STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93095

NO.
STATE OF NEBRASKA
OFFICIAL
NOV 17 1993
DEPT. OF JUSTICE

DATE: November 15, 1993

SUBJECT: Duty of the Department on Aging to Ensure Availability of Legal Counsel Under the Long-Term Care Ombudsman Act, Neb. Rev. Stat. §§ 81-2237 to 81-2264 (Cum. Supp. 1992)

REQUESTED BY: Jacklyn J. Smith, Director
Department on Aging

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

The Older Americans Act of 1965 and its subsequent amendments make federal funds available to states in order to assist older persons. 42 U.S.C.A. §§ 3021, 3023, 3024 (1973 & Supp. 1993). To be eligible to receive these federal funds, states must submit to the Commissioner of the Administration on Aging state plans which address providing numerous programs and services to older persons. 42 U.S.C.A. § 3027 (Supp. 1993). Each state's plan must include assurances that the state will carry out a State Long-Term Care Ombudsman Program in accordance with 42 U.S.C.A. § 3058g (Supp. 1993). 42 U.S.C.A. § 3027(a)(12) (Supp. 1993). Part of this ombudsman program requires that a designated state agency ensure that

> (1)(A) adequate legal counsel is available, and is able, without conflict of interest, to--
>
> > (i) provide advice and consultation needed to protect the health, safety, welfare, and rights of residents [in long-term care facilities]; and

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L. Jay Bartel
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(ii) assist the Ombudsman and representatives of the Office in the performance of the official duties of the Ombudsman and representatives; and

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

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

42 U.S.C.A. § 3058g (Supp. 1993).

To make Nebraska law consistent with the above federal requirements, the Nebraska Legislature adopted the Long-Term Care Ombudsman Act (Act), Neb. Rev. Stat. §§ 81-2237 to 81-2264 (Cum. Supp. 1992). The Act creates the Office of the State Long-Term Care Ombudsman (state ombudsman), which is to be established and operated by the Department on Aging (Department). § 81-2249. Under the Act, the Director of the Department appoints the state ombudsman. *Id.*

The Act designates to the Department the responsibility of establishing a long-term care ombudsman program consisting of both the state ombudsman and any local long-term care ombudsman programs designated as such by the Department. § 81-2250. The functions of the program, as administered by the Department, include investigating and resolving complaints made by or on behalf of older individuals who are residents or clients of long-term care facilities relating to action, inaction, or decisions of service providers and public or social service agencies which adversely affect the health, safety, welfare, or rights of such older individuals. § 81-2250(1).

As part of the program, the Department must "ensure that adequate legal counsel is available to the office [of the state ombudsman] for advice and consultation and that legal representation is provided to any state long-term care ombudsman or ombudsman advocate against whom any legal action is brought in connection with his or her official duties." § 81-2263. The Act defines "ombudsman advocate" as "an employee or a volunteer of the office [of the state ombudsman] other than the state long-term care ombudsman or of a local program trained and certified to carry out duties prescribed in rules and regulations of the office." § 81-2247.

You have requested our opinion on several questions dealing with the Department's duty to provide legal counsel under section 81-2263, quoted in relevant part above. We will address each of your questions individually below.

1. What services constitute "advice," "consultation," and "legal representation" within the meaning of section 81-2263?

> "A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct and unambiguous out of a statute."

Gillam v. Firestone Tire & Rubber Co., 241 Neb. 414, 418, 489 N.W.2d 289, 292 (1992) (quoting *County of Douglas v. Board of Regents*, 210 Neb. 573, 316 N.W.2d 62 (1982)). *See also* Neb. Rev. Stat. § 49-802(5) (1988) (words and phrases shall be construed according to common and approved usage of the language unless such words and phrases are technical or have acquired a peculiar and appropriate meaning in the law).

