

**REPORT OF THE
COMPUTER USER POLICY
DIRECTION COMMITTEE**

The Computer User Policy Direction Committee met on November 15, 1991, and December 17, 1991, and makes the following report:

A. The Committee recommends making an electronic copy of the Code of Iowa database available on an annual contract basis to the Department of General Services, Information Services Division, for loading on the Information Services Division computer system. The contract would specify the requirements that must be met by the Information Services Division and agencies using the database. The Information Services Division would be required to notify the Legislative Service Bureau of the agencies, and a contact person for each agency, that have been authorized to read, search, convenience print and convenience copy the Code. Material developed from this electronic copy must indicate on each page that the material is an unofficial or draft copy of the Code. The information obtained by an agency from the electronic copy cannot be offered for public distribution or sale in any form without advance written approval of the Director of the Legislative Service Bureau who shall serve a monitoring function for the Legislative Council. An agency shall transmit to the Legislative Service Bureau a copy of printed material developed from the electronic copy and offered for public distribution or sale. Material that is developed from the electronic copy cannot be sold at a cost that exceeds the actual development and printing costs. The electronic version cannot be reissued in an electronic form to any private entity.

B. The Committee received information concerning the status of a project that would allow amendments to be called up on a computer screen within the bills they amend. It is hoped that this project can be implemented by the time the legislative session convenes.

C. The Committee, as the designated steering committee under the Unisys systems services contract, reports that 78 hours of end user assistance and 29.5 hours of no charge assistance have been utilized as of December 13, 1991.

D. The Committee received information concerning the Computer Support Bureau's procedures for supporting both its mainframe and personal computer systems.

E. The Committee discussed receipt of moneys from Mead Data Central for purchase of the Code of Iowa on electronic data base and recommends that any funds received as a result of sale of electronic data bases be retained by the General Assembly and used for computer related purposes. In the case of the funds

received from Mead Data Central, it is recommended that the moneys be used for installation by the Computer Support Bureau of additional data transmission links between the Capitol and the Lucas Building and for the costs related to the project of the Legislative Service Bureau for computerization of the Iowa Administrative Code.

F. The Committee received reports concerning the following computer-related projects:

1. That the Legislative Service Bureau has reached a critical point in its projects to computerize the Administrative Code and will be retaining outside assistance to complete a user and printing needs assessment and to develop specifications to bring the Administrative Code into an electronic format. The Service Bureau will pay for the costs of this assistance from repayment receipts from sale of electronic databases and from its own funds.
2. That the Computer Support Bureau is working on projects to improve the data connections between legislative agencies and the General Assembly's computer resources.

Respectfully submitted,

DENNIS PROUTY
Chairperson

RPTCOMP

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

FILED
POLK COUNTY IA.

91 DEC 16 PM 4:26

JERRY L. REAS
CLERK DISTRICT COURT

CITIZENS' AIDE/OMBUDSMAN, (PK1000212)

Equity No. CF-037-21853

Plaintiff,

vs.

PAUL GROSSHEIM (99AG62238)

and CRISPUS NIX, (99AG62242)

in their capacity as employees of the

Iowa Department of Corrections

Defendants,

LEGAL MEMORANDUM
IN SUPPORT OF PLAINTIFF'S
RESISTANCE TO DEFENDANTS'
MOTION FOR PROTECTIVE
ORDER, INJUNCTIVE RELIEF
AND MOTION TO QUASH
SUBPOENA

* * * *

Comes Now the Plaintiff, Citizens' Aide/Ombudsman, by and through his attorney, and submits the following Memorandum in Support of Plaintiff's Resistance to Defendants' Motion for Protective Order, Injunctive Relief and Motion to Quash Subpoena.

Statement of Facts

The Plaintiff, Citizens' Aide/Ombudsman (hereinafter "Citizens' Aide"), received complaints concerning the conduct of prison officials at the Iowa State Penitentiary during an incident on June 30, 1991 involving Craig Gardner, an inmate at the facility. Based upon those complaints, the Citizens' Aide made an inquiry to the facility for information concerning the incident. As part of that inquiry, the Citizens' Aide requested a copy of a

videotape of the incident made by prison officials, but it was not provided.

