

Nov. 8, 1996

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Dear Ms. Shedd and Ms. Hoberman:

Thank you for your November 1, 1996 letter requesting information and my opinions regarding several issues related to the Long-Term Care Ombudsman Program (LTCOP). I am pleased to share with you information that I have available and my views regarding the questions that you raise.

As you know, I have a long and diverse history with the LTCOP. As a former state ombudsman, congressional staff person involved in writing the ombudsman provisions in the Older Americans Act (OAA) for both the 1987 and 1992 amendments to the OAA, and currently the federal official at the Administration on Aging charged with oversight of the national Long Term Care Ombudsman Program, I hope that I am able to convey in response to your questions my knowledge of both the intent and practical implication of certain provisions governing the LTCOP.

I will reiterate (paraphrasing in several instances) and respond to each of your questions in the order that you have posed them.

- 1.(a) What is the intention of the OAA requirements that the State Ombudsman determine who is capable to serve as representatives of the program and designate such representatives?

The intention is that a state ombudsman program be a single, cohesive, statewide program and that all representatives and entities which sponsor them meet criteria established by the State Ombudsman and be designated to participate in the statewide program by the State Ombudsman. By establishing the Office of the

Ombudsman, the OAA makes the State Ombudsman directly responsible for all program representatives' actions relative to the program. These provisions reflect the concern raised from around the country that in some cases the State Ombudsman, and therefore the State Unit on Aging, were providing inadequate direction over the actions and performance of substate or local ombudsman offices. Given the high level of statewide organization among long-term care facility trade associations and the impact on residents' lives of numerous state level agencies and organizations (survey and certification, health care providers licensure boards, Medicaid agencies, etc.) in order to secure the ability of ombudsmen to effectively represent the interests of facility residents, it is important that the Office of the State Ombudsman under the direction of the State Ombudsman have control over who serves as a representative of the Office, either through supervision or through contractual or other formal arrangements with designated entities.

- (b) What criteria must the Ombudsman consider in determining whether or not to designate local ombudsman entities and representatives?

The criteria are outlined in Section 712(a)(5)(C) of the OAA: Entities and individuals eligible to be designated to participate in the program shall have demonstrated capability to carry out the responsibilities of the Office; be free of conflicts of interest; in the case of the entities, be public or non-profit private entities; and meet such additional requirements as the Ombudsman shall specify. "Entity" means the structure which houses and operates the local program. Such an entity can only operate as an ombudsman program if it is designated as such by the State Ombudsman through a contract or other designation process or mechanism.

- (c) What criteria must the Ombudsman consider in determining whether or not to designate local ombudsman entities and representatives (i.e., to establish a state substructure)?

The Ombudsman must ensure that the representatives and entities are capable of carrying out all duties of local ombudsmen outlined in Section 712(a)(5)(A) of the OAA and

are able to do so without conflicts of interest. Some of the specific situations which would constitute a conflict-of-interest for the Ombudsman are outlined in Section 712(f)(3). These same conflict-of-interest situations apply to representatives which the Ombudsman designates to participate in the statewide program.

Furthermore, because ombudsmen must "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" (712[a][5][B][iii]), an ombudsman would certainly be subject to charges of conflict-of-interest if such ombudsman were employed in an agency or entity about which a long-term care facility resident or someone acting on such resident's behalf had complained.

- (d) Under the OAA, is the Ombudsman responsible for the actions of representatives of the Office? Does the OAA permit any other individual, entity, or agency to be responsible for the actions of representatives of the Office?

Under the OAA, the Ombudsman is responsible for the actions of representatives of the Office, either through supervision or through the designation of programs which meet the criteria of the Act. While other individuals or agencies may employ individuals who serve as representatives of the ombudsman program, only the Ombudsman may designate such individuals as an ombudsman representative.

- (e) Does the language and intent of the OAA contemplate the Ombudsman being the direct supervisor of such representatives, or may others perform that role? If others may perform that role, under what circumstances?

