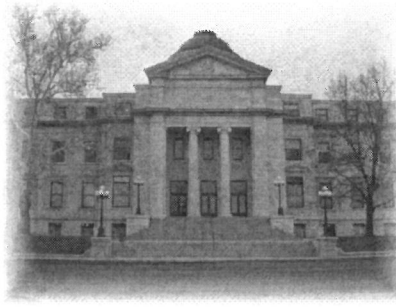


# STATE OF IOWA



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## **Presentation to Joint Government Oversight Committee January 24, 2013**

### **Overview**

The Office of Citizens' Aide/Ombudsman was established by law (now Iowa Code chapter 2C) in 1972 to serve as an independent and impartial office to which citizens can seek assistance to resolve their complaints about state and local governmental agencies. The office is located in the legislative branch, and the Ombudsman is appointed by and reports to the Legislative Council.

The jurisdiction of the Office is quite broad. It can investigate any administrative action, including a policy or a decision, of any state and local government entity, with the exception of the members of the general assembly and their staff, judges and judicial staff, and the governor and the governor's personal staff. It can investigate to determine not only whether agency action is contrary to law, rule, or policy, but also if it is unreasonable, unfair, arbitrary, inconsistent with general practice, based on improper motivation, or lacks a statement of the reasons.

Complaints may be made by telephone, fax, email, or in person. Under section 2C.12, the Office may decline to investigate a jurisdictional complaint for various reasons.

The investigations, including inquiries to agencies, are generally handled on an informal basis. Usually agencies will comply in providing the requested information. However, if necessary, the Ombudsman may issue a subpoena to compel sworn testimony or the productions of records.

If it is determined from an investigation that the agency should reconsider or modify its position, or take any other appropriate action, the Office may seek corrective action by the agency through informal suggestions by staff or more formal recommendations by the Ombudsman.

The Ombudsman may decide to publish a report about an investigation. This does not regularly happen. If a report is issued and it is critical of the agency, the agency is given the opportunity to submit a written reply to the report, and the unedited reply is attached to the published report.

### **Current Staffing and Budget**

Besides my position as Ombudsman, the Office is currently staffed with one Legal Counsel, 11 Assistant Ombudsmen, one Financial Officer, and one Receptionist/Secretary. The Deputy position remains vacant. Our FY2013 budget for the 15 fulltime employees is \$1,606,042.

## **Case Statistics for 2012**

During calendar year 2012 we opened 4,498 cases. Of the total cases:

- 3,046 were complaints about state or local government agencies within our jurisdiction.
- 517 were requests for information about government agencies within our jurisdiction.
- 868 were complaints or information requests about matters outside of our authority.
- 67 were treated as special projects for other activities related to the work of the office.

Of the 3,046 jurisdictional complaints:

- 1,520 (50%) were or are being investigated. 1,520 were declined for investigation; even so, we typically will refer the complainant to an appropriate remedy or provide an explanation or information to help the complainant to better understand the reason or issue.
- To date, 201 complaints have been substantiated or partially substantiated and 831 were not substantiated. [Note: some cases opened in 2012 are still being investigated.]
- In 112 cases, we made either informal suggestions or formal recommendations to the agencies to remedy or correct a problem or take action to improve a policy or procedure.

The amount of time spent on each case varies greatly, depending on the complexity of the issue and number of related issues, and challenges encountered in gathering the needed information.

## **Published Investigative Report**

The one public report I issued in 2012 concerned the misuse of public property for a private purpose. We determined that an Earlham School District secretary and superintendent violated Iowa law when the secretary was allowed to drive a school vehicle indefinitely on personal business. The superintendent imposed no limitations on the secretary's use of the vehicle and asked for mileage reimbursement only after the secretary had totaled the car in an accident. The secretary drove the vehicle over 1,000 miles in 27 days, including on weekends and to run personal errands.

The Iowa Constitution and state law generally prohibit government employees from using public property for private purposes to the public's detriment. There are a few statutory exceptions, but none of them applied to this situation.

The full report, including the school district's counter reply and our rebuttal to that reply, is available on our website at: <https://www.legis.iowa.gov/Ombudsman/Reports/>

## Other Similar Cases

We have seen other instances of cities spending public money on private projects for which we did not believe had sufficient economic-development justifications. Most recently, we found a city council had paid their clerk two-thirds of the cost of a \$5,000 sewer connection at her new home. We have explained to the city council that public money must provide a tangible benefit to the public at large. I have recommended that the city council acknowledge its error at a public meeting and consider asking for full or partial reimbursement for the money given to the clerk.