On July 30, 1991 the Citizens' Aide gave notice of an investigation into the incident to Crispus Nix, warden at the penitentiary, and also issued him a subpoena duces tecum to produce a copy of the videotape. The Citizens' Aide was informed that a copy of the videotape would be available for review in the office of Paul Grossheim, Director of the Iowa Department of Corrections. Two staff members from the office of the Citizens' Aide then viewed the videotape in defendant Grossheim's office.

The Citizens' Aide reiterated to defendants Nix and Grossheim that the viewing of the videotape did not satisfy the subpoena's request for a copy of the videotape. On August 29, 1991 the Citizens' Aide issued a follow-up subpoena duces tecum to defendant Grossheim. Defendant Grossheim replied that the opportunity given to view the videotape at his office had satisfied the subpoena.

Citizens' Aide filed a Petition September 12, 1991 requesting the court to compel the defendants to obey the subpoenas' demand for a copy of the videotape. Counsel for defendants filed a Notice of Appearance, together with defendants' Motion for Protective Order, Injunctive Relief and Motion to Quash Subpoena and an attached affidavit. The Citizens' Aide then filed a resistance and supporting affidavit against defendants' motions. Defendants' motions and plaintiff's resistance are now at issue before the court.

Argument

The leading Iowa case on the standards to be applied in the judicial enforcement of administrative subpoenas is *Iowa City Human Rights Commission v. Roadway Express, Inc.*, 397 N.W.2d 508

(Iowa 1986). That case dealt with the enforcement of a subpoena duces tecum issued by the Iowa City Human Rights Commission in connection with a complaint of employment discrimination lodged against Roadway Express, Inc. The Iowa Supreme Court noted that prior Iowa cases have construed broadly the right of an agency to conduct preliminary investigations and issue administrative subpoenas in the field of public interest assigned to the agency. The court also looked at standards other state and federal courts have considered in determining the enforceability of an administrative subpoena and then adopted a similar four-part test. The court's determination depends on whether the subpoena is: (1) within the statutory authority of the agency, (2) reasonably specific, (3) not unduly burdensome, and (4) reasonably relevant to the matters under investigation.

The defendants' motions do not challenge the Citizens' Aide's subpoenas with respect to specificity, burdensomeness, or relevance. The defendants claim that the videotape is confidential under Iowa Code chapter 22 and section 246.602, that it was prepared in anticipation of litigation, and that the videotape has already been produced. These objections basically pertain to the Citizens' Aide's statutory authority to request a copy of the videotape. Since they affirmatively raise additional factual issues and legal defenses to the Citizens' Aide's claims, the defendants have the burden of proof on their challenges.

I. The subpoenas were issued in connection with an investigation authorized by statute.

The Office of the Citizens' Aide is a state agency established under Iowa Code chapter 601G. Generally, an administrative agency is empowered with the right to determine what activities of a person are within the agency's investigative realm, and a determination that the information sought is relevant is entitled to a prima facie stamp of correctness. *U.S. v. Woerth*, 130 F.

Supp. 930, 939 (N.D. Iowa 1955), affirmed, 231 F.2d 822 (8th Cir. 1956).

Iowa Code section 601G.9(1) empowers the Citizens' Aide to investigate on complaint any administrative action of an agency, without regard to the finality of the administrative action, except a complaint about an employee's employment relationship with an agency. In addition, Iowa Code section 601G.6 provides for the Citizens' Aide to appoint an assistant who shall have primary responsibility for investigating complaints relating to penal or correctional agencies. The present case concerns an investigation into a complaint concerning the actions of prison officials during an incident with an inmate at the Iowa State Penitentiary. Therefore, the investigation is within the Citizens' Aide statutory and discretionary authority.

II. Pursuant to an investigation the Citizens' Aide has authority to request and subpoena documents, including videotapes.