The language and intent of the OAA is that the State Ombudsman exercise responsibility for the actions of representatives of the Ombudsman office, either through supervision or through the designation of programs which meet the criteria of the Act. In order to be designated as a representative of the Ombudsman, an ombudsman representative would be required to meet criteria

established by the Ombudsman and to carry out her/his duties in accord with policies and procedures established by the Ombudsman, and consistent with OAA provisions governing the LTCOP.

- (f) To whom are such representatives accountable for their actions?

Representatives of the Office are accountable in the performance of their activities on behalf of the Office of the State Long-Term Care Ombudsman to the State Ombudsman, who has direct responsibility for the Office of the State Long-Term Care Ombudsman, either as a result of supervision or through the designation of substate or local programs which meet the criteria of the Act.

- (g) The 1992 amendments to the OAA direct more attention to the role and responsibility of local programs and to the designation process. What was the underlying intent of this new language?

It is instructive to look at language from the U.S. Senate Report 102-151, the report of the Senate Committee on Labor and Human Resources to report out S. 243, the Senate's OAA reauthorization language (dated September 13, 1991). This is particularly significant because of the fact that most of the Senate language regarding the LTCOP prevailed in negotiations with the House and was retained in the final bill enacted into law. On page 105 of the report the Committee states:

"In most States, day-to-day complaint investigation and resolution activities are carried out by local or substate offices. The Committee bill recognizes the significance of that level of ombudsman service and strengthens the relationship between State and substate or regional ombudsman activities by clarifying the process for designating such entities. The Committee believes that the State Agency and the State Ombudsman must have the ability to select the entities most suitable and likely to effectively resolve the problems of long-term care residents as the substate or regional representatives of the program."

The legislation recognizes the reality that most complaint investigation and related activities are not done by the State Ombudsman, rather such activities are typically conducted by their representatives especially at the regional and substate level. Thus the intent was to more effectively link the two levels together so that they could in fact operate as a cohesive and effective "Office."

2. If regulatory agency staff who are not part of the Ombudsman office were in any way involved in supervising or otherwise directing Ombudsman representatives, would the OAA's confidentiality requirements be abrogated?

The OAA requires that files and records maintained by the Ombudsman office "may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose the files and records)" and prohibits "the disclosure of the identity of any complainant or resident with respect to whom the Office maintains such files or records" unless certain specified conditions are met. (Section 712[d][2]). It may be helpful to consider this response in conjunction with my response to your next question.

- 3(a). If regulatory agency staff who are not part of the Ombudsman office are involved in supervising or otherwise directing ombudsman representatives, would a conflict of interest exist under the OAA?

This of course depends upon what the "regulatory agency staff" are regulating. If the subject matter over which such staff had regulatory responsibility was the subject of or likely to be the subject of a complaint to be investigated by the State Ombudsman or his or her representatives, then this clearly raises conflict-of-interest concerns.

From my personal experience and from discussions about this topic over the years, as well as substantial involvement in the drafting of the OAA's provisions related to conflicts-of-interest, it is clear to me that certain situations easily raise serious concerns about an ombudsman's ability to operate independently and to

perform their responsibilities free of actual or perceived conflicts of interest. Examples of such that seem obvious on the surface would be:

- ! the ombudsman supervisor has a direct or indirect role in licensing or certifying long term care facilities that may be or are the subject of a complaint brought to the ombudsman or are part of multi-facility entity of which one of its facilities is the subject of a complaint, or, as a variation on this, in similar situations where the supervisor is subject to direction from an official involved in licensing or certifying facilities;
- ! the local ombudsman program is housed in an office or agency which administers programs or implements or enforces policies about which residents and their representatives file complaints -- such as eligibility for nursing home stays or other Medicaid coverage determinations directly pertaining to long-term care facility residents; and/or
- ! the complaint concerns or involves questions about the performance of regulators themselves, such as failure to fully investigate complaints concerning investigation of complaints by a survey and certification agency.

