

**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

DEPARTMENT OF ELDER AFFAIRS
As of 03/21/2011

Interim Secretary
Charles Corley
0001 (950) (8925) 1.00

Advisory Council
ADI

Advisory Council
DOEA

General Counsel
Dean Kowalczyk
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Inspector General
Stanley Behrke
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Deputy Secretary &
Chief of Staff
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Director of Internal & External
Affairs
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Chief Financial Officer
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Legislative Affairs
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Community Based Services
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Information Systems
See Page 4

Communications
See Page 3

Long-Term Care
Omnibusman Program
See Page 20-23

Revenue Management
See Page 2

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And Support
See Page 7

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Planning & Evaluation
See Page 3

Elder Rights
See Page 5

Budget
See Page 2

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Management Consultant
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1.00

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Training Manager - SES
Felipe Martinez
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Administrative Assst. II
- SES
Secret Williams
0078 (418) (0712) 1.00

Contract Administration
& Purchasing
See Page 2

Administrative Assst. II
Erka Burgess
0395 (18) (0712) 1.00

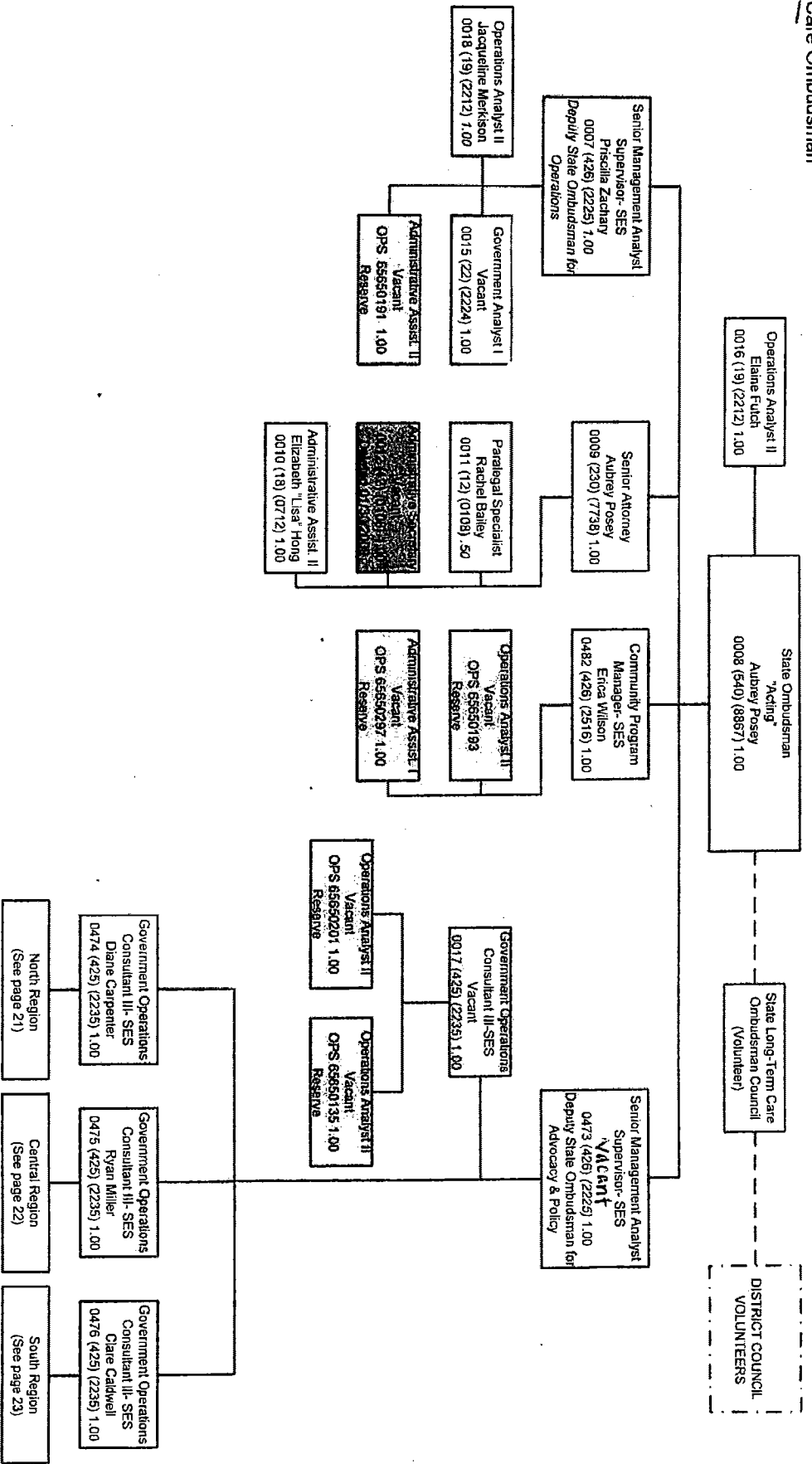
Senior Management
Analyst II - SES
Vacant
OPS 65650019 .50