The Citizens' Aide has authority to request and receive from an agency assistance and information as necessary in the performance of the duties of the office and "may examine any and all records and documents of an agency" pursuant to an investigation, with the following limited exceptions: if the examination would violate federal law or result in the denial of federal funds to the agency, if the records are the work product of an attorney under section 22.7, subsection 4, or are privileged communications under section 622.10. Iowa Code section 601G.9(3). This broad grant of power encompasses confidential documents. The right to examine and obtain confidential documents is supported by the further provision that "[C]onfidential documents provided to the citizens aide by other agencies shall continue to maintain their confidential status."

The Citizens' Aide also has power to issue a subpoena to compel any person to give testimony or to produce documentary other evidence relevant to a matter under inquiry and to petition a district court for an order directing obedience to the subpoena. Iowa Code section 601G.9(4). The language in 601G.9(4) suggests that the Citizens' Aide's subpoena power extends to anything relevant to the subject being investigated. It is arguable, however, that the power is governed by the same rights and limitations set forth in section 601G.9(3).

III. The Citizens' Aide is not precluded from requesting a copy of the videotape by a general claim of confidentiality under Iowa Code section 246.602 and Iowa Code chapter 22.

One of defendants' contention is that the videotape is confidential under Iowa Code section 246.602. Videotape documentation of inmate incidents, however, is not listed or mentioned in the statute or in the administrative rules as being a confidential document. See, 201 I.A.C. 5. Even if the videotape is confidential, Citizens' Aide is still entitled to it under section 601G.9.

In addition section 246.602 does not prohibit release of the videotape to the Citizens' Aide. That statute primarily concerns matters prohibited from public disclosure. Subsection 6 of that statute specifically provides that confidential information described in the statute may be disclosed to public officials for use in connection with their official duties relating to their duties or other purposes directly connected with administration of their programs.

Furthermore, the Citizens' Aide asserts that defendants have waived their claim of confidentiality under section 246.602, since they have historically granted the Citizens' Aide access to information listed as confidential, including disciplinary and

investigative reports, medical records, and other personal information from inmate files.

The defendants also claim that the videotape is confidential under Iowa Code chapter 22, Iowa's public records law. The confidentiality provision is found in section 22.7.

The Iowa Supreme Court has held that the statute (codified then as section 68A.7) is not applicable to an administrative agency vested with investigative authority and subpoena power. *Iowa Civil Rights Commission v. City of Des Moines*, 313 N.W.2d 510 (Iowa 1983). In that case the City of Des Moines had refused to produce personnel and medical records of certain employees subpoenaed by the Iowa Civil Rights Commission in connection with an investigation of an employment discrimination complaint. The court said the statute's purpose "is to open the doors of government to public scrutiny - to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act. *Id.* at 495. "[T]o hold that section 68A.7 is applicable to the administrative subpoena would contravene the public interest in redressing civil rights violations and frustrate the Commission's statutory investigative powers." *Id.* at 495.

The same principle and rationale apply to subpoenas issued by the Citizens' Aide. The Citizens' Aide serves the public's interests in promoting better interaction between governmental agencies and the public they serve and in remedying wrongs resulting from agencies' actions. Application of section 22.7 to the Citizens' Aide's subpoenas would pose obstacles to these objectives and the Citizens' Aide's statutory investigative powers.

In addition section 601C.(3) provides that section 22.7 does not impact Citizens' Aide's access to documents. "Notwithstanding section 22.7, pursuant to an investigation the citizens' aide may examine any and all records and documents of any agency."

Although section 501G.9(3) may provide an exception for attorney work product under section 22.7(4), the holding in the *City of Des Moines* case should prevail. Furthermore, defendants have alleged a general claim of confidentiality under section 22.7. Defendants have not specifically cited 22.7(4) as the basis for this particular claim and have not presented evidence to support a finding that the videotape constitutes attorney work product. (See following discussion.)

IV. The defendants have not shown that the videotape should be precluded under the qualified attorney work product doctrine.

Defendants further claim that the videotape was produced in anticipation of litigation, which is also referred to as the attorney work product doctrine. The Citizens' Aide disputes this allegation on both factual and legal bases.

The attorney work product doctrine developed from *Hickman v. Taylor*, 329 U. S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) and its progeny. The primary purpose of the work product doctrine "is to assure that an attorney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny upon demand of an opposing party." *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977). The doctrine is currently codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Iowa R.Civ.P. 122(c) is modeled on Fed.R.Civ.P 26(b)(3) and contains the same discovery limitation.

