaining that the EOG wanted the program to “go in a new direction.”
- DOEA contends that Mr. Lee’s departure was no different than the normal turnover with the inauguration of a new Governor.
- DOEA had no replacement for Mr. Lee at the time of his departure and did not appoint a replacement until almost three months later on April 26, 2011.

³¹ Long-Term Care Ombudsman Council, Executive Committee Letter, March 9, 2011

Appointment and removal of the LTCO is within the prerogative of the State. An important caveat to that prerogative is that the State may not use the process of appointment and removal of the LTCO to achieve what the state may not otherwise do under the statute which includes control of LTCOP advocacy and recommendations. To allow a State to control the advocacy and recommendation decisions of the LTCOP by removing and replacing the incumbent LTCO would undermine the OAA, the LTCOP and the fundamental principle of ombudsman independence. Therefore, any decision by the State to hire or fire a LTCO may not be designed to interfere with the LTCOP's ability to carry out his or her duties under the OAA.

On its face, the State's assertion that the removal was part of the normal turn-over of a new Governor holds a certain appeal given the number of state employees replaced by the current and previous incoming Governors. However, the historical record does not appear to support such a conclusion. We have been unable to discern a "turnover" pattern between previous Governors' terms and the service terms of previous LTCOs.³² The lack of apparent historical support for this "turnover" assertion, the State's own assertion of the EOG wanting a new direction for the program and subsequent LTCOP reversals of direction render the turn-over argument unpersuasive. Finally, the concept of replacing an ombudsman as part of Gubernatorial turnover is less than compelling since the principles of LTCO independence and focus on the "health, safety, welfare, and rights" of residents require that the LTCO not be appointed for the purpose of representing a Governor's policy positions.

As discussed above, the State has the authority and responsibility to appoint a qualified LTCO but to allow the State to use this authority to achieve results that are not otherwise within the State's authority and responsibility under the OAA would be contrary to the spirit of the Act. DOEA has asserted that the State requested Mr. Lee's resignation because of a desire by the EOG for the program to go in a "new direction." That this "new direction" required the departure of the LTCO is supported by the Acting

³² Appendix: Florida Governors' Terms and State Long-Term Care Ombudsman Service

LTCO's retraction, within days of being appointed and under pressure from DOEA, of correspondence previously transmitted to nursing homes by the former LTCO Mr. Brian Lee.³³

This Compliance Review does not take any position on the desirability, or lack thereof, of any particular state legislation. However, the reversal of the LTCOP's direction is even further starkly reflected by the Acting LTCO's testimony in support of Florida House Bill 1171 which former LTCO Mr. Brian Lee opposed as not being in the interests of facility residents. It is noteworthy that the position taken by the Acting LTCO conformed the LTCOP to DOEA's position on the legislation. The reversal of the information request to facilities within days of LTCO Mr. Lee's departure and the reversal of legislative advocacy positions within two months of his departure provide tangible evidence of the effect of the State's decision to change the LTCOP's direction.

It is worth noting that leadership at DOEA asserted that at no time were there any personnel performance issues with Mr. Lee. Multiple knowledgeable interviewees including DOEA management characterized Mr. Lee to the effect of being "the most dedicated public servant" they had met. Personnel records tend to support these characterizations. Thus, Mr. Lee's performance does not seem to have been an issue in the request for his resignation. The fact that the State did not have a replacement lined up when it requested Mr. Lee's resignation nor appointed a permanent replacement until almost three months later suggests that the motivation for the State's action appears to have been a desire to stop Mr. Lee from carrying out his duties under the statute rather than a desire to go affirmatively in a "new direction."

We also note that, as discussed in more detail above,³⁴ the departure of the incumbent LTCO caps off a history which DOEA openly acknowledges has not allowed the LTCO to be independent and impartial. Mr. Lee's departure has been a grave blow to a

³³ Appendix: Florida Long-Term Care Ombudsman Program Retraction Letter, February 16, 2011

³⁴ See above: "Issue Advocacy"

program that was already severely limited in its advocacy as discussed below. The confidence of the LTCOP staff and volunteers that they can carry out their statutorily required duties without fear of reprisals is noticeably absent. The current conditions in the Florida LTCOP are having a chilling effect on carrying out ombudsman duties required by the OAA and will likely affect the confidence that residents have in the program.

In multiple sections of the OAA, there are references to the importance of the determinations of the “Office of the State Long-Term Care Ombudsman.”³⁵ AoA has provided guidance to states regarding its understanding that the term “Office” (which the OAA indicates is to be “headed by” the State LTCO), means the Office held by the State LTCO. AoA has concluded that, if the “Office” equates to the State LTCO and his or her representatives, then it is only logical that determinations of the Office are the same as determinations of the State LTCO.³⁶ However, AoA understands that there has been a

³⁵ See, e.g., OAA Section 712(a)(3) FUNCTIONS.—**The Ombudsman . . . shall, personally or through representatives of the Office— . . .**

(G)(ii) recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate;”

Section 712 (h) ADMINISTRATION.—The State agency shall require the Office to—...

(2) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;

(3)(A) provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding—

(i) the problems and concerns of older individuals residing in long-term care facilities; and

(ii) recommendations related to the problems and concerns; . . .”

(emphasis added)

³⁶ Appendix: AoA Region V Memorandum to Iowa State Agency, April 26, 2010, which states in pertinent part:

“ The State Unit on Aging (SUA) and the Office of the State Long Term Care Ombudsman are distinct entities within the OAA. Section 305(a) of the OAA, requires the State to designate a single State agency to carry out the requirements of the Act. Section 712 requires the single State agency to ‘establish and operate an Office of the State Long-Term Care Ombudsman.’ To satisfy this requirement, the State agency ‘may establish and operate the Office, and carry out the program, directly, or by contract or other arrangement with any public agency or nonprofit private organization.’ Also, 45 C.F.R. § 1321.9(c) provides: ‘(c) The State agency shall have within the State agency, or shall contract or otherwise arrange with another agency or organization, as permitted by section 307(a)(12)(A), an Office of the State Long-Term Care Ombudsman, with a full-time State

lack of uniform understanding around the interpretation of the term “Office” in Section 712 of the OAA. As a result, AoA sees a need to provide further guidance to states.

This review concludes that the evidence indicates that the State of Florida caused the resignation of the incumbent LTCO in order to reverse decisions of the LTCO. The record to date suggests that the strategy has been successful in reversing positions held by the LTCOP. We believe that the State’s actions violate the spirit of the OAA, and we are troubled by the repercussions of those actions on the LTCOP and future advocacy on behalf of residents.

However, we are unable to make a determination of the State of Florida’s compliance because we have not previously provided adequate foundational guidance to the states regarding the concept of the “Office of State Long Term Care Ombudsman” in relation to the State agency. This clarification will be pursued by AoA upon conclusion of this review.

2. LICENSING RULE PROMULGATION

Section 712(f)(1) of the OAA provides as follows:

(f) CONFLICT OF INTEREST.-The State Agency shall-
(1) ensure that no individual, or member of the immediate family of an individual, involved in the designation of the Ombudsman (whether by appointment or otherwise) or the designation of an entity designated under subsection (a)(5), is subject to a conflict of interest;

ombudsman and such other staff as are appropriate. Whether the Long-Term Care Ombudsman is placed within the single State agency, or by contract with an entity outside the State agency, the OAA is explicit that the Long-Term Care Ombudsman is to be established in, and is to carry out his or her functions, in a separate ‘Office.’ 42 U.S.C. §§ 3058f(1); 3058g(a)(1)(A).”

Florida law provides that DOEA shall promulgate “rules establishing standards” related to the licensing of Assisted Living Facilities.³⁷ DOEA has promulgated Chapter 58A-5, Florida Administrative Code, addressing licensure requirements, standards, policies and procedures. Florida law also provides that DOEA shall promulgate “rules establishing standards relating to adult family-care homes” related to the licensing of Adult Family-Care Homes.³⁸ DOEA has promulgated Chapter 58A-14, Florida Administrative Code, addressing licensure requirements, standards, policies and procedures.

Concurrent responsibility for both appointment of the LTCO and the promulgation of facility licensing rules presents a direct inherent conflict of interest. The DOEA has a vested interest in the adequacy of the licensing rules it promulgates. The LTCO is charged with advocacy on behalf of residents which includes making recommendations regarding the adequacy of licensing regulations and the standards that facilities are held to. As a result, the DOEA is put in the position of appointing the LTCO that is expected to make independent determinations that implicate the adequacy of DOEA’s own facility standards which it has established through rule promulgation. This creates a direct and inherent conflict of interest.³⁹ The appointment and removal of the LTCO must be free from conflict of interest

AoA sees the need to provide foundational guidance to states regarding both the identification of and the process for remedying conflicts of interest pursuant to section 712(f) of the OAA. In order to make a compliance finding, additional clarification to the states is needed on conflicts of interest, and will be pursued by AoA upon conclusion of this review.

³⁷ Florida Statutes Section 429.41

³⁸ Florida Statutes Section 429.73(1)

³⁹ OAA Section 712(f)(1)

III. PROGRAM REQUIREMENTS

A. OPPORTUNITY FOR CONTINUED IMPROVEMENT

1. PROGRAM COORDINATION

The OAA requires that the LTCOP coordinate with other specified entities.⁴⁰ Coordination with other advocacy entities facilitates the leveraging of resources and facilitates effectively addressing resident co-occurring issues. Coordination with local law enforcement and courts of competent jurisdiction ensures that there is the familiarity and understanding necessary for those entities to both support the activities of LTCOP and to adequately respond to the types of resident issues raised by LTCOP advocacy. The LTCOP has an opportunity for improvement with regard to the coordination requirements of the OAA as a result of conducting only episodic coordination with other advocacy organizations and law enforcement. It is unclear whether this is a symptom of the LTCOP's lack of independence and the DOE's limitations on LTCOP duties. However, the LTCOP should make a concerted effort to coordinate with the entities

⁴⁰ OAA Section 712(h) *ADMINISTRATION*. -- *The State agency shall require the Office to. . .*

(6) coordinate ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illnesses established under—

(A) subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000; and

(B) the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. 10801 et seq.);

(7) coordinate, to the greatest extent possible, ombudsman services with legal assistance provided under section 306(a)(2)(C), through adoption of memoranda of understanding and other means;

(8) coordinate services with State and local law enforcement agencies and courts of competent jurisdiction

....

described above through regular consultation and mutual education on issues related to residents and their interests.

INDEX OF ABBREVIATIONS

AoA – U.S. Administration on Aging

DOEA – Florida Department of Elder Affairs

DOM – District Ombudsman Manager

EOG – Executive Office of the Governor

LTCO –State Long-Term Care Ombudsman

LTCOP – Long-Term Care Ombudsman Program

NASUAD – National Association of States United for Aging and Disabilities

OAA – Older Americans Act

ROM – Regional Ombudsman Manager

Appendices

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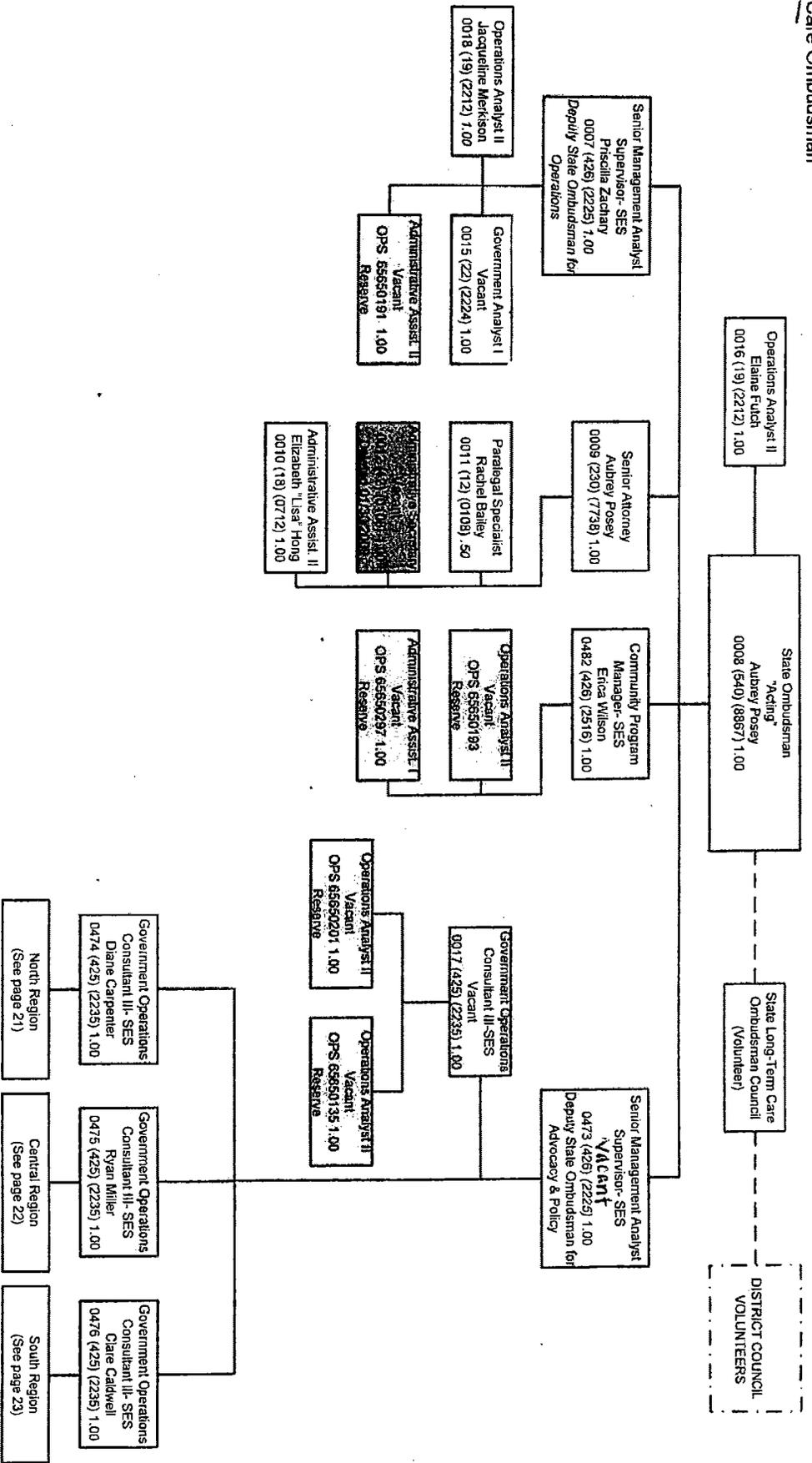
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District #	District Name	Volunteer Count
1	Northwest Florida	4
2	Panhandle	12
3	North Central Florida	7
4	Withlacoochee Area	21
5	First Coast	16
6	Mid & South Pinellas	14
7	Pasco & North Pinellas	21
8	West Central Florida	12
9	East Central Florida	28
10	Southwest Florida	21
11	Palm Beach County	12
12	Broward County	24
13	North Dade	8
14	South Dade & FL Keys	17
15	First Coast South	9
16	Treasure Coast	16
17	South Central Florida	19
	Total Volunteer Count =	258



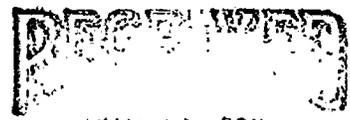
Florida Assisted Living Association

APPT'S
GOS

Promoting Excellence in Assisted Care Communities

December 27, 2010

The Honorable Rick Scott
Governor Elect
The Capitol, PL 05
400 South Monroe Street
Tallahassee, Florida 32399-0001



JAN 18 2011

GOVERNOR'S APPOINTMENTS
OFFICE

OFFICE OF THE
CITIZEN
11 JAN -5 PM 2:17

Dear Governor Elect Scott:

On behalf of the Florida Assisted Living Association's (FALA) Executive Committee please accept this letter of support for Robert Stephen Emling for the position of State Long Term Care Ombudsman. FALA is the largest association in Florida representing assisted living facilities and adult family care homes with more than 700 members that care for more than 33,000 frail elderly and disabled Floridians. FALA provides comprehensive legislative and regulatory representation before the Florida Legislature and the state agencies that regulate these facilities. In addition, FALA provides education to administrators and direct care staff.

Mr. Emling has over sixteen years of employment with the State of Florida. His current assignment is with the Agency for Health Care Administration (AHCA) as the Field Office Manager for Area 11 in Miami. Steve has effected a positive change in that area by proactively opening lines of communication through regularly scheduled meetings with the provider community and state and local agencies. Past roles have included working as the Ombudsman Coordinator for Area 8 with the Department of Elder Affairs and as a human service counselor and case manager for the Department of Children & Families. Prior to his employment with the State of Florida he spent seventeen years in the coal mining industry in various regulatory and management roles and has been a small business owner. Steve earned his Bachelor of Science Occupational Education from Southern Illinois University in Carbondale, Illinois. He is a United States Air Force Veteran. Steve has balanced advocating for Florida's frail elderly seniors while enriching a close working relationship with caregivers to continuously improve care and services.

FALA believes and supports the primary mission of The Long Term Care Ombudsman program which is to serve as a resident advocate. Steve has conveyed his commitment to this mission during our conversations with him and we believe that he would be an asset to the program.

Please feel free to contact me directly if you have any questions. Thank you for your consideration.

Sincerely,

Patricia Lange
Executive Director

cc: FALA Board of Directors



Florida's Long-Term Care OMBUDSMAN PROGRAM

Our 2 cents is no small change

35 years of changing residents' lives through quality advocacy

February 15, 2011

Administrator
Facility
Address
City, State Zip

Dear Administrator,

RICK SCOTT
GOVERNOR

The Long-Term Care Ombudsman Program appreciates the responses it has received from nursing homes across the state committed to providing quality long-term care to their residents. As you are aware, Former State Ombudsman, Brian Lee, recently requested information on the governing body of each nursing home in Florida pursuant to Title 42, United States Code, section 1320a-3 (2010).

CHARLES T. CORLEY
TERRIM SECRETARY

Given several recent events, including the federal district judge's ruling in *Florida ex rel Bondi v. U.S. Department of Health and Human Services*, No. 3:10-cv-91-RV/EMT 2011 U.S. Dist. Westlaw 285683 (N.D. Fla. Jan. 31, 2011), the Program is no longer requesting this information from each nursing home. A copy of the original letter is attached for your reference. Please feel free to contact the Program's representatives at (850) 414-2323 should you have any questions.

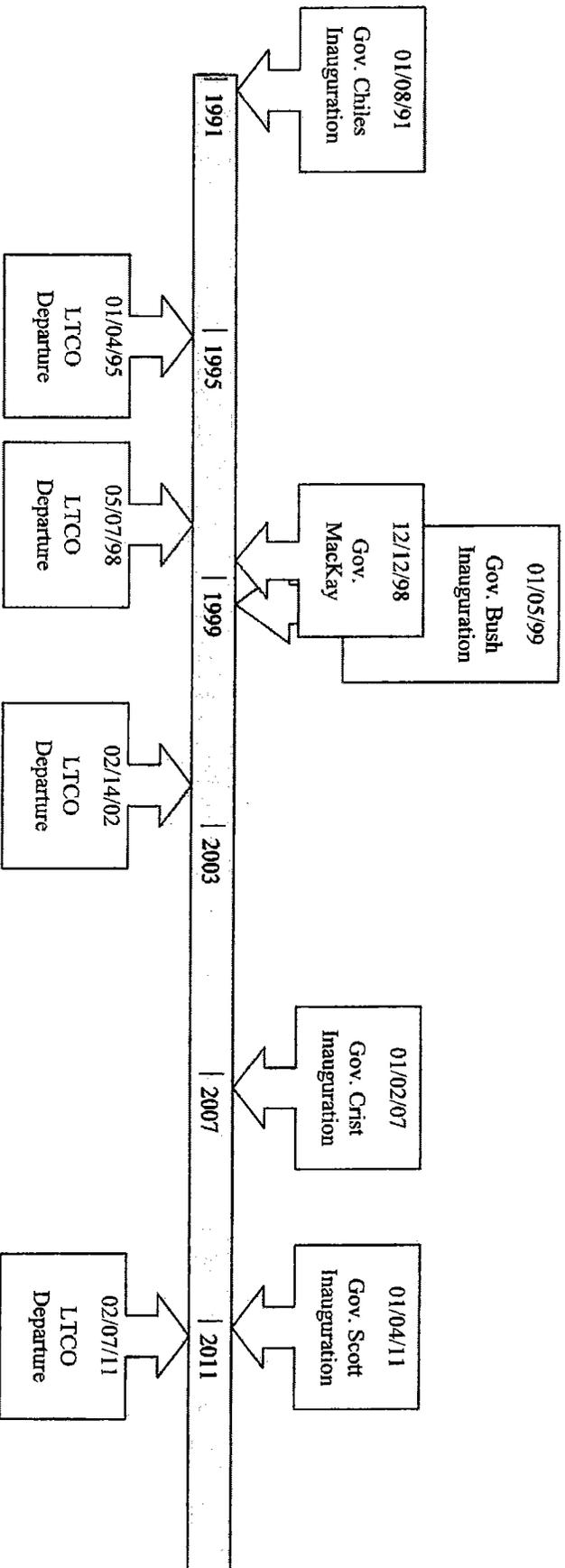
AUBREY POSEY, ESQ.
ACTING STATE LONG-TERM
CARE OMBUDSMAN

Sincerely,

Aubrey Posey, Esq.
Acting State Ombudsman

Toll-free 1-888-831-0404
4040 Esplanade Way
Tallahassee, FL 32399-7000
ombudsman.myflorida.com

Governor Inauguration & LTCO Departure Timeline



DEPARTMENT OF

April 26, 2011

**ELDER
AFFAIRS**
STATE OF FLORIDALynn Dos Santos
2158 Date Palm Way
Venice, Florida 34292

Dear Ms. Dos Santos,

RICK SCOTT
GOVERNOR

After careful consideration of information I have received regarding multiple, sequential violations of the Sunshine Law, I am regretfully compelled to de-designate you as a local council member.