Because we have located nothing which indicates that the terms "advice," "consultation," and "legal representation" in section 81-2263 should be given a peculiar meaning, we must construe such terms according to the common and approved usage of the language. "Advice" means a view, counsel, or "an opinion offered as worthy to be followed in a particular situation." Webster's New Universal Unabridged Dictionary 29 (2d ed. 1983). "Consultation" is "a meeting of persons to discuss, decide, or plan something." *Id.* at 393. Finally, "legal" means "of or applicable to lawyers," and "representation" may be defined as "standing in the place of another," such as "the part performed by a representative, delegate, agent, or deputy." *Id.* at 1535.

Section 81-2263 requires that the Department make legal counsel available to the state ombudsman's office for "advice and consultation," and to the state ombudsman and ombudsman advocates for "legal representation" involving legal actions brought in connection with their official duties. Legal services necessarily encompassed by these terms would include offering legal opinions to members of the state ombudsman's office on a variety of issues; meeting with members of the state ombudsman's office to discuss,

decide, or plan a legal course of action; and speaking or acting for the state ombudsman or ombudsman advocates in lawsuits brought against them in connection with their official duties. Obviously, the above-described legal services would include numerous specific duties that are impossible to exhaustively list here.

2. Which entities may provide legal counsel for the Office of the Long-Term Care Ombudsman? If the Attorney General may provide legal counsel, would the Attorney General be able to represent local long-term care ombudsman programs and ombudsman advocates?

(a) Office of the State Long-Term Care Ombudsman

Neb. Rev. Stat. § 84-202 (1987) provides:

> The Department of Justice shall have the general control and supervision of all actions and legal proceedings in which the State of Nebraska may be a party or may be interested, and shall have charge and control of all the legal business of all departments and bureaus of the state, or of any office thereof, which requires the services of attorney or counsel in order to protect the interests of the state.

This general control and supervision of all legal proceedings concerning the state requires the Attorney General to, among other duties, appear and defend actions and claims against the state; give written opinions on legal questions submitted by heads of executive departments; at the request of executive department heads, prosecute or defend all civil or criminal actions relating to the state's executive departments if there is sufficient legal merit to justify the proceedings; and prepare contracts, forms, or other writings for state use when requested by executive departments. Neb. Rev. Stat. § 84-205(1), (3), (4), (6) (Cum. Supp. 1992). *See also* Neb. Rev. Stat. § 84-203 (1987) (Attorney General authorized to appear for state and prosecute and defend, in any court or tribunal, any civil or criminal matter in which state is interested or a party); Op. Att'y Gen. No. 92106 (Aug. 26, 1992) (Attorney General is the state's chief legal officer, charged by law with control of the state's litigation).

Since the Department on Aging is one of Nebraska's executive departments, Neb. Rev. Stat. §§ 81-102 (1987), and since the Office of the State Long-Term Care Ombudsman is established, operated by, and is part of, the Department on Aging, the Attorney General is in control of the State Long-Term Care Ombudsman Office's legal matters.

(b) Local Long-Term Care Ombudsman Programs and Local Ombudsman Advocates

You next ask whether local ombudsman programs and local ombudsman advocates are entitled to the Attorney General's representation in legal actions brought against them in connection with their official duties.

The State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (1987, Cum. Supp. 1992 & 1993 Neb. Laws), generally provides that the state may be sued for the torts of its officials and employees. When a lawsuit is properly brought under the State Tort Claims Act, the state is the defendant, provides legal counsel, and pays any settlement or judgment. For purposes of the State Tort Claims Act, an "employee of the state" is "any one or more officers or employees of the state or any state agency and shall include duly appointed members of boards or commissions when they are acting in their official capacity." § 81-8,210(3) (Cum. Supp. 1992). This definition does not include employees of entities created by local public agencies under the Interlocal Cooperation Act or any contractor with the State of Nebraska.

We have previously addressed the meaning of "state officer or employee" within the meaning of the State Tort Claims Act and the indemnification and legal representation statutes, Neb. Rev. Stat. §§ 81-8,239.05 & 81-8,239.06 (Cum. Supp. 1992). Op. Att'y Gen. No. 93069 (Aug. 26, 1993); Op. Att'y Gen. No. 92058 (Apr. 8, 1992). Based on the analysis provided in those opinions, we conclude that local long-term care ombudsman programs and local ombudsman advocates are state officers or employees within the meaning of the State Tort Claims Act and that the state would defend actions that fall within the ambit of the State Tort Claims Act and were brought against these programs or advocates.