The Citizens' Aide, however, is not seeking discovery from the defendants for litigation purposes. Citizens' Aide's investigations do not involve an adjudication of legal rights, duties or privileges, but only the discovery of facts in relation to a particular investigation. See, *Citizens' Aide/Ombudsman v. Rolfes*, 454 N.W.2d 815, 817 (Iowa 1990). The underlying policy for the work product doctrine is not applicable when the

for the videotape and because there is nothing substantially equivalent to the videotape. The videotape uniquely depicts exactly what occurred during the incident and gives an objective viewpoint. These aspects cannot be obtained from witness accounts which depends on mental recall or involves subjective perspectives. The videotape will provide enormous assistance in the investigation. It will help in the review and assessment of the different witness accounts. It will not be considered by itself but along with other information gathered in the investigation, which should enable the Citizens' Aide to be more thorough and accurate during the fact-finding process. Furthermore, the Citizens' Aide' interests in having a copy of the videotape far outweighs any fear of misuse or wrongful recissemation of the videotape by the defendants. Defendants have not claimed nor shown any violation by the Citizens' Aide with respect to the use of confidential documents which the Citizens' Aide has obtained from them in the past.

V. The defendants have waived their claims under Iowa Code section 246.602, Iowa Code chapter 22, and the qualified attorney work product doctrine by allowing a viewing of a copy of the videotape.

The defendants acknowledge that they have provided a copy of the videotape for viewing by two members of the Citizens' Aide's staff. The Citizens' Aide contends that, as a result, the defendants have effectively waived their claims that the videotape is protected from production because it is confidential and because it was created in anticipation of litigation.

The Citizens' Aide, however, has never waived nor relinquished the demand for a copy of the videotape. The preliminary viewing in defendant Grossheim's office in fact reinforced Citizens' Aide belief that the videotape is essential to the investigation and that a copy is necessary to facilitate a complete, objective, and

Citizens' Aide issues a subpoena. An agency's document, if it is confidential, continues to maintain its confidential status and is not subject to disclosure to the public or to discovery by a party involved in litigation with the agency. Therefore, Citizens' Aide believes that the work product doctrine should not apply to investigatory subpoenas.

Even if the attorney work doctrine is applicable to the Citizens' Aide subpoena, the defendants have failed to furnish any evidence to support their claim that the videotape was produced in anticipation of litigation. The general anticipation of litigation test is "whether, in light of the nature of the documents and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Ashmead v. Harris*, 336 N.W.2d 197 (Iowa 1983). The determinative issue is whether the primary motivating purpose for the creation of the document in question was to prepare for litigation. *Schaffer v. Rogers*, 362 N.W.2d 552 (Iowa 1985). The mere assertion by defendants' counsel in the motions that the videotape was produced in anticipation of litigation is not sufficient to establish this fact. Likewise, the court should not accept as evidence the affidavit of Jeanett Bucklew, then Acting Director for the Department of Corrections. Should the court consider Ms. Bucklew's affidavit, it should not be given much weight since her statements are disputed and since Ms. Bucklew has no direct personal knowledge of this dispute. In contrast the Citizens' Aide, William P. Angrick II, has filed his own affidavit and has cited portion of a letter from defendant Grossheim which indicates that videotapes like the one at issue are not primarily produced for litigation purposes.

In the event the Court determines that the defendants have established that the videotape was produced in anticipation of litigation, Citizens' Aide contends that it should nevertheless be furnished to the Citizens' Aide because of a substantial need

independent assessment of what actually occurred in the incident. Defendants' real objection in this case is to furnishing a copy of the videotape as requested by the Citizens' Aide.

VI. The Citizens' Aide authority to examine the videotape encompasses the authority to have a copy of the videotape.

The defendants' final claim is that they have complied with the subpoenas and that the videotape has been produced for unlimited inspection and review. However, the defendants have not complied because the Citizens' Aide has repeatedly requested a copy of the videotape and advised the defendants that the preliminary viewing by the two staff members did not satisfy the subpoenas.