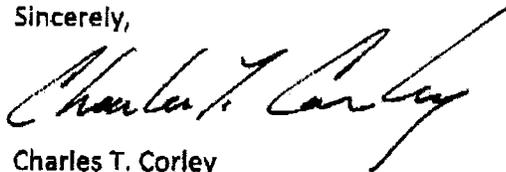
CHARLES T. CORLEY
INTERIM SECRETARY

On April 1, 4, 5, 12, 17, 20, and 26, 2011, you originated or participated in a series of email exchanges which violated section 286.011, Florida Statutes, in that there were discussions between State Council members regarding business that arguably would be discussed during a council meeting. On April 15, 2011, and again on April 22, 2011, Aubrey Posey, the Acting Statewide Long Term Care Ombudsman and Legal Advocate for the program, advised you that your conduct violated the Sunshine Law and further advised you to cease such violations. You have continued to engage in conduct which violates the Sunshine Law. Accordingly, pursuant to section 400.0069(5)(b), Florida Statutes, your appointment to the Southwest District Council is hereby rescinded.

Please return your credentials and all other relevant ombudsman materials to Ann Proie at the Southwest District Office, 2295 Victoria Avenue, Room 152, Fort Myers, Florida 33901, upon receipt of this letter.

On behalf of residents, thank you for your service,

Sincerely,

Charles T. Corley
Interim Secretary

cc: Ann Proie, Southwest District Ombudsman Manager
Valerie Healey, Southwest District Chair
Del Fields, State Council Vice-Chair

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DEPARTMENT OF HEALTH & HUMAN SERVICES

**Office of the Secretary
Administration on Aging
Region V & VII**

**233 N. Michigan Avenue
Suite 790
Chicago, Illinois 60601**

April 26, 2010

TO: John McCalley
Director

FROM: Jim Varpness
Regional Administrator

During our March 22, 2010, meeting in Des Moines we learned of your Department's policy that effectively prohibits the State Long-Term Care Ombudsman from directly communicating with legislators and specifically requires that any testimony or information provided to legislators be approved prior to submission. As a follow up to that meeting you provide us with a copy of the policy, which we reviewed and find to be inconsistent with the Older Americans Act Long-Term Care Ombudsman provisions.

The Older Americans Act (OAA) establishes that a State Long-Term Care Ombudsman should be allowed to independently determine what testimony or information should be provided to a State legislature, and therefore, a State Director may not impose a requirement of advance approval for the submission of such testimony or information, or otherwise act to prevent testimony or information from being submitted

During our April 7, 2010 call, you asked that we provide you with information explaining specifically why you may not pre-authorize or prohibit the State Ombudsman from providing testimony or written information to the State legislature regarding issues directly relating to her program responsibilities under the OAA.

The State Unit on Aging (SUA) and the Office of the State Long Term Care Ombudsman are distinct entities within the OAA. Section 305(a) of the OAA, requires the State to designate a single State agency to carry out the requirements of the Act. Section 712 requires the single State agency to "establish and operate an Office of the State Long-Term Care Ombudsman." To satisfy this requirement, the State agency "may establish and operate the Office, and carry out the program, directly, or by contract or other arrangement with any public agency or nonprofit private organization." Also, 45 C.F.R. § 1321.9(c) provides:

(c) The State agency shall have within the State agency, or shall contract or otherwise arrange with another agency or organization, as permitted by section 307(a)(12)(A), an Office of the State Long-Term Care Ombudsman, with a full-time State ombudsman and such other staff as are appropriate.

Whether the Long-Term Care Ombudsman is placed within the single State agency, or by contract with an entity outside the State agency, the OAA is explicit that the Long-Term Care Ombudsman is to be established in, and is to carry out his or her functions, in a separate "Office." 42 U.S.C. §§ 3058f(1); 3058g(a)(1)(A). The OAA also explicitly describes the responsibilities of the Ombudsman and makes clear that the Ombudsman's duties include testifying before a State legislature or other policy-making body.

Thus, Section 712(a)(3) of the OAA, 42 U.S.C. § 3058g(a)(3), provides (emphasis added):

(3) Functions

The Ombudsman shall . . .

(E) represent the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(G)(i) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;

(ii) recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and

(iii) facilitate public comment on the laws, regulations, policies and actions . . .

Similarly, Section 712(h) of the OAA, 42 U.S.C. § 3058g(h), provides (emphasis added):

(h) Administration

The State agency shall require the Office to –

(2) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;

(3)(A) provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding –

(i) the problems and concerns of older individuals residing in long-term care facilities; and

(ii) recommendations related to the problems and concerns . . .

Notice that the OAA says "*as the Office determines to be appropriate,*" and "*as the Office determines to be necessary.*" The State agency does not have the right to approve the communications that the Ombudsman's Office chooses to make to policy makers, including a State legislature.

However, the OAA does not prohibit you from adopting a policy requiring proposed testimony from being shared in advance, or circulated for comments or in-put, provided that in the end the Ombudsman retains the absolute right to decide what finally should be presented by that Office. Such cooperation and advance communication are implicit in the regulatory provisions which provide that the State agency has the responsibility to ensure that the Office of the State Long-Term Care Ombudsman performs its functions, and may establish policies for, and monitor the performance of, that Office. 45 C.F.R. §§ 1321.9(d); 1321.11. Such cooperation ensures that the SUA and the Ombudsman's office would not needlessly duplicate their efforts. The SUA may also have valuable information as well as recommendations to contribute which the Ombudsman might decide to accept. Finally, even where the SUA and Ombudsman's Office ultimately disagree, such advance notice and consultation permit both entities to coordinate their reports to the State legislature, thereby furthering a truly informed debate to the benefit of the legislature and other policy makers.

And finally, as I mentioned in our conversation, States are free to operate their State Long-Term Care Ombudsman programs outside of their State agency if they choose and find these provisions to be administratively difficult to implement within the State agency itself. Please keep me informed should you choose to do so. Otherwise, please provide us with a policy amendment that resolves the conflict discussed herein.

Jim Varpness, Regional Director, Administration on Aging, DHHS
Regional Support Centers, Chicago and Kansas City
(312) 886-8535
Mailing address: 233 N. Michigan, #790, Chicago, IL 60601-5519



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Florida's Ombudsman Program Communications Procedures

Media Inquiries When a member of the media calls program headquarters, he/she is immediately forwarded to the Public Relations Manager/Community Program Manager (CPM). Questions are fielded and answered as necessary, and responses requiring additional time for research are arranged with the State Ombudsman and/or appropriate staff members. Opportunities are shared with the Department of Elder Affairs Communications Director (CD) whenever possible, and consultation with the CD is always conducted when communication with the media on a particular issue may result in potentially negative and/or Department-wide impact.

When a member of the media calls one of the program's district ombudsman managers (DOM) or regional ombudsman managers (ROM), general questions may be fielded and answered as necessary, and the DOM/ROM is required to notify the CPM of such communication within the same business day reporting the name of the media contact, the news source name (e.g. Orlando Sentinel, Tampa Tribune, WCTV News Station), and the questions asked. Further inquiries received by local offices may then be handled at the local level with the CPM's authorization or at the headquarters level at the discretion of the CPM and State Ombudsman.

Volunteers may answer media questions; however, they must notify their district ombudsman manager of such communication within the same business day or the following business day if the inquiry is received after business hours, reporting the name of the media contact, the news source name (e.g. Orlando Sentinel, Tampa Tribune, WCTV News Station), and the questions asked. If any volunteer does not wish to answer questions, he or she should refer the reporter or news media personnel to his or her DOM.

Program staff and volunteers are not authorized to release information on resident identification or legal matters to the media. As professional representatives of the program, staff and volunteers should refrain from using inflammatory or derogatory language. Listed below are some resources ombudsmen can use when answering questions from the media: the Basic Media Question & Answer for Ombudsmen Guide or the Basic LTCOP Speaking Points Guide.

[Basic Media Question & Answer for Ombudsmen Guide](#)

[Basic LTCOP Speaking Points Guide](#)

Media Releases & Advisories are written and released as necessary to promote the program using appropriate messaging. The CPM is responsible for writing and releasing [statewide releases or advisories](#) and an official approval process is followed prior to release. Always included in the approval process are the State Ombudsman, Division Director and Communications Director. When necessary, additional approval is sought from the Secretary of Elder Affairs and/or Executive Office of the Governor through the Communications Director. All quotes and attributions are approved by their sources prior to release.

Media releases written by local office staff or volunteers must be reviewed by the CPM before release. Standard media advisories regarding local council meetings or volunteer opportunities do not need to be approved prior to release if they follow the standard format.

Media Coverage Whenever media coverage is attained in print, broadcast, or other forms of media, the Communications Director and other pertinent members of the Department's communications division are notified by the CPM as soon as possible, and an electronic and/or hard copy of the article or piece is distributed to appropriate program staff members and volunteer leadership. If a copy cannot be obtained (e.g., a television news story which was not captured by a member or affiliate of the program), an effort will be made by the CPM to summarize the achievement to all parties mentioned above. Articles which feature or mention the program are posted on the program's website whenever possible.

Publications

Newsletter: The *Ombudsman Outlook* is published on a quarterly basis and distributed to all program staff and volunteers, as well as other interested parties by request. Each issue is approved by the State Ombudsman prior to publication. All sources will be given credit for their contributions. An all-call for written submissions is periodically sent out to program staff and volunteers for inclusion of pieces in upcoming publications. The CPM will continue to act as editor-in-chief of the publication and contribute content consistent with the program's approved messaging.

Annual Report & Snapshot: The annual report and snapshot are produced and distributed to statutorily-mandated recipients by the required date each year (30 days prior to the beginning of the Florida Legislative Session.) The report follows the guidelines articulated in state law. The snapshot is a brief summary of the report, containing the previous year's statistics and legislative recommendations useful for distributing to lawmakers and other interested parties. Appropriate approvals are solicited with each publication, and a commercial printer is used after a selection process is executed following state purchasing guidelines. The CPM oversees the entire project and acts as editor-in-chief, utilizing support from the State Ombudsman, Department or contracted graphic artist, and pertinent program staff and volunteers.

[2009-2010 Annual Report](#)

[2008-2009 Annual Report](#)

[2008-2009 Annual Snapshot](#)

Other Literature (printed materials, etc.): Additional literature is produced and distributed on an as-needed basis for the purposes of recruitment, public awareness, and public service. The CPM generally composes language, selects and executes graphics and layout, and oversees printing procedures, utilizing support from the State Ombudsman and Department or contracted graphic artist. All materials to be used for external purposes are posted on the program's website under "Publications."

Community Outreach, both locally and statewide, is always encouraged among all program staff and volunteers and the CPM is available to research community partnerships and outreach opportunities at the request of the State Ombudsman. The CPM is also available to provide key speaking points, presentation materials, etc. by request when possible.

Informational Packets for Potential Volunteers

LTCOP General Powerpoint Presentation (customizable)

Website In late 2007, the State Ombudsman, CPM, and Department of Elder Affairs divisions of Management of Information Systems (MIS) and Communications mobilized to redevelop the program's website, including both its design and content. The site went live shortly thereafter. Upkeep of the site will be maintained internally at HQ, and a concentrated effort will be made to maintain the site with current information.

Social Media In early 2009, the Ombudsman Program launched pages or profiles on three of the most heavily-used social media sites: [Facebook](#), [Twitter](#) and [YouTube](#). Simultaneously, it published a [handbook](#) to be used by program staff and volunteers as both a guide and technical how-to for first-time users. As of 2011, the Ombudsman Program added to its social media outreach by launching the [OmBlog](#), a blog dedicated to unite ombudsman volunteers across the state. Volunteers are encouraged to write and submit success stories or challenges to their DOMs to forward to the CPM to be posted on the OmBlog. The CPM manages upkeep of these four sites, posting relevant and timely information and closely monitoring each for inappropriate postings or messages which require a response or may be removed. The State Ombudsman or CPM reserves the right to edit material on these sites to maintain consistent messaging for the program and to promote a positive and professional face to the public.

Advertising (print, broadcast, radio, web, etc.) is conducted on an as-needed basis when funds are available. When funds are available, the program regularly produces and/or updates its printed advertisements and broadcast-quality public service announcements. Media buys are executed by the CPM, taking into consideration elements such as return on investment, ratings, shares, vendor quality, audience demographics, and any other pertinent factors. It is expected that the CPM have a working knowledge of media buying and selling so as to conduct business in the best interests of the program and Department at all times. State purchasing guidelines are followed during the media buying process.

Note: Until further notice, Florida's Ombudsman Program is not pursuing paid advertising of any kind.

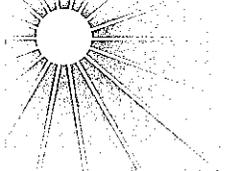
Special Events The program's headquarters (HQ) staff provides assistance (displays, take-away materials, purchasing provisions) by request to local DOMs and volunteers involved in community events such as health fairs, senior fairs, etc. The program as a whole participates as a sponsor or exhibitor in appropriate events held by or in conjunction with the Department (such as Ambassadors for Aging Day, Golden Choices, Davis Productivity Awards, etc.) whenever possible, and members of the program's HQ staff generally acts as program liaison for such events. When funds are available, giveaway items such as pens, magnets, etc. are ordered and distributed to local offices by HQ staff at the discretion of the State Ombudsman and Operations Manager.

Last Updated: March 22, 2011

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This site is developed and maintained by the staff of the Department of Elder Affairs.
Please submit questions or comments to Rebecca Smid: Smidr@elderaffairs.org
Site Design for internet Explorer 5.5 and higher

DEPARTMENT OF



**ELDER
AFFAIRS**
STATE OF FLORIDA

RICK SCOTT
GOVERNOR

CHARLES T. CORLEY
SECRETARY

September 2, 2011

Assistant Secretary Kathy Greenlee
U.S. Department of Health and Human Services
Administration on Aging
Washington, DC 20201

Assistant Secretary Greenlee:

The Florida Department of Elder Affairs is in receipt of the Administration on Aging's "Compliance Review of the State of Florida Long-Term Care Ombudsman Program", dated August 30, 2011. After a careful review of the Report, the Department has several questions and concerns for which it seeks the Administration's clarification and guidance. As such, the Department respectfully requests either an extension or a tolling of the 30 day window for submission of its Corrective Action Plan for review and approval by AoA.

Florida's Ombudsman Program exists to benefit and protect the residents of its long-term care facilities, who are among the most frail and vulnerable populations in the long-term care delivery system. The Department understands and respects the vital need for an independent LTCO to advocate on behalf of residents without the pressures of external influences. Further, the Department believes its interpretation of the Older Americans Act permits this independence while also safeguarding the residents of its long-term care facilities and ensuring programmatic stability.

Initially, in order to properly respond to the Report, the Department needs information such as: copies of all documents and materials – statutory, rule, regulation, technical advisory, or otherwise – providing parameters, guidelines, scope, and methodology for the Administration's undertaking of a Compliance Review. In this vein, the Department also needs copies of similar Compliance Review Reports (and subsequent Corrective Action Plans) assessing other state's management, operation, and coordination of Ombudsman activities and programming. Additionally, the Department requests transcripts or copies of all employee and volunteer interviews conducted pursuant to this Review and seeks copies of all requests for investigations received or possessed by the Administration if there are additional requests not included in the appendices attached to the Compliance Review.

In its Compliance Review Report, the Administration "found the State of Florida's policies and practices to be out of compliance with the Older Americans Act (OAA)" in three areas: (1) designation of local ombudsmen, (2) legislative advocacy, and (3) information dissemination. Additionally, the Compliance Review

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“revealed areas of concern to the AoA for which further guidance to the States is needed.” The Department requests clarification on several, if not all, of the Administration’s findings. The information set forth below follows the format of the Compliance Review Report.

Designation of Local Ombudsman Volunteers:

The Department seeks clarification on the Report’s assertion that 42 U.S.C. § 3058g(a)(5)(A), -- “[i]n carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity, and may designate an employee or volunteer to represent the entity” -- supports the Administration’s proposition that designation and appointment of local ombudsman volunteers and employees is the “independent responsibility of the LTCO,” and that there exists no avenue or function for the review and approval of potential appointees by the head of the State Agency. Please provide all additional support -- statutory, rule, case law, guidance such as technical assistance or otherwise -- for this interpretation.

It is the Department’s understanding that, contrary to this interpretation, “[i]f a State statute establishes a State ombudsman program which will perform the functions of section 307(a)(12) of the [OAA], the *State agency continues to be responsible to assure that all of the requirements of the [OAA] for this program are met* regardless of the State legislation or source of funds.”¹ Moreover, the State agency on aging is charged to “develop policies governing all aspects of programs operated under [the OAA], including the ombudsman program whether operated directly by the State agency or under contract ... [t]he policies developed by the State agency shall address the manner in which the State agency will monitor the performance of all programs and activities initiated under this part for quality and effectiveness.”² Such regulatory instruction seems to fly in the face of concerns that “overarching compliance issues” prevent a LTCOP from complying with OAA requirements, or that the LTCO’s “independence” is somehow compromised by a State agency electing to structure and monitor its ombudsman program in a manner consistent with the above Federal provisions. In light of the foregoing, please clarify your position.

Additionally, please supply the Department with all documented instances of the Secretary of the Florida Department of Elder Affairs declining to accept or approve a potential ombudsman appointee. The Department strongly supports the idea that the LTCO should “independently and effectively advocate on behalf of residents,” however such independence needs to be tempered by the State’s interest in protecting its most vulnerable populations from abuse and exploitation through judicious application of state

¹ 45 C.F.R. §1321.9(d) (emphasis added).

² 45 C.F.R. §1321.11 (emphasis added).

Assistant Secretary Kathy Greenlee
September 2, 2011
Page Three

background screening standards. In the state of Florida, only the Agency Head has authority to issue exemptions from disqualifying background offenses³. As such, the notion that the LTCO maintains an unbridled and unchecked ability to appoint ombudsman volunteers and employees, or that requiring the screening and approval of potential appointees somehow is not in "the spirit" of the Older Americans Act, ignores the importance and reality of the current landscape of screening direct service providers charged with the care of the state's vulnerable senior population.

Moreover, please provide statutory support for the proposition that an Agency Head is prohibited from de-designating ombudsman volunteers or employees, or rather that such de-designation is the exclusive domain of the LTCO. It appears that the OAA is entirely silent as to the process and procedures for de-designation of ombudsman employees and volunteers. In fact, certain provisions of the OAA specifically state that the State Agency is tasked with establishing policies and procedures regarding the duties of designated ombudsman employees or volunteers, and that the State Agency is responsible for establishing "policies and procedures for monitoring local Ombudsman entities designated to carry out the duties of the Office."⁴

Finally, the Department is criticized for its adherence to Chapter 286, Florida Statutes, -- the Florida "Government-in-the-Sunshine Law." The report asserts that this adherence places the Department out of compliance with the OAA when the Department prohibits local ombudsmen (and other employees and volunteers) on the State Long-Term Care Ombudsman Council from communicating with each other about LTCOP issues without prior public notice of their intent to communicate.

The Florida Constitution safeguards every Floridian's right of access to government meetings and records. The comprehensive breadth and scope of the state's open government laws have served for many years as a model for the rest of the nation. In Florida, disclosure is the standard, unless the Legislature concludes that the public necessity compels an exemption from the state's strong open government laws. Florida's Sunshine Law provides a right of access to governmental proceedings of public boards or commissions at both the state and local levels. The law is equally applicable to elected and appointed boards and has been applied to any gathering of two or more members of the same board (or council) to discuss some matter which will *foreseeably come before that board for action*.⁵ It follows that such statutory proscription does not act to prevent board or council members from discussing *any* LTCOP matters outside of a properly-noticed public meeting, but rather prevents such board or council members from

³ § 435.07, Fla. Stat.

