

*Forty-third  
Annual Report  
of the  
Nebraska  
Public Counsel*

**THE  
OMBUDSMAN**

**2013**



**Marshall Lux  
Public Counsel/Ombudsman  
State Capitol Building  
Eighth Floor  
Lincoln, Nebraska 68509  
(402) 471-2035  
Toll-Free (800) 742-7690  
ombud@leg.ne.gov**

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# NEBRASKA PUBLIC COUNSEL'S OFFICE

**“When complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for.”**

John Milton, *Areopagitica*

## ***MISSION STATEMENT***

***TO PROMOTE ACCOUNTABILITY IN PUBLIC ADMINISTRATION AND PROVIDE CITIZENS WITH AN INFORMAL MEANS FOR THE INVESTIGATION AND RESOLUTION OF THEIR COMPLAINTS AGAINST THE ADMINISTRATIVE AGENCIES OF NEBRASKA STATE GOVERNMENT.***

## ***EXPOSITION***

- The Public Counsel's Office is a public accountability and problem-solving agency. Its fundamental purposes are to promote accountability by state agencies and to investigate, address and resolve, through informal means, citizens' complaints relating to the administrative acts of state agencies.
- The "administrative acts" that may be addressed by the Public Counsel's Office include any action, rule, regulation, order, omission, decision, recommendation, practice, or procedure of an agency of state government.
- In addressing citizen complaints, the emphasis is always on the need for informality in resolving the disputes between citizens and agencies. Because of this emphasis on informality, some of the work of the Public Counsel's Office takes on the appearance of being in the nature of mediation or conciliation. However, the Public Counsel's Office is interested in more than simply resolving disputes and must, particularly in its public accountability role, carry out serious fact-finding. In order to

perform this fact-finding, the Public Counsel's Office has been given very real investigative powers, including the subpoena power.

- The approach to each citizen's complaint is tailored to its particular facts, but the Public Counsel's Office always addresses complaints impartially, and does not approach cases from an initial perspective of acting as an advocate for the complainant. In fact, many complaints are found to be unjustified by the Public Counsel's Office precisely because the results of a neutral investigation show that the complaint is not sustained by the facts. On the other hand, once it has been determined from an investigation that a complaint is justified, then it is the duty of the Public Counsel's Office to approach the relevant administrative agency with recommendations for possible corrective action. In pursuing these recommendations, the Public Counsel's Office takes on the role of an advocate, not for the complainant, but for the corrective action and, in a very real sense, for the general improvement of public administration.
- Because of its interest in improving public administration, the Public Counsel's Office is not necessarily satisfied with the outcome of a case merely because the complainant may be satisfied. The Public Counsel's Office also has to consider the broader implications of a case for the administrative system and, where appropriate, make recommendations for changes that will strengthen agency policies and procedures. By performing this function, and by publishing occasional reports of its findings and recommendations, the Public Counsel's Office also helps to promote public accountability of the agencies of state government and performs a legislative oversight function.

## TRANSMITTAL

**Neb. Rev. Stat.** Section 81-8,251 provides that the Public Counsel shall each year report to the Clerk of the Legislature and to the Governor concerning the exercise of the functions of the office during the preceding calendar year. Pursuant to Section 81-8,251, this Forty-third Annual Report of the Nebraska Public Counsel's Office has been prepared as the annual report for the calendar year 2013, and is hereby respectfully submitted.

## THE OMBUDSMAN CONCEPT

Throughout much of the last century, countries around the world, in general, and Americans, in particular, have witnessed a dramatic growth in the scope of government. The modern bureaucratic state, with its extended supervisory functions and its increased provision of services, has become an unavoidable reality. As a natural concomitant of that reality, the organization and operation of government has become more sophisticated, and more complex, as government has endeavored to perform its expanded role in an efficient, evenhanded, and procedurally reasonable manner. A common result of this increased complexity in government is the utter bewilderment that many citizens experience when confronted by the intricate, and seemingly infinite, array of rules, regulations, policies, and procedures that they encounter in their dealings with the bureaucracy of modern government. Thus, as government's involvement in the lives of its citizens has become more frequent, direct, and thorough, citizen interaction with that government has simultaneously become more complicated and, for many, far more frustrating.