The right of the Citizens' Aide not only to examine but also to obtain a copy of a document is implicit under Iowa Code section 601G.9(3). The Citizens' Aide is entitled to the "receipt" of information, and confidential documents "provided" to the Citizens' Aide by other agencies maintain their confidential status. In other situations where examination of documents or records are permitted by law, the person entitled to the examination can also copy the documents or records. See, for example, Iowa R.C.P. 129(a) [right to inspect and copy under discovery rule concerning requests for production of documents] and Iowa Code section 22.2 [right to examine and copy public records].

In addition the Citizens' Aide is granted broad power to determine the scope and manner of an investigation. Iowa Code section 601G.9(2). That power includes the authority to decide how a document is examined and if a copy is desired. If the Citizens' Aide can view the videotape only under terms set by the defendants, the defendants would in essence be dictating how the Citizens' Aide can conduct the investigation.

The defendants have not presented any justifiable reason not to furnish a copy of the videotape. They have not claimed nor demonstrated that the provision of a copy of the videotape would create undue burden or expense. On the other hand, the conditions defendants have imposed will inconvenience the Citizens Aide and may impede the investigatory process. Furthermore, any annoyance, embarrassment, oppression, or harassment claimed by the defendants have been created by defendants' own resistances, and any suggestion of mischaracterizations which may result from access to the videotape is purely speculative. Finally, because the Citizens' Aide is required by law to maintain the videotape, if it is confidential, the defendants are protected from any claimed risk of disclosure and redissemination by the Citizens' Aide.

Summary

The Court's determination of the enforceability of the Citizens' Aide's subpoenas duces tecum rest upon whether the subpoenas are within the statutory authority of the office of the Citizens' Aide, are reasonably specific, are not unduly burdensome, and are reasonably relevant to the incident under investigation. Defendants' motions raise claims challenging the statutory authority of the Citizens' Aide's requests for a copy of the videotape at issue. Defendants have failed to show that Iowa Code chapter 22 and section 246.602 preclude access to the videotape by the Citizens' Aide. Defendants also have failed to prove that the videotape was produced in anticipation of litigation and even so, sufficient reasons exist for its production to the Citizens' Aide. Furthermore, defendants have waived these claims by allowing the two members of the Citizens' Aide's staff to view a copy of the videotape. Finally, the right of the Citizens' Aide to obtain a copy of the videotape is integral to the right to examine the videotape. Since the issuance of the subpoenas was within the statutory authority of the Citizens' Aide, the subpoenas must be enforced.

Respectfully Submitted,

Ruth H. Cooperrider

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IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

CITIZENS'

CITIZENS' AIDE/OMBUDSMAN,
(BK1000212)
Plaintiff,

EQUITY NO. CE-037-21853

vs.

LEGAL MEMORANDUM

PAUL GROSSHEIM (99AG62238),
and CRISPUS NIX (99AG62242)

Defendants.

The facts in this case are not in dispute. The Defendants have allowed the Citizens Ombudsman's Office to review a tape of an inmate housed at the Iowa State Penitentiary but have refused to give the Ombudsman physical possession of a copy of the tape. The Defendants have refused because of legitimate concerns of: security of at Iowa's maximum security facility, revelation of attorney work product, and confidentiality.

Iowa Code Chapter 601G provides the Ombudsman with subpoena power. However, this subpoena power is not absolute and the court has discretion to determine the reasonableness of the subpoena. Iowa Code ch. 601G.9; see also Citizens Aide Ombudsman v. Rolfe, 454 N.W.2d 815 (Iowa 1990). [District Court reversed for abuse of discretion when it ordered a protective order which stopped an investigation by the Ombudsman's office].

In this case, the requested protective order will not impede the investigation by the Ombudsman because the tape has been made available to the Ombudsman and will continue to be made available for his review. Citizens Aide, requires a subpoena be reasonable

before it can be enforced by the court. Citizens Aide Ombudsman v. Rolfes, 454 N.W.2d 815, 819 (Iowa 1990).

The subpoena in question is unreasonable because the Defendants have offered to provide a copy of the tape to the Court (to allay any concerns he may have of modification or destruction) as well as the unlimited opportunity to review the tape at the Department of Corrections which is five minutes from the Ombudsman's office. These offers have been rebuffed and Defendants rebuked.