⁴ 42 U.S.C. § 3058g(a)(5)(B) and (D)

⁵ "Florida's Government-in-the-Sunshine Law Manual and Public Records Law Manual", 2010 edition, prepared by the Office of the Attorney General for the State of Florida, pp. 1, 5.

Assistant Secretary Kathy Greenlee
September 2, 2011
Page Four

discussing only those matters that could foreseeably come before the board for action. The state's Sunshine Law further acts to exempt certain confidential subject matter from public disclosure, and portions of public meetings relating to such confidential subject matter are protected from public access.

Consequently, the Department requests that you clarify the Administration's conclusion that, "[t]he designation of volunteers, including de-designation of volunteers, must be the exclusive purview of the LTCO and it must be clear to the volunteers that they work for and are answerable only to the LTCO for LTCOP activities."

Issue/Legislative Advocacy:

The Compliance Review Report concluded that the state "fails to comply with the legislative advocacy requirements of the OAA by: (1) [p]rohibiting the LTCO from carrying out its mandate to conduct issue advocacy with legislators, and (2) [p]rohibiting the LTCO from complying with the Florida law requirement that the LTCO register as a lobbyist before it may begin conducting legislative advocacy."

The Department requests clarification from the Administration on the specific provisions of the OAA guaranteeing LTCO independence in proposing and ushering legislative initiatives or, rather, that operate to prohibit the collaboration of the LTCO and departmental legislative staff on legislative issues implicating the role of the LTCO, especially considering the State Agency's mandate to "monitor the performance of all programs and activities initiated ... for quality and effectiveness."⁶ Further, the Department requests a copy of the stated "explicit policy prohibiting the LTCO from conducting legislative advocacy at the State Legislature" and requiring that "any legislative proposal by the LTCOP must first be reviewed and approved by DOEA and Governor's Office before the proposal can receive further exposure."

The Department is aware of numerous occasions during which the LTCO has maintained unfettered independent access to legislators, legislative staff, and legislative committees in performance of the LTCO's OAA-tasks legislative advocacy requirements. The Department is presently gathering documentation from the Florida Legislature demonstrating the legislative advocacy of recent ombudsmen on several legislative issues, including revisions to the statutory structure of the LTCOP and Council in general, as well as revisions to resident discharge and transfer procedures for individuals in various long-term care facilities.

Moreover, the Department requests from the Administration specific instances where the LTCO was prevented an opportunity to "analyze, comment on, and monitor the

⁶ 45 C.F.R. §1321.11

Assistant Secretary Kathy Greenlee
September 2, 2011
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development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State,”⁷ or was prevented an opportunity to “provide such information as the [LTCO] determines to be necessary to public and private agencies, legislators, and other persons, regarding the problems and concerns of older individuals residing in long-term care facilities and recommendations related to the problems and concerns.”⁸

In fact, it is the Department’s contention that its recent history pertaining to the LTCO’s legislative advocacy stands testament to the notion that Florida is precisely in lockstep with the Administration’s technical assistance provided to Iowa in 2010, in which it noted, “the OAA does not prohibit you from adopting a policy requiring proposed testimony from being shared in advance, or circulated for comments or input.” At no time has the Department hindered the Ombudsman from pursuing any contact with the Legislature; in fact, in many instances, the Department has appeared before the Legislature to advocate for the Ombudsman in his absence. We request that you provide us with specific circumstances where the Ombudsman has been prohibited from pursuing a legislative agenda.

Information Dissemination

The Compliance Review Report concludes that the Department fails to be in compliance with information dissemination by (1) “requiring the prior approval of press releases,” and (2) by using “orders and intimidation to ensure the cancellation of press conference activities.”

In the Department’s opinion, the OAA does not preclude a collaborative vetting or approval process between the LTCOP and the state agency regarding communications to the public or other interested parties. Information disseminated by the LTCOP is written by the program’s Public Relations Manager/Community Program Manager (CPM) and only in the instance of press releases is the information routed through the LTCO and other Department staff for innocuous purposes such as ensuring against grammatical and punctuation errors and maintaining uniformity in messaging. For media inquiries, there is no oversight approval process.

For instance, general questions are fielded and answered as necessary by individual ombudsmen in the same business day. The newsletter and other literature produced by the LTCOP do not have an approval process. Additional information dissemination through other media such as advertising, social media including Twitter, Facebook, and

⁷ 42 U.S.C. §3058g(a)(3)(G)(i)

⁸ 42 U.S.C. §3058g(h)(3)(A)

YouTube is likewise not subject to Departmental oversight and approval. The Review Report states the OAA allows the avoidance of "blind-side surprises" and such is the intent of the review by the Department's communications director to determine when a particular press release may result in potentially negative and/or Department-wide impact.

Regarding the alleged use of intimidation to cancel press conferences, it is difficult to understand how the Administration can claim one incident in 2009 is the sum and substance of the Department's information dissemination environment within which the LTCOP operates. It is apparent to the Department that the Administration did not receive all of the facts relating to this single incident. The interview cited in the Review appears incomplete and presents a one-sided recitation of the events.

The former Department Secretary did make a request that the press conference at issue be cancelled; only because other arrangements at remediation of the problems at the subject facility were arranged. Once the problem was brought to the attention of the Department, the Secretary was able to arrange an alternative method of achieving compliance from the facility. A sister agency, the Agency for Health Care Administration (AHCA), which has regulatory and licensure oversight of the facility, participated with the Secretary to effect compliance. The DOEA Secretary, AHCA Deputy Secretary, and the owner of the facility traveled to a mutually convenient location to review, in person, compliance with statutory and rule requirements. Therefore, the press conference was ultimately cancelled as needless because the LTCOP was able to engender a collaborative effort between AHCA, the Department, and the facility to resolve identified issues to the satisfaction of all parties.

Issues for Which AoA Plans to Provide Further Clarification

Although not included in the items for which the Administration has requested a Corrective Action Plan, due in part to the Administration's failure to "provide states with rules to provide specificity" and a general "lack of uniform understanding" around certain interpretations, the Compliance Review Report nonetheless takes issue with the manner and nature of the Department Secretary's ability to appoint and remove an LTCO, as well as an apparent or perceived conflict of interest resulting from certain departmental rule promulgation.

Several pages of the Report are dedicated to recounting the perceived circumstances surrounding the departure of the former LTCO before ultimately concluding that "any decision by the State to hire or fire a LTCO may not be designed to interfere with the LTCOP's [sic] ability to carry out his or her duties." To wit, the Compliance Review Report correctly notes that "[a]ppointment and removal of the LTCO is within the

prerogative of the State,” but continues by noting that “[a]n important caveat to that prerogative is that the State may not use the process of appointment and removal of the LTCO to achieve what the state may not otherwise do under the statute which includes control of LTCOP advocacy and recommendations.” The Department requests all portions of the OAA that directly reference this “important caveat” or that indicate that the LTCO’s employment within the LTCOP is anything other than “at will” at the pleasure of the Department Secretary.

Title 42 U.S.C. §3058g(j) provides that, “[t]he State shall ensure that willful interference with representatives of the Office in the performance of the official duties of the representatives ... shall be unlawful.” As this provision plainly states, the intention of the regulation is to prevent interference with the *performance* of the ombudsman’s duties in carrying out the functions of his office. The ombudsman’s duties are specifically delineated in 42 U.S.C. §3058g(a)(5)(B) and, not surprisingly, the right to the job itself or to be free from criticism is absent from any of the enumerated duties or responsibilities. Under the plain meaning of these statutes, persons voicing displeasure and criticism regarding how the ombudsman is performing his or her job, and whether the ombudsman should ultimately keep his or her job, does not constitute “willful interference” in the performance of an official duty.

The former ombudsman’s apparent assertion and belief that a “willful interference” includes criticism of how he performs his job is an illogical interpretation of these statutes, since it would conflict with other express provisions of the Florida Long-Term Care Ombudsman Program.⁹ If the former ombudsman’s argument that willful interference by any person includes criticism on how he or she conducts his or her duties is taken to its logical conclusion, then the Department Secretary would not be able to exercise his authority to remove the ombudsman pursuant to s. 400.0063(2)(b), Florida Statutes, without committing a crime.¹⁰ The Legislative mandate that the ombudsman serves at the pleasure of the Department Secretary is completely illusory if the Secretary is subject to criminal prosecution for merely disagreeing with how the ombudsman is performing the job.

Moreover, it is the Department’s belief that the Administration has misunderstood the Department’s rule promulgation duties in contending that an apparent conflict of interest is present. The Department does not promulgate “licensing” and “certification” rules; rather, it is AHCA that, pursuant to ss. 429.07 and 429.67 and ch. 408, Florida Statutes, has the duty to promulgate rules regarding licensure of nursing homes, assisted living facilities, and adult family care homes in the State of Florida. AHCA is statutorily-

⁹ As well as certain Federal requirements, including 45 C.F.R. 45 C.F.R. §1321.9(d) and §1321.11.

¹⁰ Section 400.0063(2)(b), Florida Statutes, reads, “[t]he ombudsman shall be appointed by and shall serve at the pleasure of the Secretary of Elderly Affairs.”

Assistant Secretary Kathy Greenlee
September 2, 2011
Page Eight

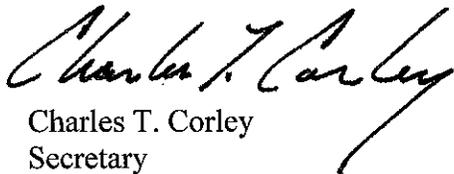
mandated to license, enforce and regulate these facilities pursuant to these sections of law.

AHCA is the only state agency with authority to grant, deny, suspend, or revoke a facility license, or impose remedial fines for regulatory violations. The Department's involvement in this rule promulgation process is limited to consultation and collaboration with its sister agencies to "establish minimum standards to ensure the health, safety, and well-being"¹¹ of residents in assisted living facilities and adult family care homes, while also ensuring "consistent quality of resident care and quality of life."¹² Additionally, the Department establishes minimum staff training and education requirements for assisted living facilities and adult family care homes.¹³

Therefore, it is the Department's opinion that its rule promulgation responsibilities under State Law are not in conflict with certain Federal Regulations specifying that the State Agency shall ensure that the LTCO "does not have a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service."¹⁴ In light of the Florida Regulatory scheme as outlined above, please clarify this issue.

The Department will await the Administration's clarification on these matters before issuing its Corrective Action Plan. The Department and I both look forward to working with the Administration to resolve the issues and concerns presented in the Compliance Review Report.

Sincerely,



Charles T. Corley
Secretary

¹¹ Section 429.73, Florida Statutes.

¹² Section 429.41, Florida Statutes.

¹³ Sections 429.52 and 429.75, Florida Statutes

¹⁴ 42 U.S.C. §3058g(f)(3)(A).



DEPARTMENT OF HEALTH & HUMAN SERVICES
ADMINISTRATION ON AGING
REGION IV

61 Forsyth Street, SW, Suite 5M69
Atlanta, GA 30303-8909

21 September 2011

Secretary Charles T. Corley
Florida Department of Elder Affairs
4040 Esplanade Way
Tallahassee, FL 32399-7000

(VIA EMAIL ATTACHMENT)

Dear Secretary Corley,

Thank you for your correspondence of September 2, 2011. Preliminarily we note that the substantive documentation relied upon for the conclusions reached by the compliance review were supplied to us by your department and are therefore already within your knowledge and possession. Additionally, there are no transcripts of interviews conducted. We will continue to review your request for materials that may be responsive to your request. In the meantime please indicate how the Florida Department of Elder Affairs (DOEA) plans to bring the operation of the Florida Long Term Care Ombudsman Program (LTCOP) into compliance with the Older Americans Act (OAA) through the required Corrective Action Plan due on or before October 3, 2011.

As you will recall, the Compliance Review Report identifies the following three areas which must be addressed by the Corrective Action Plan: Volunteer Designation, Legislative Advocacy and Information Dissemination.

Volunteer Designation

The OAA at Section 712(a)(5) requires that the designation of staff and volunteer local ombudsmen be the purview of the State Long Term Care Ombudsman (LTCO). Florida's policies and practice applicable to the LTCOP must reflect and facilitate staff and volunteer designation by the LTCO without requiring outside concurrence on individual designations. Therefore, the current Florida practice (as you have described it on numerous occasions and supported by the documentation you supplied) that the ultimate designation determination is that of the Secretary of the DOEA must be corrected to comply with the OAA requirements. The LTCO must make the ultimate determination of which individuals are designated staff and volunteer ombudsmen. This does not preclude the DOEA from developing uniform policies and procedures of broad applicability conducive to the purpose of the program and not in conflict with the above requirement which the LTCO must follow in all staff and volunteer designations.

Legislative Advocacy

The OAA requires that the LTCO carry out Legislative Advocacy in order to advocate for residents and their interests under OAA Section 712(a)(3)(G) and 712(h)(2)-(3). All feedback we have received from Florida, including discussions with you, have indicated to us that Florida law requires any person, including an employee of a state government program, to register as a "lobbyist" if that person advocates to members of the legislature in the manner required of the LTCOP. You have further advised us that DOEA has not permitted and did not have plans to permit the LTCO to register even though the LTCO would be required under the law to register.

Absent a waiver or opinion of non-applicability from the Legislature or the Office of the Attorney General indicating that the LTCO need not register to conduct the OAA required advocacy, the DOEA must permit and support both registration and legislative advocacy by the LTCO in order to carry out mandated functions under the OAA. Please indicate your plans to assure that no State practices or policies will interfere with the LTCO's ability to fulfill these functions: to "analyze, comment on and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies. . . ; recommend any changes in such laws, regulations, policies and actions . . . ; and facilitate public comment on the laws, regulations, policies, and actions." OAA Section 712(a)(3)(G).

Information Dissemination

The OAA Section 712(h)(3) requires that the LTCO provide information "to public and private agencies, legislators, and other persons, regarding (i) the problems and concerns of older individuals residing in long-term care facilities; and (ii) recommendations related to the problems and concerns. . .". Florida's policies and practice must permit and support the LTCO to both initiate communication with and respond to press and other avenues of information dissemination without prior approval or concurrence from outside the LTCOP. Specifically, please indicate how the "Ombudsman Program Communications Procedures" you supplied to us will be amended to reflect this requirement. This does not preclude DOEA from establishing policies of broad applicability that require the LTCO to provide concurrent or prior notice to DOEA of information dissemination when feasible and not counterproductive to the purpose of the dissemination. In light of past practices which you acknowledge in your correspondence, it is especially important that Florida's policies and practice reflect that it is the LTCO and not the Secretary of DOEA which has the authority to determine the timing and course of Information Dissemination most appropriate for the resident advocacy required of the LTCOP.

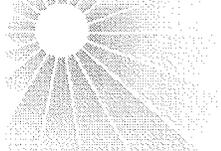
The technical information above provides the necessary information for the DOEA to complete the Corrective Action plan due on or before October 3, 2011 indicating how DOEA will bring the Florida Long Term Care Ombudsman Program into compliance with the requirements of the Older Americans Act. We look forward to receipt of your Corrective Action Plan and to bringing Florida into compliance with the Older Americans Act.

Yours truly,

A handwritten signature in blue ink, appearing to read 'Constantinos I. Miskis', is written over a light gray rectangular background.

Constantinos I. Miskis
Regional Administrator
Region IV, Atlanta

DEPARTMENT OF



**ELDER
AFFAIRS**
STATE OF FLORIDA

RICK SCOTT
GOVERNOR

CHARLES T. CORLEY
SECRETARY

September 30, 2011

Mr. Constantinos I. Miskis
Regional Administrator
Administration on Aging
Department of Health & Human Services
61 Forsyth Street, SW, Suite 5M69
Atlanta, GA 30303-8909

Dear Mr. Miskis:

Thank you for your correspondence of September 21, 2011, attempting to clarify the Administration's position on several programmatic concerns relating to the State of Florida's management and coordination of its Long-Term Care Ombudsman Program (LTCOP). The Department wishes to reiterate the fact that it is committed to ensuring the independence, objectivity and integrity of the State's Ombudsman Program, as the Department fully understands and respects the vital role the Program fulfills in safeguarding and responding to the needs of the State's most vulnerable populations. Further, the Department has always, and will continue to always, strive to follow the dictates of the Older Americans Act in its federally-mandated oversight and management of the State's Ombudsman Program.

To this end, the Department proposes the following corrective action measures to respond to the findings of the Administration's Compliance Review of the State of Florida Long-Term Care Ombudsman Program. Additionally, the Department will continue to eagerly await the requested materials and clarification it sought in its initial response to the Administration, and appreciates the Administration's promise to "continue to review [the Department's] request for materials that may be responsive" while the Department proceeds with a review and revision relating to the following programmatic concerns raised by the Administration.

Volunteer Designation

The Administration has noted that §712(a)(5) of the Older Americans Act (OAA) "requires that the designation of staff and volunteer local ombudsmen be the purview of the State Long-Term Care Ombudsman (LTCO)." Section 712(a)(5) of the OAA reads, in pertinent part, "[i]n carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity, and may designate an employee or volunteer to represent the entity."

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It remains the Department's belief that the above framework neither precludes nor proscribes the review, collaboration or input by the Department Secretary during and throughout the designation process, in large part because designated volunteers and employees of the LTCOP receive certain benefits and reimbursements by the State as part of their participation in the LTCOP. Moreover, §400.0065(2)(c), Florida Statutes, provides that, "[s]taff positions established for the purpose of coordinating the activities of each local council and assisting its members may be filled by the ombudsman after approval by the secretary." The Department remains unaware of any instance, and none have been indicated by the Administration, where the Department Secretary has prevented staff proposed for designation by the LTCO from participating in the LTCOP.

Regardless of the foregoing, the Department agrees to revise its current practices and procedures to ensure that the LTCO retains the ultimate authority over the initial designation of LTCOP staff and volunteers, and will avail itself of the Administration's recommendation to "develop uniform policies and procedures of broad applicability conducive to the purpose of the program and not in conflict with the above requirement which the LTCO must follow in all staff and volunteer designations."

Finally, in its most recent communication to the Department, the Administration failed to "provide statutory support for the proposition that an Agency Head is prohibited from de-designating ombudsman volunteers or employees, or rather that such de-designation is the exclusive domain of the LTCO," as the Department had requested. Therefore, the Department wishes to reiterate its earlier position that the OAA "is entirely silent as to the process and procedures for de-designation of ombudsman employees and volunteers. In fact, certain provisions of the OAA specifically state the State Agency is tasked with establishing policies and procedures regarding the duties of designated ombudsman employees or volunteers, and that the State Agency is responsible for establishing 'policies and procedures for monitoring local Ombudsman entities designated to carry out the duties of the Office.'"

Legislative Advocacy

The Administration has noted that §§ 712(a)(3)(G) and 712(h)(2) and (3) of the OAA "require that the LTCO carry out legislative advocacy in order to advocate for residents and their interests." Section 712(h)(2) of the OAA reads, in pertinent part, "[t]he State agency shall require the Office to ... analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate."

It is important for the Department to note, preliminarily, that the terms "lobbying" or "lobbyist" appear nowhere in the relevant OAA provisions governing the LTCO's duties and responsibilities. This is despite the fact that Congress has elsewhere recognized, and required the disclosure of, lobbyist activities in response to its overarching conclusion that, "responsible representative Government requires public awareness of the efforts of

paid lobbyists to influence the public decision making process in both the legislative and executive branches of the Federal Government,” and that, “the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.”¹

Section 11.045(1)(h), Florida Statutes, defines the term “lobbyist” as “a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity.” Moreover, §11.062, Florida Statutes, provides in relevant part that, “[n]o funds, exclusive of salaries, travel expenses, and per diem, appropriated to, or otherwise available for use by, any executive, judicial, or quasi-judicial department shall be used by any state employee or other person for lobbying purposes ... [a]ny state employee of any executive, judicial, or quasi-judicial department who violates the provisions of this section shall have deducted from her or his salary the amount of state moneys spent in violation of this section.”

Such statutory guidance closely mirrors similar Federal language providing that, “[n]o part of the money appropriated by any enactment of Congress shall, *in the absence of express authorization by Congress*, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation [...]”² It is clear to the Department that, at both the state and federal levels, close legislative attention is paid to the notion that public funding should not be obligated or expended to lobby *itself* – that is, state or federal legislative bodies. Therefore, in light of the fact that Congress has not yet expressly authorized “lobbying” or registration as a “lobbyist” in the OAA, the Department requests additional clarification of the parameters under which the LTCO may use appropriated funds for specific lobbying efforts.