As might be expected, these combined characteristics of modern government tend to generate a wide assortment of grievances in cases where citizens feel, rightly or wrongly, that their government has treated them in a manner that is unreasonable, unfair, or improper. While some of those grievances are ultimately resolved through the sole efforts of the complaining party, many grievances are left unresolved, either because there is no avenue for a ready solution, or because the grievant simply lacks the resources and sophistication necessary to utilize those avenues that do exist. When such grievances are left unresolved, citizens become more alienated from their government, and the errors of governmental operatives are left unaddressed and are, perhaps, even reinforced.

In order to help a bewildered public deal with the backlog of unresolved citizen grievances against governmental bureaucracy, numerous governments around the world have turned to the Swedish innovation of the ombudsman. Although the specific characteristics of the institution may differ in certain respects from one government to another, the basic concept of an ombudsman's office envisions an independent office that is designed to receive, investigate, and pursue informal resolution of miscellaneous citizen complaints relating to agencies of government. In carrying out this function, the ombudsman is not only expected to resolve the specific substantive complaints that come to the office, but the ombudsman is also expected to promote improvements in the quality of government by advocating for changes in the ongoing management and operation of the agencies under the

ombudsman's jurisdiction. It is also anticipated that the ombudsman, in performing these functions, will help to hold powerful governmental agencies publicly accountable for their actions.

In its classic form, an ombudsman, although an independent officer, is viewed as being an adjunct of the legislative branch of government. Indeed, one of the reasons that the ombudsman's office in its classic form is made a part of the legislative branch is to help insulate the ombudsman from pressures that the office might experience if it were placed within the executive branch of government. Because of its association with the legislative branch of government, the classic ombudsman is also able to perform a role as part of the apparatus for legislative oversight of governmental agencies and programs. In fact, the work of the ombudsman in resolving the problems that are experienced by ordinary citizens at the hands of governmental agencies gives the ombudsman a unique insight into the real world activities and consequences of those agencies and programs. That insight may then be used as a resource by the legislature in carrying out its oversight responsibilities with respect to the agencies within the ombudsman's jurisdiction.

Typically, the investigatory powers given to an ombudsman's office under the law are very real, and very meaningful. In arguing for the resolution of citizens' complaints, and in advocating for fundamental changes in the policies and procedures of administrative agencies, the "truth," as revealed to the ombudsman by a thorough investigation, is the most potent weapon that an ombudsman can wield. Indeed, without the power to thoroughly investigate the facts surrounding citizens' complaints, an ombudsman's office would be crippled in its efforts to understand and resolve those grievances. In addition to its investigatory authority, an ombudsman's office also has very broad power to make recommendations to the agencies under its jurisdiction, and to publish its findings and conclusions relative to the grievances that it investigates. However, the typical ombudsman's office does not have the authority to compel an administrative agency to accept and implement its conclusions and recommendations. Thus, in its formal relationship with the agencies under its jurisdiction, an ombudsman's office performs solely an advisory role. Nevertheless, it is widely recognized that an ombudsman's office, by providing a direct and informal avenue for the mediation of citizen grievances, is a valuable tool for enhancing the relationship between a government and its citizens and, ultimately, for improving the administration of government itself.

The ombudsman institution made its first appearance in North American government in the 1960's. In his ground breaking books *When Americans Complain* and *Ombudsmen and Others*, Professor Walter Gellhorn of Columbia University

promoted the ombudsman concept as a means of providing an “external critic of administration” for American government. In 1967, Professor Gellhorn followed up by preparing a “Model Ombudsman Statute.” Then, in 1969, the American Bar Association adopted a resolution that articulated the twelve essential characteristics of an ombudsman for government. The ABA followed this effort with the development of its own Model Ombudsman Act, which the ABA adopted in 1971. From these beginnings, the ombudsman institution gradually spread to state and local governments across the United States.