With the exception of providing a copy to the tape, it is undisputed that the Defendants have assisted the Ombudsman's investigation and will continue to do so. The Defendants have not impeded the Ombudsman from conducting his investigation and there is no legitimate purpose to be served by the Ombudsman demand for his own private copy of the tape.

Defendants wish to stress that the tape provides unlimited "intelligence information" about the internal layout of the prison and provides detailed illustration of internal procedures applied at the maximum security facility. Revelation of this information is a serious compromise to the institution's security.

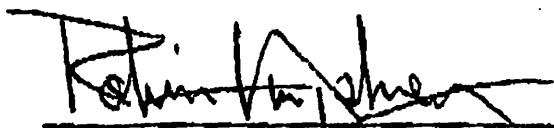
On balance, the Ombudsman has alleged the quality of the video tape machine at the Department of Corrections is not sufficient for their tastes. (NOTE: Defendants have stated they have no objection to them bringing their own video tape machine but this has been considered to be to much of an inconvenience).

Lastly, although this court does have authority to order the Ombudsman and his staff to secrecy or face contempt, in the event the Iowa State Penitentiary's security is compromised, the contempt citation will not repair the damage. Moreover, although a oath of confidentiality can be given, the more persons who review the tape the more likely the security will be intentionally or unintentionally breached.

The Defendants have also asserted that the tapes in question have been produced in anticipation of litigation. That is, the Defendants have specifically made the tape at the direction of their counsel, the Attorney General's Office. Therefore, based on the affidavit provided in their original Motion for Protective Order, by Mary Lou Bucklew, it is clear that not only is this tape confidential and subject to protection due to the maximum security concerns stated in this brief, but also for the fact that it is attorney work product and protected accordingly.

Based upon the foregoing, Defendants request this court quash the Ombudsman's subpoena and issue a protective order on behalf of the defendants.

BONNIE J. CAMPBELL
Attorney General of Iowa



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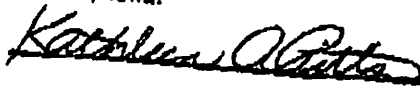
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the document referred to in the caption was mailed to the person(s) listed in the address(es) indicated, stamped with the appropriate postage for ordinary mail and deposited on the 16th day of December 1991 in a United States Post Office mail receptacle, in Des Moines, Iowa.



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December 19, 1991

MEMORANDUM

TO: CHAIRPERSON WELSH AND MEMBERS OF THE SERVICE COMMITTEE

FROM: DIANE BOLENDER, DIRECTOR

RE: DECEMBER PERSONNEL REPORT

Approval is sought to employ Gerry Rydell to fill the vacant position of publications assistant in the Administrative Code Division of the Legislative Service Bureau. Ms. Rydell has worked for the Administrative Code Division in various positions during the legislative interims since 1976. Ms. Rydell would be employed at grade 21, step 2, which is equivalent to the salary she is presently earning as a temporary proofreader/indexer.

Notification is made that the following individuals have been employed by the Legislative Service Bureau as session-only employees:

Ms. Janet Hawkins, Legislative Proofreader, Grade 16, step 1
Ms. Bridget Moser, Bill Room Clerk, Grade 13, step 1
Ms. Jennifer Ripperger, Page, Minimum Wage
Mr. Brian Clark, Page, Minimum Wage

**SERVICE COMMITTEE
OF THE LEGISLATIVE COUNCIL**

MEMBERS

Senator Joe Welsh, Chairperson
Senator Bill Hutchins
Senator Jack Rife

Representative John Connors, Vice Chairperson
Representative Kay Chapman
Representative Harold Van Maanen

TENTATIVE AGENDA

Thursday, December 19, 1991
Committee Room 22

10:00 a.m.

Call to Order

Roll Call

Approval of Minutes of November 19 Meeting
(Previously Distributed)

Report of Computer User Policy Direction Subcommittee

Personnel Report
- Legislative Service Bureau

Interim Legal Report
- Citizens' Aide/Ombudsman

Additional Business, if any

Adjournment

agenserv