The Department has never articulated a steadfast policy which has had the effect of prohibiting or preventing the LTCO from undertaking legislative advocacy activities. To the extent that the Department’s statements were misconstrued as requiring registration as a lobbyist to undertake those activities, the Department regrets that misunderstanding. The lack of a requirement to be registered as a lobbyist in Florida to participate in full legislative advocacy as engaged in by the LTCO is demonstrated by the LTCO’s past legislative advocacy activities. In its initial response to the Administration, the Department revealed that it is “aware of numerous occasions during which the LTCO has

¹ 2 U.S.C.A. §1601

² 18 U.S.C.A. §1913 (emphasis added).

maintained unfettered independent access to legislators, legislative staff, and legislative committees in performance of the LTCO's OAA-tasked legislative advocacy requirements," and that, "[a]t no time has the Department hindered the Ombudsman from pursuing contact with the Florida Legislature; in fact, in many instances, the Department has appeared before the Legislature to advocate for the Ombudsman in his absence." The Administration has, to date, not responded to the Department's request to "provide [the Department] with specific circumstances where the Ombudsman has been prohibited from pursuing a legislative agenda."

In this regard, the Department finds that proposing or suggesting adequate corrective measures, absent a policy or document explicitly articulating a prohibition against permitting the LTCO to register as a lobbyist, is difficult. Moreover, it is equally difficult to contemplate similar corrective measures with regard to the LTCO's perceived or suggested constraint against independent legislative advocacy where the Administration has yet to provide the Department with specific instances where such advocacy has been prohibited. This is especially true where the Department has informed the Administration of ample evidence demonstrating the LTCO's persistent and unabated access to legislators, legislative staff, and legislative committees. Although the LTCO has not been hindered in legislative advocacy, the Department agrees to coordinate the LTCO's registration as a lobbyist in the State of Florida.

Information Dissemination

Finally, the Administration has noted that §712(h)(3) of the OAA should be interpreted in a manner such that "Florida's policies and practice [permit] and support the LTCO to both initiate communication with and respond to press and other avenues of information dissemination without prior approval or concurrence from outside the LTCOP." Section 712(h)(3) of the OAA provides, in pertinent part, that the State agency shall "require the [LTCOP] to provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding the problems and concerns of older individuals residing in long-term care facilities, and recommendations related to the problems and concerns."

The Department wishes to reiterate its earlier assertion that, in the Department's estimation, "the OAA does not preclude a collaborative vetting or approval process between the LTCOP and the State agency regarding communications to the public or other interested parties. Information disseminated by the LTCOP is written by the program's Public Relations Manager/Community Program Manager (CPM) and only in the instance of press releases is the information routed through the LTCO and other Department staff for [largely ministerial] purposes such as ensuring against grammatical and punctuation errors and maintaining uniformity in messaging. For media inquiries, there is no oversight approval process."

Page Five

Although the Department's "Ombudsman Program Communications Procedures" permit the LTCOP to respond to media inquiries, coordinate media coverage, publish its quarterly newsletter, issue the Annual Report required under §400.0065(1)(i), Florida Statutes, conduct community outreach, maintain its program website, disseminate information via various social media outlets, and formulate advertising without requiring prior approval through various departmental channels, the Administration has correctly indicated that such document does prescribe an "official approval process" prior to the issuance of media releases and advisories.

Consequently, and in consideration of the Administration's stated concern that "the LTCOP must be able to freely and without the need for prior approval communicate with the media in order to advocate for residents and their interests," the Department agrees to amend its "Ombudsman Program Communications Procedures" to remove the requirement that media releases and advisories be subject to an official approval process prior to release. Instead, the Department will redraft such Procedures to clearly indicate that, although the LTCOP retains the ultimate ability to generate media releases and advisories "as the Office determines to be necessary," as well as the concomitant authority to accept or reject departmental input pertaining to LTCOP media releases, there exists an appropriate mechanism within such Procedures for the collaborative vetting and coordination of efforts between the Department and the LTCOP. As the burden is on the state unit under the OAA to establish and operate the LTCOP, such consultative measures are necessary to ensure the LTCOP is operating within the boundaries of both state and federal law.

The Department wishes to thank the Administration for its review and guidance pertaining to the above issues, and will remain available and responsive to further instruction relating to these proposed corrective measures.

Sincerely,

A handwritten signature in cursive script, reading "Charles T. Corley". The signature is written in black ink and is positioned above the typed name and title.

Charles T. Corley
Secretary

**LONG-TERM CARE FACILITIES:
OMBUDSMAN PROGRAM**

- 400.0060 Definitions.
- 400.0061 Legislative findings and intent; long-term care facilities.
- 400.0063 Establishment of Office of State Long-Term Care Ombudsman; designation of ombudsman and legal advocate.
- 400.0065 State Long-Term Care Ombudsman; duties and responsibilities.
- 400.0067 State Long-Term Care Ombudsman Council; duties; membership.
- 400.0069 Local long-term care ombudsman councils; duties; membership.
- 400.0070 Conflicts of interest.
- 400.0071 State Long-Term Care Ombudsman Program complaint procedures.
- 400.0073 State and local ombudsman council investigations.
- 400.0074 Local ombudsman council onsite administrative assessments.
- 400.0075 Complaint notification and resolution procedures.
- 400.0077 Confidentiality.
- 400.0078 Citizen access to State Long-Term Care Ombudsman Program services.
- 400.0079 Immunity.
- 400.0081 Access to facilities, residents, and records.
- 400.0083 Interference; retaliation; penalties.
- 400.0087 Department oversight; funding.
- 400.0089 Complaint data reports.
- 400.0091 Training.

400.0060 Definitions.—When used in this part, unless the context clearly dictates otherwise, the term:

- (1) “Administrative assessment” means a review of conditions in a long-term care facility which impact the rights, health, safety, and welfare of residents with the purpose of noting needed improvement and making recommendations to enhance the quality of life for residents.
- (2) “Agency” means the Agency for Health Care Administration.
- (3) “Department” means the Department of Elderly Affairs.
- (4) “Local council” means a local long-term care ombudsman council designated by the ombudsman pursuant to s. 400.0069. Local councils are also known as district long-term care ombudsman councils or district councils.
- (5) “Long-term care facility” means a nursing home facility, assisted living facility, adult family-care home, board and care facility, or any other similar residential adult care facility.
- (6) “Office” means the Office of State Long-Term Care Ombudsman created by s. 400.0063.

(7) “Ombudsman” means the individual appointed by the Secretary of Elderly Affairs to head the Office of State Long-Term Care Ombudsman.

(8) “Resident” means an individual 60 years of age or older who resides in a long-term care facility.

(9) “Secretary” means the Secretary of Elderly Affairs.

(10) “State council” means the State Long-Term Care Ombudsman Council created by s. 400.0067.

History.—ss. 1, 30, ch. 93-177; s. 4, ch. 95-210; s. 1, ch. 2006-121.

400.0061 Legislative findings and intent; long-term care facilities.—

(1) The Legislature finds that conditions in long-term care facilities in this state are such that the rights, health, safety, and welfare of residents are not fully ensured by rules of the Department of Elderly Affairs or the Agency for Health Care Administration or by the good faith of owners or operators of long-term care facilities. Furthermore, there is a need for a formal mechanism whereby a long-term care facility resident, a representative of a long-term care facility resident, or any other concerned citizen may make a complaint against the facility or its employees, or against other persons who are in a position to restrict, interfere with, or threaten the rights, health, safety, or welfare of a long-term care facility resident. The Legislature finds that concerned citizens are often more effective advocates for the rights of others than governmental agencies. The Legislature further finds that in order to be eligible to receive an allotment of funds authorized and appropriated under the federal Older Americans Act, the state must establish and operate an Office of State Long-Term Care Ombudsman, to be headed by the State Long-Term Care Ombudsman, and carry out a long-term care ombudsman program.

(2) It is the intent of the Legislature, therefore, to utilize voluntary citizen ombudsman councils under the leadership of the ombudsman, and through them to operate an ombudsman program which shall, without interference by any executive agency, undertake to discover, investigate, and determine the presence of conditions or individuals which constitute a threat to the rights, health, safety, or welfare of the residents of long-term care facilities. To ensure that the effectiveness and efficiency of such investigations are not impeded by advance notice or delay, the Legislature intends that the ombudsman and ombudsman councils and their designated representatives not be required to obtain warrants in order to enter into or conduct investigations or onsite administrative assessments of long-term care facilities. It is the further intent of the Legislature that the environment in long-term care facilities be conducive to the dignity and independence of residents and that investigations by ombudsman councils shall further the enforcement of laws, rules, and regulations that safeguard the health, safety, and welfare of residents.

History.—ss. 2, 30, ch. 93-177; s. 758, ch. 95-148; s. 111, ch. 99-8; s. 2, ch. 2006-121.

400.0063 Establishment of Office of State Long-Term Care Ombudsman; designation of ombudsman and legal advocate.—

(1) There is created an Office of State Long-Term Care Ombudsman in the Department of Elderly Affairs.

(2)(a) The Office of State Long-Term Care Ombudsman shall be headed by the State Long-Term Care Ombudsman, who shall serve on a full-time basis and shall personally, or through representatives of the office, carry out the purposes and functions of the office in accordance with state and federal law.

(b) The ombudsman shall be appointed by and shall serve at the pleasure of the Secretary of Elderly Affairs. The secretary shall appoint a person who has expertise and experience in the fields of long-term care and advocacy to serve as ombudsman.

(3)(a) There is created in the office the position of legal advocate, who shall be selected by and serve at the pleasure of the ombudsman and shall be a member in good standing of The Florida Bar.

(b) The duties of the legal advocate shall include, but not be limited to:

1. Assisting the ombudsman in carrying out the duties of the office with respect to the abuse, neglect, or violation of rights of residents of long-term care facilities.
2. Assisting the state and local councils in carrying out their responsibilities under this part.
3. Pursuing administrative, legal, and other appropriate remedies on behalf of residents.
4. Serving as legal counsel to the state and local councils, or individual members thereof, against whom any suit or other legal action is initiated in connection with the performance of the official duties of the councils or an individual member.

History.—ss. 3, 30, ch. 93-177; s. 41, ch. 95-196; s. 121, ch. 2000-349; s. 41, ch. 2000-367; s. 20, ch. 2002-223; s. 3, ch. 2006-121; s. 20, ch. 2006-197.

400.0065 State Long-Term Care Ombudsman; duties and responsibilities.—

(1) The purpose of the Office of State Long-Term Care Ombudsman shall be to:

(a) Identify, investigate, and resolve complaints made by or on behalf of residents of long-term care facilities relating to actions or omissions by providers or representatives of providers of long-term care services, other public or private agencies, guardians, or representative payees that may adversely affect the health, safety, welfare, or rights of the residents.

(b) Provide services that assist in protecting the health, safety, welfare, and rights of residents.

(c) Inform residents, their representatives, and other citizens about obtaining the services of the State Long-Term Care Ombudsman Program and its representatives.

(d) Ensure that residents have regular and timely access to the services provided through the office and that residents and complainants receive timely responses from representatives of the office to their complaints.

(e) Represent the interests of residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents.

(f) Administer the state and local councils.

(g) Analyze, comment on, and monitor the development and implementation of federal, state, and local laws, rules, and regulations, and other governmental policies and actions, that pertain to the health, safety,

welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the state, and recommend any changes in such laws, rules, regulations, policies, and actions as the office determines to be appropriate and necessary.

(h) Provide technical support for the development of resident and family councils to protect the well-being and rights of residents.

(2) The State Long-Term Care Ombudsman shall have the duty and authority to:

(a) Establish and coordinate local councils throughout the state.

(b) Perform the duties specified in state and federal law, rules, and regulations.

(c) Within the limits of appropriated federal and state funding, employ such personnel as are necessary to perform adequately the functions of the office and provide or contract for legal services to assist the state and local councils in the performance of their duties. Staff positions established for the purpose of coordinating the activities of each local council and assisting its members may be filled by the ombudsman after approval by the secretary. Notwithstanding any other provision of this part, upon certification by the ombudsman that the staff member hired to fill any such position has completed the initial training required under s. 400.0091, such person shall be considered a representative of the State Long-Term Care Ombudsman Program for purposes of this part.

(d) Contract for services necessary to carry out the activities of the office.

(e) Apply for, receive, and accept grants, gifts, or other payments, including, but not limited to, real property, personal property, and services from a governmental entity or other public or private entity or person, and make arrangements for the use of such grants, gifts, or payments.

(f) Coordinate, to the greatest extent possible, state and local ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illnesses and with legal assistance programs for the poor through adoption of memoranda of understanding and other means.

(g) Enter into a cooperative agreement with the Statewide Advocacy Council for the purpose of coordinating and avoiding duplication of advocacy services provided to residents.

(h) Enter into a cooperative agreement with the Medicaid Fraud Division as prescribed under s. 731(e)(2)(B) of the Older Americans Act.

(i) Prepare an annual report describing the activities carried out by the office, the state council, and the local councils in the year for which the report is prepared. The ombudsman shall submit the report to the secretary at least 30 days before the convening of the regular session of the Legislature. The secretary shall in turn submit the report to the United States Assistant Secretary for Aging, the Governor, the President of the Senate, the Speaker of the House of Representatives, the Secretary of Children and Family Services, and the Secretary of Health Care Administration. The report shall, at a minimum:

1. Contain and analyze data collected concerning complaints about and conditions in long-term care facilities and the disposition of such complaints.
2. Evaluate the problems experienced by residents.

3. Analyze the successes of the ombudsman program during the preceding year, including an assessment of how successfully the program has carried out its responsibilities under the Older Americans Act.
 4. Provide recommendations for policy, regulatory, and statutory changes designed to solve identified problems; resolve residents' complaints; improve residents' lives and quality of care; protect residents' rights, health, safety, and welfare; and remove any barriers to the optimal operation of the State Long-Term Care Ombudsman Program.
 5. Contain recommendations from the State Long-Term Care Ombudsman Council regarding program functions and activities and recommendations for policy, regulatory, and statutory changes designed to protect residents' rights, health, safety, and welfare.
 6. Contain any relevant recommendations from the local councils regarding program functions and activities.
- History.—ss. 4, 30, ch. 93-177; s. 112, ch. 99-8; s. 122, ch. 2000-349; s. 42, ch. 2000-367; s. 21, ch. 2002-223; s. 4, ch. 2006-121.

400.0067 State Long-Term Care Ombudsman Council; duties; membership.—

- (1) There is created within the Office of State Long-Term Care Ombudsman, the State Long-Term Care Ombudsman Council.
- (2) The State Long-Term Care Ombudsman Council shall:
 - (a) Serve as an advisory body to assist the ombudsman in reaching a consensus among local councils on issues affecting residents and impacting the optimal operation of the program.
 - (b) Serve as an appellate body in receiving from the local councils complaints not resolved at the local level. Any individual member or members of the state council may enter any long-term care facility involved in an appeal, pursuant to the conditions specified in s. 400.0074(2).
 - (c) Assist the ombudsman to discover, investigate, and determine the existence of abuse or neglect in any long-term care facility, and work with the adult protective services program as required in ss. 415.101-415.113.
 - (d) Assist the ombudsman in eliciting, receiving, responding to, and resolving complaints made by or on behalf of residents.
 - (e) Elicit and coordinate state, local, and voluntary organizational assistance for the purpose of improving the care received by residents.
 - (f) Assist the ombudsman in preparing the annual report described in s. 400.0065.
- (3) The State Long-Term Care Ombudsman Council shall be composed of one active local council member elected by each local council plus three at-large members appointed by the Governor.
 - (a) Each local council shall elect by majority vote a representative from among the council members to represent the interests of the local council on the state council. A local council chair may not serve as the representative of the local council on the state council.

(b)1. The secretary, after consulting with the ombudsman, shall submit to the Governor a list of persons recommended for appointment to the at-large positions on the state council. The list shall not include the name of any person who is currently serving on a local council.

2. The Governor shall appoint three at-large members chosen from the list.

3. If the Governor does not appoint an at-large member to fill a vacant position within 60 days after the list is submitted, the secretary, after consulting with the ombudsman, shall appoint an at-large member to fill that vacant position.

(c)1. All state council members shall serve 3-year terms.

2. A member of the state council may not serve more than two consecutive terms.

3. A local council may recommend removal of its elected representative from the state council by a majority vote. If the council votes to remove its representative, the local council chair shall immediately notify the ombudsman. The secretary shall advise the Governor of the local council's vote upon receiving notice from the ombudsman.

4. The position of any member missing three state council meetings within a 1-year period without cause may be declared vacant by the ombudsman. The findings of the ombudsman regarding cause shall be final and binding.

5. Any vacancy on the state council shall be filled in the same manner as the original appointment.

(d)1. The state council shall elect a chair to serve for a term of 1 year. A chair may not serve more than two consecutive terms.

2. The chair shall select a vice chair from among the members. The vice chair shall preside over the state council in the absence of the chair.

3. The chair may create additional executive positions as necessary to carry out the duties of the state council. Any person appointed to an executive position shall serve at the pleasure of the chair, and his or her term shall expire on the same day as the term of the chair.

4. A chair may be immediately removed from office prior to the expiration of his or her term by a vote of two-thirds of all state council members present at any meeting at which a quorum is present. If a chair is removed from office prior to the expiration of his or her term, a replacement chair shall be chosen during the same meeting in the same manner as described in this paragraph, and the term of the replacement chair shall begin immediately. The replacement chair shall serve for the remainder of the term and is eligible to serve two subsequent consecutive terms.

(e)1. The state council shall meet upon the call of the chair or upon the call of the ombudsman. The council shall meet at least quarterly but may meet more frequently as needed.

2. A quorum shall be considered present if more than 50 percent of all active state council members are in attendance at the same meeting.

3. The state council may not vote on or otherwise make any decisions resulting in a recommendation that will directly impact the state council or any local council, outside of a publicly noticed meeting at which a quorum is present.

(f) Members shall receive no compensation but shall, with approval from the ombudsman, be reimbursed for per diem and travel expenses as provided in s. 112.061.

History.—ss. 5, 30, 31, ch. 93-177; s. 759, ch. 95-148; s. 113, ch. 99-8; s. 209, ch. 99-13; s. 15, ch. 2000-263; s. 11, ch. 2000-305; s. 124, ch. 2000-349; s. 44, ch. 2000-367; s. 22, ch. 2002-223; s. 6, ch. 2006-121.

400.0069 Local long-term care ombudsman councils; duties; membership.—

(1)(a) The ombudsman shall designate local long-term care ombudsman councils to carry out the duties of the State Long-Term Care Ombudsman Program within local communities. Each local council shall function under the direction of the ombudsman.

(b) The ombudsman shall ensure that there is at least one local council operating in each of the department's planning and service areas. The ombudsman may create additional local councils as necessary to ensure that residents throughout the state have adequate access to State Long-Term Care Ombudsman Program services. The ombudsman, after approval from the secretary, shall designate the jurisdictional boundaries of each local council.

(2) The duties of the local councils are to:

(a) Serve as a third-party mechanism for protecting the health, safety, welfare, and civil and human rights of residents.

(b) Discover, investigate, and determine the existence of abuse or neglect in any long-term care facility and to use the procedures provided for in ss. 415.101-415.113 when applicable.

(c) Elicit, receive, investigate, respond to, and resolve complaints made by or on behalf of residents.

(d) Review and, if necessary, comment on all existing or proposed rules, regulations, and other governmental policies and actions relating to long-term care facilities that may potentially have an effect on the rights, health, safety, and welfare of residents.

(e) Review personal property and money accounts of residents who are receiving assistance under the Medicaid program pursuant to an investigation to obtain information regarding a specific complaint or problem.

(f) Recommend that the ombudsman and the legal advocate seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents.

(g) Carry out other activities that the ombudsman determines to be appropriate.

(3) In order to carry out the duties specified in subsection (2), a member of a local council is authorized to enter any long-term care facility without notice or first obtaining a warrant, subject to the provisions of s. 400.0074(2).

(4) Each local council shall be composed of members whose primary residence is located within the boundaries of the local council's jurisdiction.

(a) The ombudsman shall strive to ensure that each local council include the following persons as members:

1. At least one medical or osteopathic physician whose practice includes or has included a substantial number of geriatric patients and who may practice in a long-term care facility;
2. At least one registered nurse who has geriatric experience;
3. At least one licensed pharmacist;
4. At least one registered dietitian;
5. At least six nursing home residents or representative consumer advocates for nursing home residents;
6. At least three residents of assisted living facilities or adult family-care homes or three representative consumer advocates for alternative long-term care facility residents;
7. At least one attorney; and
8. At least one professional social worker.

(b) In no case shall the medical director of a long-term care facility or an employee of the agency, the department, the Department of Children and Family Services, or the Agency for Persons with Disabilities serve as a member or as an ex officio member of a council.

(5)(a) Individuals wishing to join a local council shall submit an application to the ombudsman. The ombudsman shall review the individual's application and advise the secretary of his or her recommendation for approval or disapproval of the candidate's membership on the local council. If the secretary approves of the individual's membership, the individual shall be appointed as a member of the local council.

(b) The secretary may rescind the ombudsman's approval of a member on a local council at any time. If the secretary rescinds the approval of a member on a local council, the ombudsman shall ensure that the individual is immediately removed from the local council on which he or she serves and the individual may no longer represent the State Long-Term Care Ombudsman Program until the secretary provides his or her approval.