Program Manager
Sarah Halseil
OPS 65650323 1.00

Senior Clerk
Vacant
OPS 65650019 .50

Senior Management
Analyst II - SES
Eloise Williams
0024 (426) (2220) 1.00

Contract Administration
& Purchasing
See Page 2



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



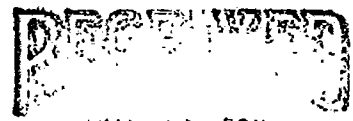
Florida Assisted Living Association

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.

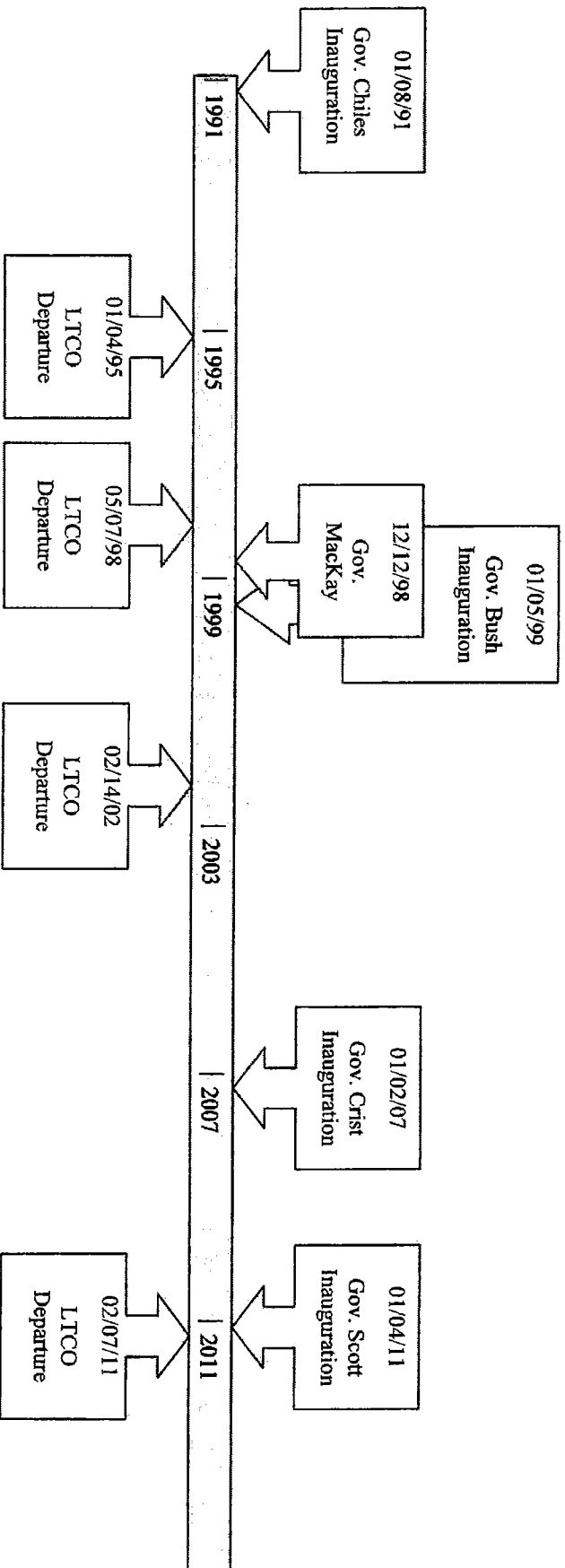
AUBREY POSEY, ESQ.
ACTING STATE LONG-TERM
CARE OMBUDSMAN

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.

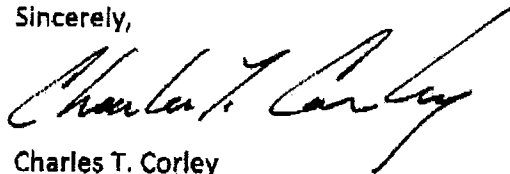
CHARLES T. CORLEY
INTERIM SECRETARY

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

4040 ESPLANADE WAY
TALLAHASSEE, FLORIDA
32399-7000phone 850-414-2000
fax 850-414-2004
TDD 850-414-2001<http://elderaffairs.state.fl.us>



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
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Florida Department of Elder Affairs Intranet

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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.

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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