We base this conclusion on several statutes contained in the Long-Term Care Ombudsman Act which establish that these local entities perform official state duties and functions. Specifically, section 81-2250 states that the Department on Aging is to establish a long-term care ombudsman program, which includes both state and local programs. Sections 81-2242 and 81-2252 make it clear that local programs are designated as such by the Department on Aging, pursuant to its rules and regulations, and that these regulations establish specifications regarding local ombudsman office sites, as well as requirements concerning staffing, training, operating standards, and program review. Section 81-2252 allows the state ombudsman's office to withdraw a local ombudsman program's designation if the local entity fails to

meet applicable rules and regulations established by the Department on Aging.

Section 81-2247 requires that employees or volunteers in these local programs be trained and certified to "carry out duties prescribed in rules and regulations of the office [of the state ombudsman]." *See also* § 81-2250(2) (Department on Aging must train state and local ombudsman personnel); § 81-2253 (state ombudsman to develop procedures for certifying local ombudsman advocates). Further, section 81-2263, the statute requiring the Department on Aging to make legal counsel available to the state ombudsman and ombudsman advocates, refers to "official duties" of ombudsman advocates. As noted above, "ombudsman advocates" is defined to include both employees and volunteers of local ombudsman programs. Finally, section 81-2262 states that "[a]ny local long-term care ombudsman program or any individual certified by this office, whether an employee or an unpaid volunteer, shall be treated as a representative of the office [of the state long-term care ombudsman]."

It is clear from these statutes that local long-term care ombudsman personnel, whether employees or volunteers, are state representatives performing state duties, as directed by statute and regulation. Therefore, these personnel are state employees or officers under the State Tort Claims Act, and are entitled to state legal representation for claims brought against them which fall within that Act.

Most actions arising under the State Tort Claims Act involve claims that the state or its employees were negligent in performing their duties and, as a result, injured the plaintiff. There are, however, other types of actions which can be brought against state officials and employees as individuals that are not covered by the State Tort Claims Act. For example, Neb. Rev. Stat. § 81-8,219(4) (Cum. Supp. 1992) specifically exempts from the State Tort Claims Act any "claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." This means that while the state cannot be sued for any of these acts of its officials or employees, the official or employee can still be sued as an individual for such alleged wrongs. Additionally, while the state may be immune from suit on a claim involving violation of a plaintiff's constitutional rights, the state official or employee who allegedly violated the plaintiff's constitutional rights can still be sued as an individual. Accordingly, situations may arise in which a member of local ombudsman entities are subject to suit as individuals for an

alleged wrong which does not fall within the scope of the State Tort Claims Act.

The state does provide some protection for its officials and employees in these situations, and this same protection is available to members of local ombudsman entities. Neb. Rev. Stat. § 81-8,239.05 (Cum. Supp. 1992) provides that the State of Nebraska "shall indemnify its officials and employees and its past officials and employees for money damages and reasonable costs incurred as a result of an act or omission occurring in the course and scope of employment of such official or employee . . . ." Indemnification under that section includes the payment of awards, settlements, and associated costs. Neb. Rev. Stat. § 81-8,239.06 (Cum. Supp. 1992) provides that state officers or employees who are sued in a civil action may, in writing, request legal representation by the Attorney General. Such representation is to be provided upon such request if the civil action is based in fact upon an alleged act or omission in the course and scope of the official's or employee's state employment.

Therefore, sections 81-8,239.05 and 81-8,239.06 establish a system whereby state officials and employees sued in civil actions not covered by the State Tort Claims Act can obtain legal representation by the Attorney General and indemnification of all costs and judgments, so long as the particular lawsuit arises out of an act or omission of the official or employee in the course and scope of his or her state employment. As we have previously stated, since it appears that members of local long-term care ombudsman offices are state officials or employees when performing their official duties, they would be entitled to take advantage of these statutory representation and indemnification provisions. However, note that these indemnification and legal representation provisions would not apply in cases involving malfeasance in office, willful or wanton neglect of duty, or an act or omission occurring outside the course and scope of employment. §§ 81-8,239.05(2) & 81-8,239.06(1).