(c) A local council may recommend the removal of one or more of its members by submitting to the ombudsman a resolution adopted by a two-thirds vote of the members of the council stating the name of the member or members recommended for removal and the reasons for the recommendation. If such a recommendation is adopted by a local council, the local council chair or district coordinator shall immediately report the council's recommendation to the ombudsman. The ombudsman shall review the recommendation of the local council and advise the secretary of his or her recommendation regarding removal of the council member or members.

(6)(a) Each local council shall elect a chair for a term of 1 year. There shall be no limitation on the number of terms that an approved member of a local council may serve as chair.

(b) The chair shall select a vice chair from among the members of the council. The vice chair shall preside over the council in the absence of the chair.

(c) The chair may create additional executive positions as necessary to carry out the duties of the local council. Any person appointed to an executive position shall serve at the pleasure of the chair, and his or her term shall expire on the same day as the term of the chair.

(d) A chair may be immediately removed from office prior to the expiration of his or her term by a vote of two-thirds of the members of the local council. If any chair is removed from office prior to the expiration of his or her term, a replacement chair shall be elected during the same meeting, and the term of the replacement chair shall begin immediately. The replacement chair shall serve for the remainder of the term of the person he or she replaced.

(7) Each local council shall meet upon the call of its chair or upon the call of the ombudsman. Each local council shall meet at least once a month but may meet more frequently if necessary.

(8) A member of a local council shall receive no compensation but shall, with approval from the ombudsman, be reimbursed for travel expenses both within and outside the jurisdiction of the local council in accordance with the provisions of s. 112.061.

(9) The local councils are authorized to call upon appropriate agencies of state government for such professional assistance as may be needed in the discharge of their duties. All state agencies shall cooperate with the local councils in providing requested information and agency representation at council meetings.

History.—s. 27, ch. 75-233; s. 3, ch. 76-168; s. 136, ch. 77-104; s. 8, ch. 77-401; s. 1, ch. 77-457; s. 4, ch. 78-323; s. 2, ch. 78-393; ss. 6, 12, ch. 80-198; ss. 2, 3, 5, ch. 81-184; ss. 2, 3, ch. 81-318; ss. 1, 4, ch. 82-46; ss. 15, 19, ch. 82-148; ss. 35, 79, 80, 83, 84, ch. 83-181; s. 39, ch. 86-220; s. 2, ch. 87-396; s. 7, ch. 89-294; s. 3, ch. 91-115; s. 27, ch. 92-33; ss. 6, 29, 30, 31, ch. 93-177; s. 49, ch. 93-217; s. 760, ch. 95-148; s. 5, ch. 95-210; s. 114, ch. 99-8; s. 125, ch. 2000-349; s. 45, ch. 2000-367; s. 23, ch. 2002-223; s. 7, ch. 2006-121; s. 21, ch. 2006-197.

Note.—Former s. 400.307.

400.0070 Conflicts of interest.—

(1) The ombudsman shall not:

(a) Have a direct involvement in the licensing or certification of, or an ownership or investment interest in, a long-term care facility or a provider of a long-term care service.

(b) Be employed by, or participate in the management of, a long-term care facility.

(c) Receive, or have a right to receive, directly or indirectly, remuneration, in cash or in kind, under a compensation agreement with the owner or operator of a long-term care facility.

(2) Each employee of the office, each state council member, and each local council member shall certify that he or she has no conflict of interest.

(3) The department shall define by rule:

- (a) Situations that constitute a person having a conflict of interest that could materially affect the objectivity or capacity of a person to serve on an ombudsman council, or as an employee of the office, while carrying out the purposes of the State Long-Term Care Ombudsman Program as specified in this part.
- (b) The procedure by which a person listed in subsection (2) shall certify that he or she has no conflict of interest.

History.—s. 8, ch. 2006-121.

400.0071 State Long-Term Care Ombudsman Program complaint procedures.—The department shall adopt rules implementing state and local complaint procedures. The rules must include procedures for:

- (1) Receiving complaints against a long-term care facility or an employee of a long-term care facility.
- (2) Conducting investigations of a long-term care facility or an employee of a long-term care facility subsequent to receiving a complaint.
- (3) Conducting onsite administrative assessments of long-term care facilities.

History.—s. 28, ch. 75-233; s. 3, ch. 76-168; s. 9, ch. 77-401; s. 1, ch. 77-457; ss. 7, 12, ch. 80-198; ss. 4, 6, ch. 81-184; ss. 2, 3, ch. 81-318; s. 4, ch. 82-46; ss. 36, 79, 83, ch. 83-181; ss. 16, 29, 30, ch. 93-177; s. 49, ch. 93-217; s. 126, ch. 2000-349; s. 46, ch. 2000-367; s. 24, ch. 2002-223; s. 9, ch. 2006-121.

Note.—Former s. 400.311.

400.0073 State and local ombudsman council investigations.—

- (1) A local council shall investigate, within a reasonable time after a complaint is made, any complaint of a resident, a representative of a resident, or any other credible source based on an action or omission by an administrator, an employee, or a representative of a long-term care facility which might be:
 - (a) Contrary to law;
 - (b) Unreasonable, unfair, oppressive, or unnecessarily discriminatory, even though in accordance with law;
 - (c) Based on a mistake of fact;
 - (d) Based on improper or irrelevant grounds;
 - (e) Unaccompanied by an adequate statement of reasons;
 - (f) Performed in an inefficient manner; or
 - (g) Otherwise adversely affecting the health, safety, welfare, or rights of a resident.
- (2) In an investigation, both the state and local councils have the authority to hold public hearings.
- (3) Subsequent to an appeal from a local council, the state council may investigate any complaint received by the local council involving a long-term care facility or a resident.
- (4) If the ombudsman or any state or local council member is not allowed to enter a long-term care facility, the administrator of the facility shall be considered to have interfered with a representative of the office, the state council, or the local council in the performance of official duties as described in s. 400.0083(1) and to have committed a violation of this part. The ombudsman shall report a facility's refusal to allow entry to

the agency, and the agency shall record the report and take it into consideration when determining actions allowable under s. 400.102, s. 400.121, s. 429.14, s. 429.19, s. 429.69, or s. 429.71.

History.—s. 29, ch. 75-233; s. 3, ch. 76-168; s. 10, ch. 77-401; s. 1, ch. 77-457; ss. 8, 12, ch. 80-198; ss. 4, 6, ch. 81-184; ss. 2, 3, ch. 81-318; s. 4, ch. 82-46; ss. 16, 19, ch. 82-148; ss. 37, 79, 83, ch. 83-181; ss. 7, 29, 30, ch. 93-177; s. 49, ch. 93-217; s. 761, ch. 95-148; s. 127, ch. 2000-349; s. 47, ch. 2000-367; s. 1, ch. 2001-45; s. 10, ch. 2006-121; s. 22, ch. 2006-197; s. 76, ch. 2007-5; s. 53, ch. 2007-230.

Note.—Former s. 400.314.

400.0074 Local ombudsman council onsite administrative assessments.—

(1) In addition to any specific investigation conducted pursuant to a complaint, the local council shall conduct, at least annually, an onsite administrative assessment of each nursing home, assisted living facility, and adult family-care home within its jurisdiction. This administrative assessment shall focus on factors affecting the rights, health, safety, and welfare of the residents. Each local council is encouraged to conduct a similar onsite administrative assessment of each additional long-term care facility within its jurisdiction.

(2) An onsite administrative assessment conducted by a local council shall be subject to the following conditions:

(a) To the extent possible and reasonable, the administrative assessments shall not duplicate the efforts of the agency surveys and inspections conducted under part II of this chapter and parts I and II of chapter 429.

(b) An administrative assessment shall be conducted at a time and for a duration necessary to produce the information required to carry out the duties of the local council.

(c) Advance notice of an administrative assessment may not be provided to a long-term care facility, except that notice of followup assessments on specific problems may be provided.

(d) A local council member physically present for the administrative assessment shall identify himself or herself and cite the specific statutory authority for his or her assessment of the facility.

(e) An administrative assessment may not unreasonably interfere with the programs and activities of residents.

(f) A local council member may not enter a single-family residential unit within a long-term care facility during an administrative assessment without the permission of the resident or the representative of the resident.

(g) An administrative assessment must be conducted in a manner that will impose no unreasonable burden on a long-term care facility.

(3) Regardless of jurisdiction, the ombudsman may authorize a state or local council member to assist another local council to perform the administrative assessments described in this section.

(4) An onsite administrative assessment may not be accomplished by forcible entry. However, if the ombudsman or a state or local council member is not allowed to enter a long-term care facility, the

administrator of the facility shall be considered to have interfered with a representative of the office, the state council, or the local council in the performance of official duties as described in s. 400.0083(1) and to have committed a violation of this part. The ombudsman shall report the refusal by a facility to allow entry to the agency, and the agency shall record the report and take it into consideration when determining actions allowable under s. 400.102, s. 400.121, s. 429.14, s. 429.19, s. 429.69, or s. 429.71.

History.—s. 11, ch. 2006-121; s. 77, ch. 2007-5; s. 54, ch. 2007-230.

400.0075 Complaint notification and resolution procedures.—

(1)(a) Any complaint or problem verified by an ombudsman council as a result of an investigation or onsite administrative assessment, which complaint or problem is determined to require remedial action by the local council, shall be identified and brought to the attention of the long-term care facility administrator in writing. Upon receipt of such document, the administrator, with the concurrence of the local council chair, shall establish target dates for taking appropriate remedial action. If, by the target date, the remedial action is not completed or forthcoming, the local council chair may, after obtaining approval from the ombudsman and a majority of the members of the local council:

1. Extend the target date if the chair has reason to believe such action would facilitate the resolution of the complaint.
2. In accordance with s. 400.0077, publicize the complaint, the recommendations of the council, and the response of the long-term care facility.
3. Refer the complaint to the state council.

(b) If the local council chair believes that the health, safety, welfare, or rights of the resident are in imminent danger, the chair shall notify the ombudsman or legal advocate, who, after verifying that such imminent danger exists, shall seek immediate legal or administrative remedies to protect the resident.

(c) If the ombudsman has reason to believe that the long-term care facility or an employee of the facility has committed a criminal act, the ombudsman shall provide the local law enforcement agency with the relevant information to initiate an investigation of the case.

(2)(a) Upon referral from a local council, the state council shall assume the responsibility for the disposition of the complaint. If a long-term care facility fails to take action on a complaint by the state council, the state council may, after obtaining approval from the ombudsman and a majority of the state council members:

1. In accordance with s. 400.0077, publicize the complaint, the recommendations of the local or state council, and the response of the long-term care facility.
2. Recommend to the department and the agency a series of facility reviews pursuant to s. 400.19, s. 429.34, or s. 429.67 to ensure correction and nonrecurrence of conditions that give rise to complaints against a long-term care facility.

3. Recommend to the department and the agency that the long-term care facility no longer receive payments under any state assistance program, including Medicaid.

4. Recommend to the department and the agency that procedures be initiated for revocation of the long-term care facility's license in accordance with chapter 120.

(b) If the state council chair believes that the health, safety, welfare, or rights of the resident are in imminent danger, the chair shall notify the ombudsman or legal advocate, who, after verifying that such imminent danger exists, shall seek immediate legal or administrative remedies to protect the resident.

(c) If the ombudsman has reason to believe that the long-term care facility or an employee of the facility has committed a criminal act, the ombudsman shall provide local law enforcement with the relevant information to initiate an investigation of the case.

History.—s. 30, ch. 75-233; s. 3, ch. 76-168; s. 244, ch. 77-147; s. 11, ch. 77-401; s. 1, ch. 77-457; s. 19, ch. 78-95; ss. 14, 18, ch. 80-186; ss. 9, 12, ch. 80-198; ss. 4, 6, ch. 81-184; ss. 2, 3, ch. 81-318; s. 4, ch. 82-46; ss. 17, 19, ch. 82-148; ss. 38, 79, 83, ch. 83-181; s. 17, ch. 90-347; ss. 8, 29, 30, ch. 93-177; s. 49, ch. 93-217; s. 762, ch. 95-148; s. 42, ch. 95-196; s. 115, ch. 99-8; s. 128, ch. 2000-349; s. 48, ch. 2000-367; s. 44, ch. 2004-5; s. 12, ch. 2006-121; s. 78, ch. 2007-5.

Note.—Former s. 400.317.

400.0077 Confidentiality.—

(1) The following are confidential and exempt from the provisions of s. 119.07(1):

(a) Resident records held by the ombudsman or by the state or a local ombudsman council.

(b) The names or identities of the complainants or residents involved in a complaint, including any problem identified by an ombudsman council as a result of an investigation, unless:

1. The complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure in writing;

2. The complainant or resident consents orally and the consent is documented contemporaneously in writing by the ombudsman council requesting such consent; or

3. The disclosure is required by court order.

(c) Any other information about a complaint, including any problem identified by an ombudsman council as a result of an investigation, unless an ombudsman council determines that the information does not meet any of the criteria specified in ¹s. 119.14(4)(b); or unless the information is to collect data for submission to those entities specified in s. 712(c) of the federal Older Americans Act for the purpose of identifying and resolving significant problems.

(2) That portion of an ombudsman council meeting in which an ombudsman council discusses information that is confidential and exempt from the provisions of s. 119.07(1) is closed to the public and exempt from the provisions of s. 286.011.

(3) All other matters before the council shall be open to the public and subject to chapter 119 and s. 286.011.

(4) Members of any state or local ombudsman council shall not be required to testify in any court with respect to matters held to be confidential under s. 429.14 except as may be necessary to enforce the provisions of this act.

(5) Subject to the provisions of this section, the Office of State Long-Term Care Ombudsman shall adopt rules for the disclosure by the ombudsman or local ombudsman councils of files maintained by the program.

(6) This section does not limit the subpoena power of the Attorney General pursuant to s. 409.920(10)(b). History.—ss. 31, 32, ch. 75-233; s. 3, ch. 76-168; s. 12, ch. 77-401; s. 1, ch. 77-457; ss. 10, 12, ch. 80-198; ss. 4, 6, ch. 81-184; ss. 2, 3, ch. 81-318; s. 4, ch. 82-46; ss. 39, 79, 83, ch. 83-181; s. 18, ch. 90-347; ss. 9, 29, 30, ch. 93-177; s. 49, ch. 93-217; s. 225, ch. 96-406; s. 3, ch. 2000-163; s. 129, ch. 2000-349; s. 49, ch. 2000-367; s. 18, ch. 2004-344; s. 23, ch. 2006-197; s. 33, ch. 2009-223.

¹Note.—Repealed by s. 1, ch. 95-217.

Note.—Former s. 400.321.

400.0078 Citizen access to State Long-Term Care Ombudsman Program services.—

(1) The office shall establish a statewide toll-free telephone number for receiving complaints concerning matters adversely affecting the health, safety, welfare, or rights of residents.

(2) Every resident or representative of a resident shall receive, upon admission to a long-term care facility, information regarding the purpose of the State Long-Term Care Ombudsman Program, the statewide toll-free telephone number for receiving complaints, and other relevant information regarding how to contact the program. Residents or their representatives must be furnished additional copies of this information upon request.

History.—s. 4, ch. 99-394; s. 13, ch. 2006-121.

400.0079 Immunity.—

(1) Any person making a complaint pursuant to this part who does so in good faith shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed as a direct or indirect result of making the complaint.

(2) The ombudsman or any person authorized by the ombudsman to act on behalf of the office, as well as all members of the state and local councils, shall be immune from any liability, civil or criminal, that otherwise might be incurred or imposed during the good faith performance of official duties.

History.—s. 33, ch. 75-233; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 2, 3, ch. 81-318; ss. 79, 83, ch. 83-181; ss. 10, 29, 30, ch. 93-177; s. 49, ch. 93-217; s. 130, ch. 2000-349; s. 50, ch. 2000-367; s. 14, ch. 2006-121.

Note.—Former s. 400.324.

400.0081 Access to facilities, residents, and records.—

- (1) A long-term care facility shall provide the office, the state council and its members, and the local councils and their members access to:
 - (a) Any portion of the long-term care facility and any resident as necessary to investigate or resolve a complaint.
 - (b) Medical and social records of a resident for review as necessary to investigate or resolve a complaint, if:
 1. The office has the permission of the resident or the legal representative of the resident; or
 2. The resident is unable to consent to the review and has no legal representative.
 - (c) Medical and social records of the resident as necessary to investigate or resolve a complaint, if:
 1. A legal representative or guardian of the resident refuses to give permission;
 2. The office has reasonable cause to believe that the representative or guardian is not acting in the best interests of the resident; and
 3. The state or local council member obtains the approval of the ombudsman.
 - (d) The administrative records, policies, and documents to which residents or the general public have access.
 - (e) Upon request, copies of all licensing and certification records maintained by the state with respect to a long-term care facility.
 - (2) The department, in consultation with the ombudsman and the state council, may adopt rules to establish procedures to ensure access to facilities, residents, and records as described in this section.
- History.—ss. 11, 30, ch. 93-177; s. 131, ch. 2000-349; s. 51, ch. 2000-367; s. 15, ch. 2006-121.

400.0083 Interference; retaliation; penalties.—

- (1) It shall be unlawful for any person, long-term care facility, or other entity to willfully interfere with a representative of the office, the state council, or a local council in the performance of official duties.
 - (2) It shall be unlawful for any person, long-term care facility, or other entity to knowingly or willfully take action or retaliate against any resident, employee, or other person for filing a complaint with, providing information to, or otherwise cooperating with any representative of the office, the state council, or a local council.
 - (3) Any person, long-term care facility, or other entity that violates this section:
 - (a) Shall be liable for damages and equitable relief as determined by law.
 - (b) Commits a misdemeanor of the second degree, punishable as provided in s. 775.083.
- History.—ss. 12, 30, ch. 93-177; s. 132, ch. 2000-349; s. 52, ch. 2000-367; s. 16, ch. 2006-121.

400.0087 Department oversight; funding.—

- (1) The department shall meet the costs associated with the State Long-Term Care Ombudsman Program from funds appropriated to it.

(a) The department shall include the costs associated with support of the State Long-Term Care Ombudsman Program when developing its budget requests for consideration by the Governor and submittal to the Legislature.

(b) The department may divert from the federal ombudsman appropriation an amount equal to the department's administrative cost ratio to cover the costs associated with administering the program. The remaining allotment from the Older Americans Act program shall be expended on direct ombudsman activities.

(2) The department shall monitor the office, the state council, and the local councils to ensure that each is carrying out the duties delegated to it by state and federal law.

(3) The department is responsible for ensuring that the office:

(a) Has the objectivity and independence required to qualify it for funding under the federal Older Americans Act.

(b) Provides information to public and private agencies, legislators, and others.

(c) Provides appropriate training to representatives of the office or of the state or local councils.

(d) Coordinates ombudsman services with the Advocacy Center for Persons with Disabilities and with providers of legal services to residents of long-term care facilities in compliance with state and federal laws.

(4) The department shall also:

(a) Receive and disburse state and federal funds for purposes that the ombudsman has formulated in accordance with the Older Americans Act.

(b) Whenever necessary, act as liaison between agencies and branches of the federal and state governments and the State Long-Term Care Ombudsman Program.

History.—ss. 13, 30, ch. 93-177; s. 43, ch. 95-196; s. 133, ch. 2000-349; s. 53, ch. 2000-367; s. 25, ch. 2002-223; s. 18, ch. 2006-121.

400.0089 Complaint data reports.—The office shall maintain a statewide uniform reporting system to collect and analyze data relating to complaints and conditions in long-term care facilities and to residents for the purpose of identifying and resolving significant problems. The office shall publish quarterly and make readily available information pertaining to the number and types of complaints received by the State Long-Term Care Ombudsman Program and shall include such information in the annual report required under s.

400.0065.

History.—ss. 14, 30, ch. 93-177; s. 44, ch. 95-196; s. 116, ch. 99-8; s. 16, ch. 2000-263; s. 134, ch. 2000-349; s. 54, ch. 2000-367; s. 26, ch. 2002-223; s. 37, ch. 2003-1; s. 19, ch. 2006-121.

400.0091 Training.—The ombudsman shall ensure that appropriate training is provided to all employees of the office and to the members of the state and local councils.

(1) All state and local council members and employees of the office shall be given a minimum of 20 hours of training upon employment with the office or approval as a state or local council member and 10 hours of continuing education annually thereafter.

(2) The ombudsman shall approve the curriculum for the initial and continuing education training, which must, at a minimum, address:

- (a) Resident confidentiality.
- (b) Guardianships and powers of attorney.
- (c) Medication administration.
- (d) Care and medication of residents with dementia and Alzheimer's disease.
- (e) Accounting for residents' funds.
- (f) Discharge rights and responsibilities.
- (g) Cultural sensitivity.
- (h) Any other topic recommended by the secretary.