## **Legal Challenges to Ombudsman's Authority**

In recent years, most notably in 2012, the Office has encountered increasing legal challenges by agencies to our investigative authority, in particular our access to agency information. These challenges are impeding our ability to obtain information necessary to an investigation. They can also impact our productivity, in that we have to spend time trying to address them with the agency. Given the positions that some agencies and the Attorney General's Office are taking on some of these issues, overcoming these challenges may require legislative change or litigation. One such lawsuit against the Department of Corrections was just completed last week.

### Litigation Against the Department of Corrections (Mental Process Privilege Claim)

In October 2010 we filed a lawsuit against the Department of Corrections (DOC) seeking to enforce a subpoena to conduct a sworn interview of an administrative law judge (ALJ) regarding the basis for her ruling on an inmate's discipline. After the Iowa District Court ruled in our favor, the DOC appealed to the Iowa Supreme Court, claiming we could not question the ALJ based on a mental process privilege. The Iowa Supreme Court found that the mental process privilege applies to ALJs during an Ombudsman investigation, but concluded we had provided a sufficient showing of improper conduct to overcome the ALJ's mental process privilege claim.

Based on this ruling, the mental process privilege could allow an agency decision-maker acting in a quasi-judicial capacity to refuse to answer the Ombudsman's questions about their thought processes in arriving at a decision. A witness providing a statement to the Ombudsman will be able to assert the privilege despite clear statutory authority for the Ombudsman to investigate the improper motivations or irrelevant considerations of public officials' actions, or to obtain the reasoning for a decision. The Court determined the mental process privilege applies because of a general provision in the Ombudsman's statute (section 2C.21) that states the same privileges and immunities that apply in court also apply to any witness in an Ombudsman's investigation.

### Deliberative Process Privilege

The deliberative process privilege is closely associated with the mental process privilege in that it applies when agency officials discuss a pending action prior to coming to a conclusion. We have two cases where the privilege is being raised and the issue is still developing. If asserted, the privilege potentially affects our access to emails, closed session records, and witness

testimony. We believe asserting this privilege contravenes the clear intent of our statute for an agency to provide us “assistance and information as necessary” in an investigation.

### Attorney-Client Privilege

This privilege involves direct communications between the attorney and the agency. Section 2C.9 specifically precludes us from examining records and accessing hearings or proceedings which are attorney work product or covered by the attorney-client privilege. This challenge has been raised to deny us records in several cases by some state and local agencies. Currently, we are being denied access to email and verbal communications between a professional licensing board and its attorney related to the board’s decision on a complaint. While we recognize the importance of this privilege, we have concerns when agency officials attempt to use this shield to refuse to provide their own answers to our questions about their positions or actions, since this privilege belongs to the agency (as the client) and not the attorney representing the agency.

### Closed Session Records

In 2012 the Attorney General’s Office, in its representation of two professional licensing boards, denied us access to their closed meeting records on the argument that Iowa Code section 21.5(4) prevents our examination absent a court order. We disagree and believe that we have authority to review the records under our statutory authority to review confidential documents and that the confidentiality of the sealed session records only applies to access by the public.

Adherence to the Attorney General’s legal interpretation could severely undermine our Office’s ability to review violations of the Open Meetings Law or to access information relevant to an investigation that is only available in closed meeting records. In one investigation that resulted in a public critical report in 2012, we were able to review closed session records to determine if a school board’s disciplinary action was based on improper motivation. Denying our access in that case would have severely impeded our investigation and the accuracy of our factual conclusions.

### **Legislative Proposals**

I submitted two bills during the 2012 legislative session. One would have changed the name of the Office from “Citizens’ Aide” to “Ombudsman.” This bill is being submitted again in 2013.

The other bill would have clarified and expanded current law so that any advisory body created by a governmental body to make recommendations to the governmental body would be subject to the Open Meetings Law. Currently, not all such advisory bodies are subject to the law and there is confusion based on statutory language and case law which advisory bodies are covered.

As a result of our investigation of several complaints about the debt setoff process under section 8A.504, I made some recommendations to the Department of Administrative Services (DAS) to improve the process, especially as it relates to due process rights in setoffs initiated by local agencies, and to update the DAS rules. We worked with the DAS on drafting a bill for consideration in 2013.

## **Involvement in Special Subject Areas**

In addition to doing general case work, some staff members are also assigned as specialists in subject areas about which we have more complaints or have additional involvement on the issues. The following highlights other activities in some of the specialty subject areas.