I can say from my personal experience as a State Ombudsman in state government, complaints about the performance of other state officials are particularly sensitive and difficult. It is important in such situations that there be no perception that an ombudsman is protecting fellow public officials by less than full pursuit of the matter until its appropriate conclusion.

- (b) Under the OAA, what is the responsibility of representatives of the Ombudsman office to facilitate public comment on laws, regulations and governmental actions affecting residents?

In 1992, the OAA was amended to specify direct duties of the local ombudsmen consistent with the duties of the State Ombudsman, as local ombudsmen are representatives of

the Office of the Ombudsman. In regard to public policy matters, the representatives of the Office are expected to provide the foundation to support statewide efforts to represent residents' interests in governmental policy matters.

Facilitating public comment on laws, regulations and governmental actions affecting residents is an important duty of ombudsman representatives which is specifically required in Section 712(a)(5)(B) of the OAA.

- (c) Is it the intent of the OAA to ensure that representatives of the Ombudsman office openly address policy matters which have an impact on residents of nursing facilities.

As stated above, this duty of ombudsman representatives is specified in Section 712(a)(5)(B)(v)(I) of the OAA and reflects the importance of representatives of the office working in concert with statewide efforts as part of the State Office of the Ombudsman and State Long-Term Care Ombudsman Program.

- (d) Would the public perception of a conflict of interest between the regulatory agency and the Ombudsman, and/or the Ombudsman's representatives, be contrary to the OAA?

I believe it would. Please note my response to question 3(a) and my closing comments at the end of this letter. Those who call on ombudsmen for assistance must perceive that the ombudsman is an independent, objective party who is able to freely speak and act on behalf of the interests of residents; and the ombudsman must, in fact, be able to freely advocate for residents' interests.

Much of what you are seeking my comments about relates to the overall theme of the ability of ombudsmen to act independently on behalf of their clients. Issues such as conflicts-of-interest and confidentiality seem to be components of the overall issue of independent action in performance of their responsibilities. I would like to close with my general thoughts on this topic and offer additional insight as to why much of the OAA language governing the LTCOP has increasingly emphasized independent action by ombudsmen. As an example of this from the 1992 Amendments, note the modification to sec. 712(a)(3)(G)(ii) that now states that Ombudsman (or through representatives) shall "recommend any changes in such laws, regulations, policies, and actions as the Office [headed by the State Ombudsman] determines to be appropriate." As another example, note sec. 712(h)(3)(A) which reads, in part that "(The State Agency shall require the Office to) provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons regarding..."

With very few exceptions long-term care ombudsmen throughout the country do not have the legal authority to compel action, such as through law or regulation or condition of participation or licensure, or to sanction for failure to act, such as through the use of civil monetary penalties, suspension or revocation of licenses or suspension of monetary payments. Typically, those authorities rest with regulatory agencies. The ombudsman's ability to compel action is to a very large degree dependent upon the strength of their perceived integrity and the ability to truly act upon the wishes of their clients. In other words, to the extent the ombudsman is not perceived as being truly independent to act upon behalf of the complainant, his/here ability to fully and vigorously represent the client is limited. Anything that diminishes the actual or perceived independence of the program is likely to diminish the ombudsman's ability to compel any other individual or entity, whether it be a nursing home administrator, a regulatory body or others, to take appropriate action in response to the complaint carried by the ombudsman. In truth, ombudsmen have very little in their tool box, so to speak, besides their word, the knowledge, their tenacity, and their freedom to act. If those attributes are not impaired, then ombudsmen do not need many more tools.

Their ability to operate as an office is key to this. The ombudsman responsibilities are to be executed as part of a statewide program in order to ensure that residents' individual experiences are addressed, both on an individual and a systemic level.

I appreciate your raising these issues with me and hope that I have adequately responded to your questions. Please let me know if I can be of further assistance.

Sincerely,

(S)

William F. Benson
Deputy Assistant Secretary for Aging