(3) No employee, officer, or representative of the office or of the state or local councils, other than the ombudsman, may hold himself or herself out as a representative of the State Long-Term Care Ombudsman Program or conduct any authorized program duty described in this part unless the person has received the training required by this section and has been certified by the ombudsman as qualified to carry out ombudsman activities on behalf of the office or the state or local councils.

History.—ss. 15, 30, ch. 93-177; s. 135, ch. 2000-349; s. 55, ch. 2000-367; s. 32, ch. 2001-62; s. 27, ch. 2002-223; s. 20, ch. 2006-121.

OLDER AMERICANS ACT
TITLE VII, CHAPTER 2, SECTIONS 711/712

LONG TERM CARE OMBUDSMAN PROGRAMS

CHAPTER 2—OMBUDSMAN PROGRAMS

Section. 711. DEFINITIONS.

As used in this chapter:

- (1) OFFICE.—The term “Office” means the office established in section 712(a)(1)(A).
- (2) OMBUDSMAN.—The term “Ombudsman” means the individual described in section 712(a)(2).
- (3) LOCAL OMBUDSMAN ENTITY.—The term “local Ombudsman entity” means an entity designated under section 712(a)(5)(A) to carry out the duties described in section 712(a)(5)(B) with respect to a planning and service area or other substate area.
- (4) PROGRAM.—The term “program” means the State Long-Term Care Ombudsman program established in section 712(a)(1)(B).
- (5) REPRESENTATIVE.—The term “representative” includes an employee or volunteer who represents an entity designated under section 712(a)(5)(A) and who is individually designated by the Ombudsman.
- (6) RESIDENT.—The term “resident” means an older individual who resides in a long-term care facility.

(42 U.S.C. 3058f)

Section. 712. STATE LONG-TERM CARE OMBUDSMAN PROGRAM.

(a) ESTABLISHMENT.—

- (1) IN GENERAL.—In order to be eligible to receive an allotment under section 703 from funds appropriated under section 702 and made available to carry out this chapter, a State agency shall, in accordance with this section—
 - (A) establish and operate an Office of the State Long-Term Care Ombudsman; and
 - (B) carry out through the Office a State Long-Term Care Ombudsman program.
- (2) OMBUDSMAN.—The Office shall be headed by an individual, to be known as the State Long-Term Care Ombudsman, who shall be selected from among individuals with expertise and experience in the fields of long-term care and advocacy.
- (3) FUNCTIONS.—The Ombudsman shall serve on a fulltime basis, and shall, personally or through representatives of the Office—
 - (A) identify, investigate, and resolve complaints that—
 - (i) are made by, or on behalf of, residents; and
 - (ii) relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents (including the welfare and rights of the

residents with respect to the appointment and activities of guardians and representative payees), of—

- (I) providers, or representatives of providers, of long-term care services;
- (II) public agencies; or
- (III) health and social service agencies;

(B) provide services to assist the residents in protecting the health, safety, welfare, and rights of the residents;

(C) inform the residents about means of obtaining services provided by providers or agencies described in subparagraph (A)(ii) or services described in subparagraph (B);

(D) ensure that the residents have regular and timely access to the services provided through the Office and that the residents and complainants receive timely responses from representatives of the Office to complaints;

(E) represent the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(F) provide administrative and technical assistance to entities designated under paragraph (5) to assist the entities in participating in the program;

(G)

(i) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;

(ii) recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and

(iii) facilitate public comment on the laws, regulations, policies, and actions;

(H)

(i) provide for training representatives of the Office;

(ii) promote the development of citizen organizations, to participate in the program; and

(iii) provide technical support for the development of resident and family councils to protect the well-being and rights of residents; and

(I) carry out such other activities as the Assistant Secretary determines to be appropriate.

(4) CONTRACTS AND ARRANGEMENTS.—

(A) IN GENERAL.—Except as provided in subparagraph (B) the State agency may establish and operate the Office, and carry out the program, directly, or by contract or other arrangement with any public agency or nonprofit private organization.

(B) LICENSING AND CERTIFICATION ORGANIZATIONS; ASSOCIATIONS.—The State agency may not enter into the contract or other arrangement described in subparagraph (A) with—

- (i) an agency or organization that is responsible for licensing or certifying long-term care services in the State; or

(ii) an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals.

(5) DESIGNATION OF LOCAL OMBUDSMAN ENTITIES AND REPRESENTATIVES.—

(A) DESIGNATION.—In carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity, and may designate an employee or volunteer to represent the entity.

(B) DUTIES.—An individual so designated shall, in accordance with the policies and procedures established by the Office and the State agency—

(i) provide services to protect the health, safety, welfare and rights of residents;

(ii) ensure that residents in the service area of the entity have regular, timely access to representatives of the program and timely responses to complaints and requests for assistance;

(iii) identify, investigate, and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents;

(iv) represent the interests of residents before government agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(v)

(I) review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents; and

(II) facilitate the ability of the public to comment on the laws, regulations, policies, and actions;

(vi) support the development of resident and family councils; and

(vii) carry out other activities that the Ombudsman determines to be appropriate.

(C) ELIGIBILITY FOR DESIGNATION.—Entities eligible to be designated as local Ombudsman entities, and individuals eligible to be designated as representatives of such entities, shall—

(i) have demonstrated capability to carry out the responsibilities of the Office;

(ii) be free of conflicts of interest and not stand to gain financially through an action or potential action brought on behalf of individuals the Ombudsman serves;

(iii) in the case of the entities, be public or nonprofit private entities; and

(iv) meet such additional requirements as the Ombudsman may specify.

(D) POLICIES AND PROCEDURES.—

(i) IN GENERAL.—The State agency shall establish, in accordance with the Office, policies and procedures for monitoring local Ombudsman entities designated to carry out the duties of the Office.

(ii) POLICIES.—In a case in which the entities are grantees, or the representatives are employees, of area agencies on aging, the State agency shall develop the policies in consultation with the area agencies on aging. The policies shall provide for

participation and comment by the agencies and for resolution of concerns with respect to case activity.

(iii) CONFIDENTIALITY AND DISCLOSURE.—The State agency shall develop the policies and procedures in accordance with all provisions of this subtitle regarding confidentiality and conflict of interest.

(b) PROCEDURES FOR ACCESS.—

(1) IN GENERAL.—The State shall ensure that representatives of the Office shall have—

(A) access to long-term care facilities and residents;

(B)(i) appropriate access to review the medical and social records of a resident, if—

(I) the representative has the permission of the resident, or the legal representative of the resident; or

(II) the resident is unable to consent to the review and has no legal representative; or

(ii) access to the records as is necessary to investigate a complaint if—

(I) a legal guardian of the resident refuses to give the permission;

(II) a representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident; and

(III) the representative obtains the approval of the Ombudsman;

(C) access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities; and

(D) access to and, on request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities.

(2) PROCEDURES.—The State agency shall establish procedures to ensure the access described in paragraph (1).

(c) REPORTING SYSTEM.—The State agency shall establish a statewide uniform reporting system to—

(1) collect and analyze data relating to complaints and conditions in long-term care facilities and to residents for the purpose of identifying and resolving significant problems; and

(2) submit the data, on a regular basis, to—

(A) the agency of the State responsible for licensing or certifying long-term care facilities in the State;

(B) other State and Federal entities that the Ombudsman determines to be appropriate;

(C) the Assistant Secretary; and

(D) the National Ombudsman Resource Center established in section 202(a)(21).

(d) DISCLOSURE.—

(1) IN GENERAL.—The State agency shall establish procedures for the disclosure by the Ombudsman or local Ombudsman entities of files maintained by the program, including records described in subsection (b)(1) or (c).

(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 a 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.

(e) CONSULTATION.—In planning and operating the program, the State agency shall consider the views of area agencies on aging, older individuals, and providers of long-term care.

(f) CONFLICT OF INTEREST.—The State agency shall—

(1) ensure that no individual, or member of the immediate family of an individual, involved in the designation of the Ombudsman (whether by appointment or otherwise) or the designation of an entity designated under subsection (a)(5), is subject to a conflict of interest;

(2) ensure that no officer or employee of the Office, representative of a local Ombudsman entity, or member of the immediate family of the officer, employee, or representative, is subject to a conflict of interest;

(3) ensure that the Ombudsman—

(A) does not have a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;

(B) does not have an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service;

(C) is not employed by, or participating in the management of, a long-term care facility; and

(D) does not receive, or have the 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; and

(4) establish, and specify in writing, mechanisms to identify and remove conflicts of interest referred to in paragraphs (1) and (2), and to identify and eliminate the relationships described in subparagraphs (A) through (D) of paragraph (3), including such mechanisms as—

(A) the methods by which the State agency will examine individuals, and immediate family members, to identify the conflicts; and

(B) the actions that the State agency will require the individuals and such family members to take to remove such conflicts.

(g) LEGAL COUNSEL.—The State agency shall ensure that—

(1)(A) adequate legal counsel is available, and is able, without conflict of interest, to—

(i) provide advice and consultation needed to protect the health, safety, welfare, and rights of residents; and

(ii) assist the Ombudsman and representatives of the Office in the performance of the official duties of the Ombudsman and representatives; and

(B) legal representation is provided to any representative of the Office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of the official duties of the Ombudsman or such a representative; and

(2) the Office pursues administrative, legal, and other appropriate remedies on behalf of residents.

(h) ADMINISTRATION.—The State agency shall require the Office to—

(1) prepare an annual report—

(A) describing the activities carried out by the Office in the year for which the report is prepared;

(B) containing and analyzing the data collected under subsection (c);

(C) evaluating the problems experienced by, and the complaints made by or on behalf of, residents;

(D) containing recommendations for—

(i) improving quality of the care and life of the residents; and

(ii) protecting the health, safety, welfare, and rights of the residents;

(E)(i) analyzing the success of the program including success in providing services to residents of board and care facilities and other similar adult care facilities; and

(ii) identifying barriers that prevent the optimal operation of the program; and

(F) providing policy, regulatory, and legislative recommendations to solve identified problems, to resolve the complaints, to improve the quality of care and life of residents, to protect the health, safety, welfare, and rights of residents, and to remove the barriers;

(2) analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;

(3)(A) provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding—

(i) the problems and concerns of older individuals residing in long-term care facilities; and

(ii) recommendations related to the problems and concerns; and

(B) make available to the public, and submit to the Assistant Secretary, the chief executive officer of the State, the State legislature, the State agency responsible for licensing or certifying long-term care facilities, and other appropriate governmental entities, each report prepared under paragraph (1);

- (4)(A) not later than 1 year after the date of the enactment of this title, establish^[15] procedures for the training of the representatives of the Office, including unpaid volunteers, based on model standards established by the Director of the Office of Long-Term Care Ombudsman Programs, in consultation with representatives of citizen groups, long-term care providers, and the Office, that—
- (A) specify a minimum number of hours of initial training;
 - (B) specify the content of the training, including training relating to—
 - (i) Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State;
 - (ii) investigative techniques; and
 - (iii) such other matters as the State determines to be appropriate; and
 - (C) specify an annual number of hours of in-service training for all designated representatives;
- (5) prohibit any representative of the Office (other than the Ombudsman) from carrying out any activity described in subparagraphs (A) through (G) of subsection (a)(3) unless the representative—
- (A) has received the training required under paragraph (4); and
 - (B) has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office;
- (6) coordinate ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illnesses established under—
- (A) subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000; and
 - (B) the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. 10801 et seq.);
- (7) coordinate, to the greatest extent possible, ombudsman services with legal assistance provided under section 306(a)(2)(C), through adoption of memoranda of understanding and other means;
- (8) coordinate services with State and local law enforcement agencies and courts of competent jurisdiction; and
- (9) permit any local Ombudsman entity to carry out the responsibilities described in paragraph (1), (2), (3), (6), or (7).
- (i) **LIABILITY.**—The State shall ensure that no representative of the Office will be liable under State law for the good faith performance of official duties.

(j) NONINTERFERENCE.—The State shall—

(1) ensure that willful interference with representatives of the Office in the performance of the official duties of the representatives (as defined by the Assistant Secretary) shall be unlawful;

(2) prohibit retaliation and reprisals by a long-term care facility or other entity with respect to any resident, employee, or other person for filing a complaint with, providing information to, or otherwise cooperating with any representative of, the Office; and

(3) provide for appropriate sanctions with respect to the interference, retaliation, and reprisals.

(42 U.S.C. 3058g)

Source: U.S. Department of Health and Human Services, Administration on Aging

Posted on Saturday, 09.03.11



Program to protect elders undermined, feds say

The program charged with protecting Florida residents from abuse in ALFs and nursing homes has been undermined by political and industry interference, the feds say.

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BY CAROL MARBIN MILLER AND MICHAEL SALLAH

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A statewide volunteer advocacy program for nursing home and assisted living residents has been crippled by conflicts of interest and political meddling by the governor's office and state elder affairs administrators, a federal report says.

The U.S. Administration on Aging, which investigated the alleged political firing of an outspoken head of the state's Long-term Care Ombudsman Program, charged in a strongly worded, 31-page report Thursday that the volunteer group has become so hamstrung by politics that volunteers can not effectively advocate for frail elderly and disabled people who cannot protect themselves.

Release of the report comes at a critical time: On Friday, the day after its release, the state Department of Elder Affairs, which houses the ombudsman program, fired its Miami administrator, Clare Caldwell, whose most recent evaluation, in June, described her as "an invaluable employee who is committed to promoting the best care and quality of life for residents." Caldwell said her bosses refused to tell her why she was fired, except to say that she served "at the will of the [agency] secretary," and her services were no longer desired.

"I don't understand how this can happen," Caldwell told The Miami Herald Friday morning. "I don't have any idea why I'm being fired."

"I've always thought that my allegiance is to the public," Caldwell said, adding: "That's not what they want."

The office of Gov. Rick Scott refused on Friday to discuss Caldwell's firing, or the report, which tied interference in the program directly to the administration.

A spokeswoman for the Department of Elder Affairs, Ashley Marshall, also declined to discuss the report, though she did release the agency's eight-page response to federal aging administrators.

"Florida's Ombudsman Program exists to benefit and protect the residents of long-term care facilities, who are among the most frail and vulnerable populations in the...delivery system. The Department understands and respects the vital needs for an independent [ombudsman] to advocate on behalf of residents without the pressures of external influences," wrote Charles T. Corley, the agency's secretary.

As to Caldwell's termination Friday, Marshall told The Herald in an email: "It is not within standard departmental protocol for me to comment on personnel matters."

Brian Lee, the former ombudsman at the center of the controversy, called the report “the first step toward vindication of the ombudsman program. This is a step in the right direction toward ensuring the program is an independent voice for residents,” he said.

From the beginning, the report said, Florida’s ombudsman program was beset by a conflict of interest: The Department of Elder Affairs develops licensing rules for all assisted living facilities, or ALFs. But the department also holds the authority to appoint or terminate ombudsmen who are supposed to have the authority to criticize such rules. Florida, the report said, “has created an organizational conflict of interest.”

Elder affairs administrators, the report said, openly admitted they do “not support the spirit” of federal rules that guarantee the independence of elder advocates and allow volunteers to take positions “which may be contrary to the positions” of the elder affairs department or other “sister agencies of the governor.”

“As a result, the Long-term Care Ombudsman Program has been severely limited in its ability to carry out its mission...to advocate for residents and their interests,” the report added.

The federal report suggests the volunteer advocacy group has long been under the thumb of Florida governors’ administrations, which went so far as to forbid advocates from speaking publicly without clearing their messages in advance. The federal government says that policy violates the U.S. Older Americans Act, which governs long-term care ombudsmen.

In December 2009, for example, the program’s state advisory council voted to call a news conference to push for improvements at an assisted living facility — sources have told The Miami Herald the incident involved Miami’s Munne Center — after behind-the-scenes efforts had fallen short. The volunteer, retired U.S. Marine Corps. Col. Donald Hering, canceled the conference abruptly after his supervisors “insisted that it was not to go ahead under any circumstances,” the report said. “The reason given for the instruction to cancel the news conference was that going ahead would embarrass” the state Agency for Health Care Administration, or AHCA, which licenses and regulates ALFs and nursing homes and had repeatedly failed to act on Munne.

Hering, who was recently promoted to deputy state ombudsman, concluded “that his job was on the line if the press conference went ahead,” the report said.

In his reply to the report, Corley called a description of the event “one-sided.” The conference, Corley added, was “needless” because the ombudsman program “was able to engender a collaborative effort between AHCA, the [elder affairs] department and the facility to resolve identified issues to the satisfaction of all parties.”

But in April 2011, two years later, AHCA halted all new admissions to Munne, sought a permanent revocation of the home’s license — and imposed a \$1,172.59 fine — following a scathing 63-page inspection report that turned up a wave of ongoing violations: poor training of key employees; a failure to hospitalize residents with life-threatening pressure sores; searing temperatures inside the building; foul odors, filthy bathrooms, stained floors and broken furniture; and the home’s habitual inability to keep track of its own residents.

One resident, for example, roamed from the ALF six times in six months. A resident, diagnosed with schizophrenia, was found lying in a ditch surrounded by ant hills. He had been bitten so many times by the insects that police had to take him to the hospital, the report said.

But the administration of Gov. Scott, the report says, has gone much further:

On Jan. 28, shortly after Scott’s inauguration, the ombudsman program’s director, Brian Lee — described in the report by colleagues as “the most dedicated public servant they had met” — was fired. Lee’s dismissal came shortly after he sent nursing homes a letter requesting ownership and financial information to which, under the new federal health care reform legislation, he was entitled.

Then, on Feb. 7, the report said, the governor’s office told elder affairs administrators “that it was time for Mr. Lee ‘to go.’” The program needed to “go in a new direction.” Days later, elder affairs “leadership” told the acting head of the ombudsman program that Lee’s letter to nursing homes needed to be “fixed,” the report added.

Though the Administration on Aging acknowledged in its report that the appointment and removal of ombudsmen was well within the administration’s authority, the report said the state could not remove ombudsmen in order to achieve

political aims. “The departure of the incumbent [ombudsman] caps off a history which the Department of Elder Affairs openly acknowledges has not allowed [the program] to be independent and impartial,” the report added.

“Mr. Lee’s departure has been a grave blow to a program that was already severely limited in its advocacy.”

In his letter to federal authorities, Corley noted that “willful interference” with ombudsmen is a crime, though under the statute’s “plain meaning,” administrators are well within their rights in “voicing displeasure and criticism regarding how the ombudsman is performing his or her job.”

“If [Lee’s] argument that willful interference by any person includes criticism on how he or she conducts his or her duties is taken to its logical conclusion, then the department secretary would not be able to exercise his authority to remove the ombudsman...without committing a crime. The Legislative mandate that the ombudsman serves at the pleasure of the department secretary is completely illusory if the secretary is subject to criminal prosecution for merely disagreeing with how the ombudsman is performing the job.”

Two months after Lee was fired, a local volunteer who was calling for an investigation into his firing was herself terminated. Elder affairs administrators say she was fired for sending emails to other volunteers in violation of the state’s public records law — though Lee says the emails also were sent to several reporters.

The federal report noted her departure with “grave concern,” saying such an interpretation of Florida’s Sunshine Law would deal a crippling blow to volunteers’ ability to speak with each other.

After Lee’s departure, the elder affair’s department appointed a new ombudsman who came with the support of an important group: the assisted living industry.

In December, before Scott took office, the director of the Florida Assisted Living Association sent the governor-elect a letter recommending an AHCA inspector for Lee’s job, praising the man, Robert Emling, for “proactively opening lines of communication...with the provider community and state and local agencies.” Emling withdrew his name from consideration, and association director Pat Lange then recommended Jim Crochet, who was given the job.

“We were impressed with Jim’s expertise, and we felt he would bring a lot to the position,” Lange told The Herald.

Crochet did not respond to calls for comment

Read more: <http://www.miamiherald.com/2011/09/02/v-fullstory/2388104/program-to-protect-elders-undermined.html#ixzz1XBfDv0tG>

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

10/4/2011

Meeting Date

Bill Number (if applicable)

Topic Introduction of Secretary Corley & Comments on AoA Compliance Review

Amendment Barcode (if applicable)

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Speaking: For Against Information

Representing Florida Department of Elder Affairs

Appearing at request of Chair: Yes No

Lobbyist registered with Legislature: Yes No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

For officially noticed committee meetings, pursuant to s. 11.061, Florida Statutes, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.

If designated employee:

Time: from _____ to _____

This form is part of the public record for this meeting.

S-001 (08/24/11)

THE FLORIDA SENATE
COMMITTEE APPEARANCE RECORD

(Submit to Committee Chair or Administrative Assistant)

10/4/11

Date

Bill Number

Name DEAN KOWALCHUK

Phone 414-2074

Address 4040 ESPLANADE WAY

E-mail _____

Street

TAL

FL

32399

Job Title _____

City

State

Zip

Speaking: For Against Information

Appearing at request of Chair

Subject OMBUDSMAN

Representing IDDEA

Lobbyist registered with Legislature: Yes No

Pursuant to s. 11.061, Florida Statutes, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.