### Open Meetings and Open Records Issues

Last year the Legislature created the Iowa Public Information Board to handle complaints and serve as a resource for issues related to the Open Meetings and Open Records Laws. The Board is currently in development and does not take effect until July 1, 2013. During this transitional period, I have met with Board representatives to discuss various matters to help with its development. I offered the Board free use of our electronic case management system software, which the Board has accepted. I will also be providing the Board some potential information for its website. In addition, the assistant ombudsman who is our specialist on open meeting and open records matters continues to attend all the Board meetings and provides comments or information as appropriate to Board representatives. We will continue to work with the Board for a smooth transition as it assumes responsibility for these complaints; however, I expect we could still receive and act on a few complaints related to these matters separately from the Board.

In 2012 we received 198 complaints and 117 requests for information about these issues. We continue to see a need for more training and education of agency officials and custodians of records. Our staff specialist did presentations or trainings about the Open Meetings and Open Records Laws to approximately 500 people around Iowa. Attendees included librarians and law enforcement record custodians and dispatchers. In addition, she met with a group of county assessors to discuss our concerns about fees; subsequently, she participated in a work group to establish a model policy that was later presented to more than 300 county and city assessors.

### Corrections

Our designated specialist for issues related to corrections had a busy training schedule in 2012. She conducted six trainings to newly hired employees for the Department of Corrections and four basic jail school trainings at the Iowa Law Enforcement Academy (ILEA) for newly hired jail staff. At ILEA's invitation, she has also been part of its jail school for veteran staff held around the state. She completed 6 of these presentations in 2012 and has 12 more to do.

### Child Welfare

In 2012 we completed a major investigation about the Department of Human Services' (DHS) failure to properly notify a mother regarding her son's actual foster home location. During the course of the investigation, we identified several problems with the DHS rule and recommended amendments to the rule, which were agreed upon by the DHS. The DHS also accepted my recommendations to provide statewide information and trainings to ensure DHS employees and other professionals working in the child welfare system are familiar with the rule's requirements.

Our designated child welfare specialist participated in a DHS work group mandated by the Legislature to study and make recommendations regarding a “differential response” approach to handling reports of child abuse. A report of this study was submitted in December 2012.

The assigned specialist also represents our Office in the state’s child support advisory committee. She has worked with the Child Support Recovery Unit (CSRU) to establish an online link from its website to the Judiciary’s information and pro se forms to help individuals with support modification. We are continuing collaborative efforts with CSRU to find workable solutions to help parents to modify, suspend, or terminate support orders through administrative procedures.

### Mental Health

Mental health is a concern that underlies many of our complaints, especially from offenders in the correctional system. As a result, we have tried to play an active role as the state undergoes a redesign of its mental health system. During 2012 our mental health specialist participated in the DHS/Judicial work group, which made multiple recommendations to the Legislature regarding the mental health and substance abuse commitment process, and the training and supervision of mental health advocates and their placement in the Department of Inspections and Appeals.

Our staff specialist also participated in the Comprehensive Jail Diversion Program-Mental Health Courts Study, which made multiple recommendations to the Legislature regarding further research and funding of justice involved services and making justice involved services be a core service in the redesign.

I have met with John Baldwin, Director of the Department of Corrections, on our mutual concerns with the overwhelming number of mentally ill persons being incarcerated, especially those with serious violent or assaultive behaviors. When a person is adjudged incompetent, placement becomes an issue because most facilities, including the state mental health institutes, will not take a person labeled “assaultive.” The only available place to send such persons is the DOC’s forensic unit at the Iowa Medical and Classification Center (IMCC). There is often a long wait to get into IMCC so the person remains in jail where staff is not necessarily trained to deal with mental health issues. Also, IMCC is more geared to deal with correctional issues versus the panoply of problems associated with the mentally ill. In addition, we recently learned IMCC is not licensed to take juveniles, so they usually are held in jail. We believe there is a need for a separate secure forensic facility with staff trained to deal with mental illness, autism, intellectual disabilities, and assaultive persons who may seriously harm themselves or others.

### **Staff and Case Work Reorganization**

For many years, the practice has been for all investigators to take all the incoming complaints for an entire day on a rotation basis and to process those cases until completion. I do not believe this approach is the most efficient nor does it take advantage of the varying knowledge base and skills amongst staff. This past summer I held a retreat with staff to discuss how we can perform our work better. Virtually everyone wants to revamp our current system. I am collecting data and considering options with the hope of transitioning to an improved process for cases in 2013.