While we have concluded that members of local long-term care ombudsman offices, who by statute are "representatives" of the state ombudsman performing "official duties," would fall within the statutory legal representation and indemnification provisions discussed above, we note that this arrangement could be quite costly to the State of Nebraska. By making local ombudsman personnel state officers, the State will incur costs related to workers compensation, insurance, tort liability, and indemnification. Some of these costs could also affect the budget of the Department on Aging.

3. May the Department on Aging arrange for the provision of some services required by law with one entity, such as the Attorney General, and arrange for the provision of other services with other entities, such as private law firms licensed to practice in Nebraska?

Neb. Rev. Stat. § 84-205(4) (Cum. Supp. 1992) prohibits heads of state executive departments, which would include the Department on Aging, from paying or contracting to pay from state funds any money for special attorneys unless such employment is authorized in writing by the Governor or Attorney General. Therefore, in order to arrange for private law firms to provide legal services to the state or local long-term care ombudsman programs, you will need the proper authorization. While the Governor may authorize an agency to hire outside counsel for non-litigation matters, appointment of legal counsel to handle litigation involving the state must be made by the Attorney General.

We note that some state agencies fund counsel through the Attorney General's Office. Given our current resources, if you anticipate needing a high volume of legal assistance involving your long-term care ombudsman programs, you may want to consider contracting with our office to provide you with an Assistant Attorney General who would work exclusively or semi-exclusively for the ombudsman programs, on both litigation and non-litigation matters, in exchange for your agency paying that attorney's salary or a portion thereof.

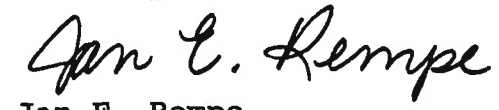
4. If the Department on Aging may contract with private firms to provide all or a part of the services required by law, may the Department use state or federal funds to pay for such services? If state or federal funds may be used, which funds may be used?

If the Attorney General appointed a Special Assistant Attorney General to provide all or part of your required legal services, the Department could use any state or federal funds designated for such purposes to fund this legal counsel. For example, 42 U.S.C.A. § 3058a(a) (Supp. 1993) appropriates federal funds to "carry out" the federal statutes concerning long-term care ombudsman programs. In order to receive such funds, the Department on Aging is required to establish and operate a state long-term care ombudsman program and office. As discussed above, part of operating this program is providing legal counsel. 42 U.S.C.A. § 3058g(g). The Department on Aging is therefore authorized to use these federal funds for hiring the required legal counsel to meet its federal statutory obligations.

Similarly, 1992 Neb. Laws LB 677A, § 1, appropriated funds through 1994 to "aid in carrying out the provisions of" Nebraska's Long-Term Care Ombudsman Act. Since the Department on Aging is required to make legal counsel available under the Act, it seems that using state funds for these purposes would be within the scope of the appropriation.

Sincerely,

DON STENBERG
Attorney General



Jan E. Rempe
Assistant Attorney General

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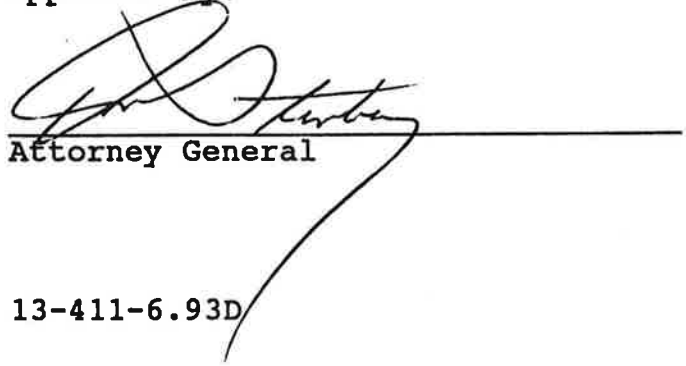

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