If designated employee: Time: from _____ .m. to _____ .m.

THE FLORIDA SENATE

COMMITTEE APPEARANCE RECORD

(Submit to Committee Chair or Administrative Assistant)

10/4/2011
Date

Bill Number

Name Lynn Das Santos
Address 2958 DATE Palm Way
Street Venice, FL 34292
City State Zip

Phone 941-485-6402
E-mail Floweratz2147
Job Title Retired @ Comcast net
Teacher

Speaking: For Against Information Appearing at request of Chair

Subject Independence of long Term Care Ombudsman

Representing No one - private citizen advocate

Lobbyist registered with Legislature: Yes No

Pursuant to s. 11.061, Florida Statutes, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.
If designated employee: Time: from _____ .m. to _____ .m.

S-001 (08/2005)

THE FLORIDA SENATE

COMMITTEE APPEARANCE RECORD

(Submit to Committee Chair or Administrative Assistant)

10/4/11
Date

Bill Number

Name Brian Lee
Address 3488 Cedarwood Trl.
Street Tallahassee, FL 32312
City State Zip

Phone 4912198
E-mail blee1714@gmail.com
Job Title

Speaking: For Against Information Appearing at request of Chair

Subject Administration on Aging or Aging Dept Ombudsman

Representing Concerned Citizen Advocate

Lobbyist registered with Legislature: Yes No

Pursuant to s. 11.061, Florida Statutes, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.
If designated employee: Time: from _____ .m. to _____ .m.



The Florida Senate

Issue Brief 2012-210

September 2011

Committee on Children, Families, and Elder Affairs

A REVIEW OF FEDERAL FOSTERING CONNECTIONS IMPLEMENTATION IN FLORIDA

Statement of the Issue

Signed into law on October 7, 2008, the Fostering Connections to Success and Increasing Adoptions Act of 2008¹ (Fostering Connections) made a number of important changes to improve the lives of children, young adults, and families impacted by the nation's child welfare system. In addition to making additional Title IV-E funds available to states, the intent of the law is to promote permanency and better outcomes for children and young adults through policy changes in seven areas:

- Support for kinship or relative care and family connections;
- Support for young adults aging out of care;
- Coordinated health services;
- Improved educational stability and opportunities;
- Incentives and assistance for adoption;
- Direct access to federal resources for Indian Tribes,² and
- Workforce development.³

The National Association of Public Child Welfare Administrators surveyed all 50 states and the District of Columbia relating to implementation of Fostering Connections provisions in partnership with Casey Family Programs. States, including Florida, reported varying degrees of progress.⁴

Discussion

Background

Relative Care

It is generally understood that foster care is a temporary living situation for children who are removed from their homes, and child welfare agencies are required to establish permanent, stable living arrangements for children

¹ P.L. 110-351.

² There are two federally recognized tribes in Florida, the Seminole Tribe of Florida and the Miccosukee Tribe of Indians of Florida. The Department of Children and Families (DCF or the department) provides child protective investigations and case management services on the Seminole Tribe of Florida reservations at the request of, and in collaboration with, the Seminole Tribe. The Miccosukee Tribe has a tribal court system that handles both child protective investigations and case management on their reservations. At this time DCF does not anticipate either tribe making a request to operate a IV-E program under Fostering Connections.

³ The availability of federal Title IV-E training dollars is expanded to allow states to seek enhanced reimbursement for costs associated with training private agencies which are defined as "state-licensed or state approved child welfare agencies providing services," as well as court personnel, attorneys, guardians ad litem, court appointed special advocates, prospective relative guardians, and foster and adoptive parents.

⁴ National Association of Public Child Welfare Administrators, *Available at:* <http://www.napcwa.org/Legislative/fostering.asp>. (last visited June 28, 2011).

brought into care. If returning home is not possible or appropriate, agencies must quickly and competently identify another permanent home for these children – preferably through adoption, guardianship, or a less formal placement with a relative. Current federal law is intended to implement best practice policies and most state laws require that relatives be given priority in placement decisions.⁵

Kinship or relative care has become increasingly important in meeting the needs of children either involved in, or at risk of becoming involved in, the child welfare system. Relative care arrangements prevent large numbers of children from entering the formal child welfare system.⁶ Studies have shown that children placed in relative care when compared to children in general care placements:

- Experience greater placement stability and fewer placement changes;
- Have a greater sense of satisfaction with their living arrangement and feel less stigmatized;
- Are less likely to re-enter the child welfare system once reunified with birth parents; and
- Have scores in physical, cognitive, emotional, and skill-based domains more like those of children who are able to remain in their home following a child abuse and neglect investigation.⁷

Despite their important role in ensuring the safety and healthy development of children, relative caregivers often experience hardships and need services and supports. They face a variety of barriers, including difficulties enrolling children in school, accessing and authorizing medical treatment, maintaining public housing leases, obtaining affordable legal service, and accessing a variety of federal benefits and services.

Educational Needs

For all children, and in particular for children in care, educational coordination, stability, continuity, advocacy and opportunity are essential to academic success. Positive school experiences enhance a child's well-being, help transitions to adulthood be more successful, and increase chances for personal fulfillment and economic self-sufficiency.⁸ Studies indicate, however, that children in care have higher rates of school transfer, school absence or tardiness, and suspension and expulsion when compared to similar children who are not in care. They are more likely to receive poor grades, be placed in more restrictive classrooms, perform below grade level, be retained a grade, and receive low scores on state testing.⁹ Studies also suggest they are less likely to do their homework, receive help with schoolwork, enroll in college preparatory courses, receive a high school diploma, or participate in post-secondary education.¹⁰

Health Care

Children in care have greater health care needs than other children and account for a disproportionate share of public spending on children's health care.¹¹ Nevertheless, children in care experience serious unmet health care needs. This is due, in part, to placement instability combined with limited coordination and information-sharing between service providers. On average, children placed in care experience one to two changes in homes per year. Placement changes are usually accompanied by changes in physicians and other health care providers, resulting in

⁵ Child Welfare Information Gateway. Out-of-Home Care. Available at:

<http://www.childwelfare.gov/outofhome/overview.cfm>. (last visited July 17, 2011).

⁶ Gleeson, James P. *Kinship Care Research and Literature: Lessons Learned and Directions for Future Research*, summary of a presentation entitled *Advocating for Kinship Care as a Valuable Resource for Families* given at Child Welfare League of America's National Conference in Washington, DC, on February 28, 2007. Available at: <http://cwla.org/programs/kinship/kinshipsummer2007.pdf>. (last visited July 18, 2011).

⁷ *Id.*

⁸ National Conference of State Legislatures. *Educating Children in Foster Care State Legislation 2004 – 2007*. March 2008. Available at: http://www.ncsl.org/print/cyf/foster_care_education.pdf. (last visited July 18, 2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ The Children's Partnership. *Improving Health Outcomes for Children In Foster Care: The Role of Electronic Record Systems*. Digital Opportunity for Youth Issue Brief: January 2009. Available at: <http://www.childrenspartnership.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=12947>. (last visited July 18, 2011).

incomplete health information that is spread across many different sites.¹² In turn, children in care frequently receive incomplete and/or duplicate immunizations and lack proper ongoing primary care, including regular assessments of their healthy development and emotional status, along with needed treatment.¹³

Fostering Connections

Child welfare experts frequently cite Fostering Connections as the most significant and expansive reform to federal child welfare policy¹⁴ since the Adoption and Safe Families Act (ASFA) of 1997.¹⁵ The legislation includes options for states to consider, as well as specific requirements that must be met. Provisions in the law are aimed at improving the oversight of foster children's health care needs, educational stability, and connection to family members. Generally, the law requires states to:

- Provide educational stability to children in care by ensuring regular school attendance, enabling children to remain in the same school or when a move is necessary, ensuring that transfers occur promptly; and
- Improve health care for children in care by requiring the state child welfare agency to work with the state Medicaid agency to create a plan to better coordinate health care for these children.

In addition, the law provides states the opportunity to provide one or more optional services:

- Allow children who turn 18 in care without permanent families to remain in care to age 19, 20, or 21 with continued federal support to increase their opportunities for success as they transition to adulthood;
- Receive federal funds to assist with subsidized guardianship payments to enable children in care to live in permanent guardianships with grandparents or other relatives. Under certain circumstances, families may continue to receive guardianship assistance until the child reaches age 21. The law also clarifies that states may waive non-safety related licensing standards for relatives on a case-by-case basis; and
- Continue maintenance adoption subsidy payments to families for children who were adopted from care after the age of 16 and who meet certain criteria for continued payments.

Fostering Connections also expands the availability of federal training dollars, on a phased-in basis, to reach more individuals caring for and working with children in the child welfare system, including relative guardians, staff of private child welfare agencies, court personnel, attorneys, guardians ad litem, and court appointed special advocates.

Implementation in Florida

FOSTERING CONNECTIONS PROVISION	CURRENT STATUS IN FLORIDA
RELATIVE CARE	
States may establish a Guardianship Assistance Program (GAP) to provide relative guardianship assistance payments on behalf of children to grandparents and other relatives who have assumed legal guardianship of the children and states will be able to use Title IV-E funds for this purpose. ¹⁶	Florida has not exercised the option of providing guardianship assistance payments. To do so would require restructuring the existing Relative Caregiver Program in order to meet federal eligibility requirements. Florida would also have to make statutory changes to the licensure requirements for foster

¹² *Id.*

¹³ *Id.*

¹⁴ Fostering Connections Resource Center. Available at: http://www.fosteringconnections.org/about_the_law?id=0001. (last visited July 13, 2011).

¹⁵ P.L. 105-89.

¹⁶ States are also allowed to place a sibling(s) of an eligible child in the same relative guardianship arrangement and to make guardianship assistance payments on behalf of those siblings. In order to receive payments, states must negotiate and enter

	homes. ¹⁷
States must, within 30 days after the removal of a child from the custody of the parent, exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child. ¹⁸	Florida met all of the provisions of this requirement before Fostering Connections was adopted. ¹⁹
States must make reasonable efforts to place siblings removed from their home in the same foster care, relative guardianship, or adoptive placement and in the case of siblings removed from their home who are not jointly placed, to provide frequent visitation or other ongoing interaction between the siblings.	Florida law provides legislative intent that whenever possible siblings are to be placed together. ²⁰ Rule requires that weekly in-person visitation between separated siblings be recommended to court unless it is deemed not feasible or not in the best interest of one or more of the children concerned. ²¹
SUPPORT FOR YOUNG ADULTS	
States may, at their option, continue to provide care and support to a child in care until the age of 19, 20, or 21 if he or she meets certain eligibility criteria. ²² States may also extend adoption assistance and/or guardianship payments on behalf of certain children ages 19, 20, or 21, if they meet the same criteria.	Florida has not exercised this option. Young adults may request to remain under the court's jurisdiction until age 19 or to remain in a foster home or group home, but foster care status is not extended. ²³
Caseworkers and other individuals must provide every child or young adult assistance and support to develop a transition plan during the 90-day period immediately prior to exiting care. The plan must be personalized at the direction of the child or young adult and must include specific options on housing, health insurance, education, local opportunities for mentors, and workforce supports and employment services.	A policy memorandum was sent by DCF to all regional directors that required each CBC and case management organization to develop local procedures to ensure that each child in care has a transition plan developed to meet the requirements of Fostering Connections. Documentation of transition plan development in the Florida Safe Families Network (FSFN) is also required. ²⁴
Eligibility for the Chafee Foster Care Independent Living Program (ILP) services is extended to children adopted or placed in kinship guardianship after	Florida already offers these services to children who have been adopted or placed into a court approved relative guardianship after attaining the age of 16.

into a written binding relative guardianship agreement with the prospective relative guardian. Those agreements must include certain specified requirements.

¹⁷ See ss. 39.5085 and 409.175, F.S.

¹⁸ In addition, the state must inform relatives of their options to participate in the care and placement of the child including the requirements to become a foster family home and the additional services and supports that are available for children placed in such a home.

¹⁹ See ss. 39.301, 39.401, and 39.402, F.S. and 65C-30.003, F.A.C., related to diligent search and notification of relatives. See ss. 39.4085, F.S., 65C-28.008, 65C-30.007 and 65C-30.011, F.A.C., and the Relative Caregiver Program Brochure, related to options, services, and supports available to relative caregivers. Brochure available at: http://centerforchildwelfare.fmhi.usf.edu/kb/RelCarPrgmPrac/DCF_RelCgvrProg.pdf. (last visited July 29, 2011). See ss. 39.301 and 39.502, F.S., related to notification exceptions in cases involving domestic violence.

²⁰ See s. 39.001(1)(k), F.S.

²¹ 65C-28.002, F.A.C. When there is a recommendation of no visitation or less than weekly visitation because it is not in the best interest of the child, the court shall be provided clinical documentation of those reasons which must be documented in the case file.

²² Fostering Connections allows states, at their option, to provide care and support to children in care until the age of 19, 20, or 21 provided that the child is either 1) completing high school or an equivalency program; 2) enrolled in post-secondary or vocational school; 3) participating in a program or activity designed to promote, or remove barriers to, employment; 4) employed for at least 80 hours per month; or 5) incapable of doing any of these activities due to a medical condition.

²³ See s. 39.013, F.S.

²⁴ The department surveyed the 20 CBC lead agencies and received responses from ten relating to their process for developing the required transition plans. Those ten CBCs self-report that they are in compliance with the law. However, statewide data shows that only 68 percent of 17 year olds have a signed independent living transition plan filed with the court and 53 percent were involved in developing their transition plan. Independent Living Transitional Services Critical Checklist, 2010. Available at: <http://www.dcf.state.fl.us/programs/indliving/docs/ILSurveyChartbook2010.pdf>. (last visited August 2, 2011).

<p>attaining age 16. In addition, eligibility for Education and Training Vouchers (ETV) is extended to children who are placed in a relative guardianship after attaining the age of 16.²⁵</p>	<p>However, if the legislature chooses to implement other optional provisions of Fostering Connections, additional federal funding may be available to provide these services.</p>
<p>COORDINATED HEALTH SERVICES</p>	
<p>States are required to develop a plan for the ongoing oversight and coordination of health care services for children in care.²⁶</p>	<p>The department, working in partnership with state and community stakeholders, began a strategic initiative in February 2009 to improve health and mental outcomes for children and young adults who are in or at risk for involvement with the dependency system. The initiative began with the charge to review the health and mental health needs of children involved in the dependency system and to develop strategies to ensure those needs are met with quality and appropriate services. A multi-agency and stakeholder taskforce²⁷ was established to address identified issues. The taskforce identified four major goals and work continues toward meeting these goals.^{28,29}</p>
<p>IMPROVED EDUCATIONAL STABILITY AND OPPORTUNITIES</p>	
<p>States must add case plan requirements to ensure the educational stability of children in care, including assurances that the state agency has coordinated with appropriate local educational agencies to ensure that the child remains in the school in which the child is enrolled at the time of placement. If remaining in the child's school of origin is not in his or her best interest, the state must assure that the local educational agency provides immediate enrollment in a new school and all</p>	<p>While there are provisions in statute and rule relating to school attendance and stability,³⁰ ongoing cooperation between the child welfare and the education systems is insufficient to ensure successful educational outcomes for children in care.³¹</p>

²⁵ Children adopted after the age of 16 are already eligible.

²⁶ The plan should ensure a coordinated strategy to identify and respond to the health care needs of children in foster care placements, including mental health and dental health needs. The plan should also outline a schedule for initial and follow-up health screening, how health needs identified through screenings will be monitored and treated, how medical information will be updated and appropriately shared, how continuity of health care will be ensured, and how oversight of prescription medications will be achieved.

²⁷ The stakeholder taskforce has twenty-eight members representing all the health and human services child serving agencies across the state as well as key advocacy and stakeholder groups. A variety of professional disciplines are represented in the membership, including but not limited to fields of medicine, nursing, mental health, legal, insurance, substance abuse, child welfare and public policy making and financing (Medicaid and Health Maintenance Organizations); with professional staff support provided by the department.

²⁸ Those goals are developing Florida's Health Oversight and Coordination Plan as required in the Fostering Connections Act; advancing the concept of creating a "medical home" for all children in the dependency system identifying any disconnects among various program eligibility determination processes and computer systems and developing strategies for the seamless integration of medical, mental health and substance abuse services with the dependency system.

²⁹ Statewide data for 2010 shows that 69 percent, 85 percent, 45 percent, and 42 percent of children ages 13-17 in care received dental, physician, mental health, and vision services respectively. Some CBCs have lower outcomes. For children ages 13-17 served by the Sarasota Family YMCA, 25 percent, 50 percent, 25 percent, and 0 percent received dental, physician, mental health and vision services. Independent Living Transitional Services Critical Checklist, 2010. Available at: <http://www.dcf.state.fl.us/programs/inliving/docs/ILSurveyChartbook2010.pdf>. (last visited August 2, 2011).

³⁰ See ss. 39.0016, 39.6012(2)(b)4., F.S., and 65C-30.006, F.A.C.

³¹ Statewide data shows that for children in care ages 13-17, 55% are at or above grade level; 57% who are below grade level are receiving remediation services; 66% have passed their grade level FCAT; 48% who failed their grade level FCAT are receiving tutoring and other services to improve chances of passing; 62% have an educational and career path which has been developed into a written plan; and 60% have an educational and career plan that has been filed with the court. Independent Living Transitional Services Critical Checklist, 2010. Available at: <http://www.dcf.state.fl.us/programs/inliving/docs/ILSurveyChartbook2010.pdf>. (last visited August 2, 2011).

of the child's educational records must be provided to the new school. States must also provide assurances that children in care are enrolled in school, home schooled, in an independent study program, or incapable of attending school on a fulltime basis due to the medical condition of the child.	
The definition of a Title IV-E foster care maintenance payment is amended to include the cost of "reasonable travel" for transportation expenses related to allowing a child to remain in the same school he or she was attending prior to coming into care. ³²	Transportation remains an issue as the education and child welfare systems reportedly look to each other to pay for transportation. ³³
INCENTIVES AND ASSISTANCE FOR ADOPTION	
The requirement that states could only claim reimbursement for special needs children adopted from foster care who met Title IV-E income eligibility standards was removed allowing states, over time, to seek reimbursement for adoption assistance payments made on behalf of all special needs children who meet other IV-E eligibility requirements. ³⁴ This is often referred to as the "de-linking" provision.	As federal adoption assistance eligibility expands, states will save money that would have been spent on state only adoption assistance programs.
The Adoption Incentives Program is renewed for five years. ³⁵	Florida received a \$5,718,271 adoption incentive award for FY 2010 (based on FY 2009 earning year). ³⁶ These funds are used by the department for maintenance adoption subsidies.
States are required to inform prospective adoptive parents of the availability of the federal adoption tax credit.	This information is provided to adoptive parents as part of the discussion relating to the benefits of adopting a child. ³⁷

³² Under previous law, states could seek Title IV-E reimbursement for transportation-related expenses as an administrative expense with a 50 percent reimbursement rate. Under Fostering Connections those costs will be reimbursed at the Medicaid matching rate.

³³ Reported by the department on August 112, 2011. Communication on file with the Committee on Children, Families, and Elder Affairs.

³⁴ The phase-in of the de-linking eligibility provision begins October 2009 for special needs children age 16 or older, and for children who have been in foster care for 60 consecutive months (5 years) or are a sibling to a child who is eligible due to his age or length in foster care. The phase-in spans nine years and will be complete on September 30, 2018. The Act requires that savings resulting from these new Title IV-E eligibility rules must be invested in services (including post-adoption services) provided under Parts B and E of Title IV.

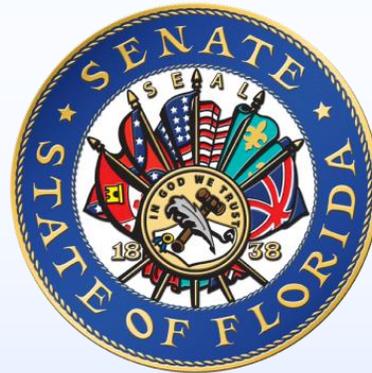
³⁵ The Adoption Incentives program was created as part of the Adoption and Safe Families Act of 1997 to offer incentive funds to states that increased the number of adoptions from the foster care system. Under Fostering Connections, the adoption incentives were revised to provide stronger incentives for states to increase their efforts to find children adoptive homes, particularly older children and children with special needs. In addition, the law introduced the concept of an adoption rate, which is derived from comparing current year adoptions to the number of children in care at the end of the previous year. States receive additional money if they exceed their highest foster child adoption rate for previous years back to 2002. The Adoption Incentive program gives states \$4,000 for every foster child adopted above their 2007 baseline, plus a payment of \$8,000 for every foster child age nine and older and \$4,000 for every other special needs child adopted above the respective baselines. In addition, states receive \$1,000 for every foster child adopted over and above the level of the state's highest foster child adoption rate for previous years. States have 24 months to use the incentive payments and the payments may only be used to provide services that are allowed under Parts B or E of Title IV.

³⁶ U.S. Department of Health and Human Services. Administration for Children and Families. Available at: http://www.acf.hhs.gov/news/press/2010/fy10_adoption_incentive_awards.htm. (last visited August 2, 2011).

³⁷ This information is also available to adoptive parents in the Florida's Adoption Assistance Program brochure provided by Florida's Adoption Information Center. Available at: <http://www.adoptflorida.com/assistance-program.htm>. (Last visited August 3, 2011) and the Explore Adoption website available at: <http://www.adoptflorida.org/about3.shtml>. (Last visited August 3, 2011).

Issue Brief 2012-210

***Review Federal Fostering Connections
Implementation in Florida***



***Committee on Children, Families, and Elder Affairs
October 2011***

The Fostering Connections to Success and Increasing Adoptions Act of 2008

- The act made a number of important changes to improve the lives of children, young adults, and families impacted by the nation's child welfare system.
- In addition to making additional Title IV-E funds available to states, the intent of the law is to promote permanency and better outcomes for children and young adults through policy changes in a number of areas.



Support for kinship or relative care and family connections

Guardianship Assistance Program

- This voluntary program would allow states to provide payments on behalf of children to **grandparents and other relatives** who have **assumed legal guardianship** of those children – states will be able to use Title IV-E funds for this purpose.

Relative Notification

- States are required to exercise due diligence to **identify** and **provide notice** to all adult grandparents and other adult relatives of the child.

Sibling Connections

- States are required to make reasonable efforts to **place siblings** removed from their home **together**. Requires states to provide **frequent visitation** or other **ongoing interaction** between siblings who are not placed together.



Support for young adults aging out of care

Extension of Care

- States may continue to **provide care** and support to eligible young adults in care until the age of **19, 20, or 21**. States may also extend **adoption assistance and/or guardianship payments** on behalf of eligible young adults until the age of 19, 20, or 21.

Transition Plan

- Every child or young adult must receive assistance to develop a **transition plan** during the 90-day period prior to exiting care.

Extension of Independent Living (IL) Services

- Eligibility for IL services is **extended to children** adopted or placed in relative guardianship after turning 16. In addition, eligibility for Education and Training Vouchers (ETV) is extended to children who are placed in a relative guardianship after attaining the age of 16.



Coordinated health services

Coordinated Healthcare Plan

- States are required to **develop a plan** for the ongoing oversight and **coordination of health care services** for children in care.



Improved educational stability and opportunities

Educational Stability

- States must provide educational stability to children in care by ensuring regular school attendance, enabling children to remain in the same school or when a move is necessary, ensuring that transfers occur promptly.

Transportation Costs

- The definition of a Title IV-E foster care maintenance payment is amended to include the cost of "reasonable travel" for transportation expenses related to allowing a child to remain in the same school he or she was attending prior to coming into care.



Incentives and assistance for adoption

De-linking Provision

- The requirement that states could only claim reimbursement for special needs children adopted from foster care who met Title IV-E income eligibility standards **was removed** allowing states, over time, to seek reimbursement for adoption assistance payments made on behalf of all special needs children who meet other IV-E eligibility requirements.

Adoption Incentives Program

- The Adoption Incentives Program is renewed for **five years**.

Federal Adoption Tax Credit

- States are required to **inform prospective adoptive parents** of the availability of the federal adoption tax credit.



The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

BILL: SPB 7000

INTRODUCER: Children, Families, and Elder Affairs Committee

SUBJECT: Open Government Sunset Review of Section 409.25661, F.S., Insurance Claim Data Exchange Information

DATE: September 28, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Farmer	CF	Pre-meeting
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This proposed committee bill is the result of the Children, Families, and Elder Affairs Committee’s Open Government Sunset Review of the public-records exemption for personal information obtained during an insurance claim data exchange. The exemption will expire October 2, 2012, unless saved from repeal through reenactment by the Legislature.

Currently, s. 409.25659, F.S., requires the Department of Revenue (DOR or department) to develop and operate a data match system in which an insurer may voluntarily provide DOR with the name, address, and, if known, date of birth and Social Security number or other taxpayer identification number for each noncustodial parent who has a claim with the insurer and who owes past-due child support. Section 409.25661, F.S., provides that specified information regarding a noncustodial parent who owes past-due child support, collected by DOR pursuant to s. 409.25659, F.S., is confidential and exempt from public records. This bill reenacts this public-records exemption.

This bill amends section 409.25661, Florida Statutes.

II. Present Situation:

Florida Public-Records Law

Florida has a long history of providing public access to government records. The Legislature

enacted the first public-records law in 1892.¹ In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level.² Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public-Records Act³ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency⁴ records are available for public inspection. Section 119.011(12), F.S., defines the term “public records” very broadly to include “all documents, ... tapes, photographs, films, sounds recordings ... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Unless made exempt, all such materials are open for public inspection at the moment they become records.⁵

Only the Legislature is authorized to create exemptions to open-government requirements. Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁶

Records may be identified as either exempt from public inspection or exempt and confidential. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.⁷ If a record is simply made exempt from public inspection, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.⁸

Open Government Sunset Review Act

The Open Government Sunset Review Act⁹ provides for the systematic review of exemptions from the Public-Records Act in the fifth year after the exemption’s enactment. By June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹⁰ An identifiable public purpose is served if the Legislature finds that the

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² FLA. CONST. art. I, s. 24.

³ Chapter 119, F.S.

⁴ An agency includes any state, county, or municipal officer, department, or other separate unit of government that is created or established by law, as well as any other public or private agency or person acting on behalf of any public agency. Section 119.011(2), F.S.

⁵ *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

⁶ FLA. CONST. art. I, s. 24(c).

⁷ *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

⁸ *Id.* at 54.

⁹ Section 119.15, F.S.

¹⁰ Section 119.15(6)(b), F.S.

purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or combination of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.¹¹

The act also requires the Legislature, as part of the review process, to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?¹²

Insurance Claim Data Exchange

Section 409.25659, F.S., was established during the 2004 Regular Session to provide for the identification of claims¹³ on liability insurance which could potentially be applied to child support arrearages in Title IV-D cases.¹⁴

The department was directed by statute to develop and operate a data match system to identify noncustodial parents who owe past-due child support and who also have a claim with an insurer.

¹¹ *Id.*

¹² Section 119.15(6)(a), F.S.

¹³ A “claim” is considered an open, unresolved bodily injury claim on liability coverage in excess of \$3,000 in an insurance contract payable to an individual, or to a third party for the benefit of the individual, who is a Florida resident or who had an accident or loss that occurred in Florida, or who has an outstanding child support obligation in Florida. Section 409.24659(1), F.S.

¹⁴ Chapter 2004-334, Laws of Fla. The term “Title IV-D” refers to state-run child support enforcement programs which are funded through grants provided for by the Social Security Act of 1975. Title IV of the Social Security Act covers grants to states for the purpose of providing aid and services to needy families with children and for child-welfare services. Part “D” of that law covers child support and the establishment of paternity.

This process allows insurers to voluntarily provide DOR with the name, address, and, if known, date of birth and Social Security number or other taxpayer identification number for each noncustodial parent identified as having a claim.¹⁵ This data can only be used for purposes of child support enforcement.¹⁶

Within the data match system, an insurer may provide DOR with the needed information in one of three ways:

- An insurer may provide the required data for each claim directly to DOR electronically so that the department can conduct a data match;
- An insurer may receive or access data from DOR and conduct a data match of all noncustodial parents who have a claim with the insurer and who owe past-due child support, and submit the match data regarding each noncustodial parent to DOR; or
- An insurer may authorize an insurance claim data collection organization to complete one of the two options mentioned above.¹⁷

Due to the variety of data submission methods provided within the system, it would be possible for DOR to receive information on individuals having a claim with an insurer, who do not owe child support.¹⁸

In 2004, DOR contacted most of the top 25 insurers in the state to begin implementation of the statute. However, during this time insurers were responding to claims resulting from damage caused by the 2004 hurricane season so DOR decided to postpone working on the insurance claim data exchange initiative.¹⁹

In February 2006 Congress passed the Deficit Reduction Act of 2005 (the Act), which authorized the Federal Department of Health and Human Services (HHS) to compare information concerning individuals owing past-due child support with information maintained by insurers concerning insurance claims, settlements, awards, and payments. The Act further allows HHS to furnish information resulting from the data matches to state agencies responsible for child support enforcement.²⁰ A federal workgroup was established to implement this provision. The department monitored the activities of the federal workgroup charged with implementing the nationwide insurance data match program and began implementing the changes necessary to receive data from the federal program.²¹

¹⁵ Section 409.25659(2), F.S.

¹⁶ Section 409.25659(5), F.S.

¹⁷ Section 409.25659(2)(a)-(c), F.S.

¹⁸ Conversation with representatives from the Fla. Dep't of Revenue (July 12, 2011).

¹⁹ Comm. on Children, Families, and Elder Affairs, The Florida Senate, *Open Government Sunset Review Regarding Noncustodial Parents Owing Past-Due Child Support*, 4 (Interim Report 2009-202) (Sept. 2008), available at http://archive.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-202cf.pdf (last visited June 15, 2011).

²⁰ *Id.*

²¹ *Id.*

In November 2008, DOR began data matching activities with the federal program and began issuing income deduction notices on matches.²² Between November 2008 and October 2009, the department received 2,996 data matches from the federal program.²³ Of those matches, 422 were previously made by the department through other means.²⁴ According to department representatives, approximately \$2 million has been collected since the department implemented the federal matching program.²⁵

During the 2009 Regular Session, there was discussion over whether the federal voluntary insurance data match program would replace the state's voluntary program. The department sent 84 letters to Florida-based insurance companies from November 2009 through February 2010 inviting them to participate in the voluntary state program. The department received responses from two companies, both of which stated they do not handle personal liability insurance. In February 2011, DOR sent an additional 135 letters to Florida-based insurance companies and as of June 1, 2011, they had received only three responses, including one from Citizens Property Insurance Corporation (Citizens).²⁶ The department has been working with Citizens to design a data match system and by 2012, DOR should begin receiving data from Citizens.²⁷ The department continues to encourage voluntary participation in the state insurance claim data match through annual contact letters to Florida-based insurers.²⁸

The department reports that as of May 2011, the number of noncustodial parents eligible to be matched using the insurance claim data exchange is 448,965.²⁹

Public-Records Exemption for Insurance Claim Data Exchange

Section 409.25661, F.S., provides that information obtained by DOR during an insurance claim data exchange pursuant to s. 409.25659, F.S., is confidential and exempt from public disclosure until the department determines whether a match exists. If a match does exist, the matched data is no longer considered confidential and exempt and becomes available for public disclosure unless otherwise exempt. If a match does not exist, the information must be destroyed.

This public-records exemption was created in 2004 and during the 2009 and 2010 Regular Sessions, the Legislature extended the repeal date of the exemption to provide DOR with ample time to determine the success of the provisions contained in the federal Deficit Reduction Act of 2005. This exemption stands repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.

²² E-mail from Debbie Thomas, Dep't of Revenue, to staff of the Senate Committee on Children, Families, and Elder Affairs (June 14, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

²³ Governmental Affairs Policy Committee, The Florida House of Representatives, *House of Representatives Staff Analysis HB 7091* (Mar. 5, 2010), available at <http://archive.flsenate.gov/data/session/2010/House/bills/analysis/pdf/h7091.GAP.pdf> (last visited July 13, 2011).

²⁴ *Id.*

²⁵ Conversation with representatives from the Fla. Dep't of Revenue (July 12, 2011).

²⁶ Dep't of Revenue, *CSE Insurance Data Match Public Records Exemption* (June 14, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

²⁷ Conversation with representatives from the Fla. Dep't of Revenue (July 12, 2011).

²⁸ Dep't of Revenue, *supra* note 27.

²⁹ E-mail from Debbie Thomas, Dep't of Revenue, to staff of the Committee on Children, Families, and Elder Affairs (June 24, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

Committee on Children, Families, and Elder Affairs' Open Government Sunset Review

Based on an Open Government Sunset Review of this exemption, Senate professional staff of the Children, Families, and Elder Affairs Committee recommended in September 2011 that the Legislature retain the public-records exemption established in s. 409.25661, F.S., which makes personal information obtained by DOR during an insurance claim data exchange pursuant to s. 409.25659, F.S., confidential and exempt from public disclosure until the department determines whether a match exists.³⁰

This recommendation was made in light of the information gathered for this Open Government Sunset Review, which indicated there is a public necessity in maintaining the confidential nature of personal information gathered by the department relating to persons having open liability claims with participating insurers. Additionally, the department reports that insurance providers may be less likely to participate in the insurance claim data exchange program without the exemption, making the exemption vital to the effective administration of the program.

III. Effect of Proposed Changes:

This proposed committee bill reenacts and saves from repeal s. 409.25661, F.S., allowing the information obtained by the Department of Revenue (DOR) during an insurance claim data exchange pursuant to s. 409.25659, F.S., to remain confidential and exempt from public disclosure until such time as the department determines whether a match exists.

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemption for the information obtained by DOR during an insurance claim data exchange, the exemption will expire on October 2, 2012. Without the exemption, the names, addresses, dates of birth, social security numbers, and claim numbers of noncustodial parents will become public.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This proposed committee bill retains an existing public records exemption. This bill complies with the requirement of article I, section 24 of the Florida Constitution that public-records exemptions be addressed in legislation separate from substantive law changes.

³⁰ Committee on Children, Families, and Elder Affairs, Fla. Senate, *Open Government Sunset Review of Section 409.25661, Relating to Insurance Claim Data Exchange Information* (Interim Report 2012-301) (Sept. 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-301CF.pdf> (last visited Sept. 27, 2011).

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

FOR CONSIDERATION By the Committee on Children, Families, and Elder Affairs

586-00441-12

20127000__

1 A bill to be entitled
2 An act relating to a review under the Open Government
3 Sunset Review Act; amending s. 409.25661, F.S.,
4 relating to a public-records exemption for insurance
5 claim data exchange information used for identifying
6 parents who owe past due child support; saving the
7 exemption from repeal under the Open Government Sunset
8 Review Act; removing the scheduled repeal of the
9 exemption; providing an effective date.

10
11 Be It Enacted by the Legislature of the State of Florida:

12
13 Section 1. Section 409.25661, Florida Statutes, is amended
14 to read:

15 409.25661 Public records exemption for insurance claim data
16 exchange information.-

17 ~~(1)~~ Information obtained by the Department of Revenue
18 pursuant to s. 409.25659 is confidential and exempt from s.
19 119.07(1) and s. 24(a), Art. I of the State Constitution until
20 such time as the department determines whether a match exists.
21 If a match exists, such information becomes available for public
22 disclosure. If a match does not exist, the nonmatch information
23 shall be destroyed as provided in s. 409.25659.

24 ~~(2) This section is subject to the Open Government Sunset~~
25 ~~Review Act in accordance with s. 119.15 and shall stand repealed~~
26 ~~on October 2, 2012, unless reviewed and saved from repeal~~
27 ~~through reenactment by the Legislature.~~

28 Section 2. This act shall take effect October 1, 2012.

CourtSmart Tag Report

Room: SB 401
Caption: Children, Families, and Elder Affairs Committee

Type:
Judge:

Started: 10/4/2011 10:47:21 AM
Ends: 10/4/2011 12:38:49 PM **Length:** 01:51:29

10:47:25 AM Roll Call and opening remarks by Senator Storms
10:49:13 AM Senator Latvala comments
10:49:27 AM Senator Storms comments
10:50:19 AM Senator-Elect Audrey Gibson remarks
10:50:34 AM Senator Storms remarks
10:51:07 AM Charles T. Corley, Secretary, Department of Elder Affairs (DOEA)
10:53:53 AM Senator Storms remarks
10:54:14 AM Senator Storms, Compliance Review of the State of Florida Long-Term Care Ombudsman Program by the U.S. Department of Health and Human Services, Administration on Aging
10:59:47 AM Secretary Corley, DOEA, remarks
11:02:30 AM Senator Storms remarks
11:04:41 AM Senator Rich remarks
11:04:41 AM Secretary Corley, DOEA, remarks
11:05:26 AM Senator Rich question
11:06:08 AM Secretary Corley, DOEA, response
11:07:33 AM Senator Detert remarks
11:09:08 AM Secretary Corley, DOEA, response
11:11:12 AM Senator Storms remarks
11:13:59 AM Senator Dockery question
11:15:40 AM Secretary Corley, DOEA, response
11:17:54 AM Senator Dockery question
11:18:13 AM Secretary Corley, DOEA, response
11:18:26 AM Senator Dockery question
11:18:35 AM Secretary Corley, DOEA, response
11:18:43 AM Senator Storms response to Senator Dockery's question
11:20:52 AM Senator Dockery comments
11:21:04 AM Senator Storms comments
11:22:14 AM Secretary Corley, DOEA, response
11:22:59 AM Senator Storms comments
11:24:35 AM Senator Rich question
11:26:20 AM Secretary Corley, DOEA, response
11:27:32 AM Senator Rich question
11:27:41 AM Secretary Corley, DOEA, response
11:28:30 AM Senator Storms comments
11:33:23 AM Secretary Corley, DOEA, response
11:33:42 AM Senator Storms comments
11:33:51 AM Public Testimony, Lynn Dos Santos
11:37:14 AM Senator Dockery comments
11:37:27 AM Lynn Dos Santos response
11:38:38 AM Senator Storms comments
11:39:44 AM Public Testimony, Lynn Dos Santos response
11:40:12 AM Senator Rich remarks
11:41:15 AM Secretary Corley, DOEA, response
11:42:36 AM Senator Storms comment
11:42:42 AM Senator Latvala questions
11:43:13 AM Secretary Corley, DOEA, response
11:45:01 AM Senator Latvala question
11:45:22 AM Secretary Corley, DOEA, response
11:45:43 AM Senator Latvala question
11:46:12 AM Secretary Corley, DOEA, remarks
11:46:21 AM Dean Kowalchyk, General Counsel, DOEA remarks
11:47:28 AM Senator Latvala remarks and question

11:47:41 AM Dean Kowalchyk, General Counsel, DOEA remarks
11:48:38 AM Senator Storms remarks
11:49:56 AM Senator Detert response
11:50:30 AM Dean Kowalchyk, General Counsel, DOEA response
11:50:55 AM Senator Storms remarks
11:51:16 AM Dean Kowalchyk, General Counsel, DOEA response
11:51:23 AM Senator Storms remarks
11:51:51 AM Dean Kowalchyk, General Counsel, DOEA remarks
11:52:12 AM Senator Storms remarks
11:52:37 AM Dean Kowalchyk, General Counsel, DOEA response
11:52:51 AM Senator Storms remarks
11:54:11 AM Dean Kowalchyk, General Counsel, DOEA remarks
11:54:49 AM Senator Storms remarks
11:55:00 AM Public Testimony, Brian Lee
11:59:15 AM Senator Storms comments
12:00:30 PM Carol Preston, CFEA Chief Legislative Analyst, 2012-210 -- Fostering Connections Implementation in Florida Issue Brief
12:04:30 PM Senator Storms question
12:04:46 PM Carol Preston response
12:05:13 PM Senator Storms remark
12:05:19 PM Carol Preston remarks
12:12:34 PM Senator Rich remarks
12:14:29 PM Senator Storms remarks
12:15:59 PM Senator-Elect Audrey Gibson question
12:16:29 PM Senator Storms remarks
12:16:49 PM Carol Preston continued comments regarding Fostering Connection Implementation Issue Brief (2012-210)
12:24:07 PM Senator Storms remarks
12:24:20 PM Carol Preston response to Senator-Elect Audrey Gibson's question
12:25:29 PM Senator-Elect Gibson question
12:26:14 PM Carol Preston response
12:27:57 PM Senator Detert remarks
12:28:33 PM Senator Storms comments regarding SPB 7000 -- OGSR/Insurance Claim Data Exchange Information Mandatory Review (2012-301)
12:28:51 PM Ashley Daniell, CFEA Staff Attorney, SPB 7000 -- OGSR/Insurance Claim Data Exchange Information Mandatory Review (2012-301)
12:29:14 PM Senator Storms comments
12:29:24 PM SPB 7000 vote
12:29:39 PM Senator Storms comments regarding Interagency Background Screening Workgroup Monitor Project (2012-422)
12:30:42 PM Carol Preston, CFEA Chief Legislative Analyst, Interagency Background Screening Workgroup Monitor Project (2012-422)
12:32:20 PM Senator Storms remarks and Carol Preston remarks
12:32:58 PM Carol Preston continued remarks
12:33:37 PM Senator Storms remarks
12:35:02 PM Carol Preston continued remarks
12:36:39 PM Senator Storms comments
12:38:44 PM Adjourn