## **INFORMATION AND REFERRAL**

In addition to performing its specific statutory mandate regarding the resolution of citizen complaints, the Office of the Public Counsel has assumed the additional function of responding to citizen requests for general information relative to government. In this day of complex bureaucratic structures and imponderable regulatory provisions, it is not unusual for citizens to be confused or simply "lost" in their dealings with government. The Office of the Public Counsel is frequently contacted by citizens with questions regarding the provision of governmental services, the content of specific laws and regulations and a variety of miscellaneous issues relating to government in general.

Historically, the Office of the Public Counsel has responded to such inquiries either by providing the information sought directly or by referring the citizens involved to the organizations or governmental entities that would be best equipped to provide the information sought. The Office of the Public Counsel, with its broad expertise in the organization and operation of government, particularly on the state level, has proven to be ideally suited to serve as a clearinghouse for citizen inquiries pertaining to government. Over the years, thousands of citizens have contacted the Office of the Public Counsel and have received the information necessary to enable them to better understand and interact with their government.

## HISTORY OF THE OFFICE

On July 22, 1969, the Nebraska Legislature passed LB 521, providing for the establishment of the Office of the Public Counsel. LB 521 was approved by Governor Norbert T. Tiemann, on July 29, 1969. (See Appendix.) The Office commenced actual operation on June 1, 1971, with the appointment of Mr. Murrell B. McNeil to the position of Public Counsel.

In creating the Office of the Public Counsel, the Nebraska Legislature established an office that was, in all significant respects, consistent with the classic model of an ombudsman's office as articulated in the American Bar Association's Resolution setting forth the twelve essential characteristics of an ombudsman for government. The new law contemplated that the Public Counsel would be an independent officer, appointed by the Legislature for a term of six years and subject to removal, for good cause, only by a vote of 2/3 of the members of the Legislature. In order to facilitate its efforts to resolve citizen complaints, the Office of the Public Counsel was endowed with very thorough investigatory powers, including the authority to address questions to officers and employees of state agencies, free access to agency records and facilities, and the subpoena power. The Office of the Public Counsel was further empowered to publish its findings and conclusions relative to citizen complaints and to make recommendations to the agencies under its jurisdiction. The Office was also authorized to participate, on its own motion, in general studies and inquiries not relating to specific citizen complaints. The jurisdiction of the Office of the Public Counsel was limited to scrutiny of the administrative agencies of the state government. The Office was not given jurisdiction over complaints relating to the courts, to the Legislature or to the Governor and her personal staff. Most significantly, the Office of the Public Counsel was not given jurisdiction over political subdivisions of the State.

After serving for over nine years as Nebraska's Public Counsel, Murrell McNeil retired from office, effective July 31, 1980. Upon Mr. McNeil's retirement, Mr. Marshall Lux, then the Deputy Public Counsel, became the Acting Public Counsel, by operation of law. On February 19, 1981, the Executive Board of the Legislative Council nominated Mr. Lux for appointment to the position of Public Counsel, pursuant to Section 81-8,241, R.R.S. 1943. That nomination was approved by the Nebraska Legislature on February 20, 1981. The Legislature reappointed Mr. Lux to successive terms in 1987, 1993, 1999, 2005, and 2011.

Throughout its history, the Public Counsel's Office has been the subject of legislative

initiatives that have refined and extended the scope of the office's role in Nebraska government. The first of these developments was seen in 1976, as policy-makers around the country were searching for new ways to reform the corrections system in the wake of the Attica riots. The Nebraska Legislature responded to that situation in part by amending the Public Counsel Act to create the new position of the Deputy Public Counsel (Ombudsman) for Corrections. In creating this new position, the Legislature was, in effect, saying that it wanted to give special emphasis to resolving prison complaints and to have someone on the Legislature's staff who could act as an expert in that area. It was anticipated that this new position would not only offer inmates an effective avenue for obtaining administrative justice and the redress of grievances, but that it would also serve the interests of the state by helping to reduce sources of anger and frustration that led to inmate violence, and by decreasing the number of inmate lawsuits relating to prison conditions and operation. The Deputy Public Counsel for Corrections is Mr. James Davis III.

A significant issue before the Nebraska Legislature in 1989 was concerned with demands by Native Americans, particularly the Pawnee Tribe, that the Nebraska State Historical Society repatriate to the tribes those human remains and artifacts that archaeologists had recovered over the decades from Native American burial sites. The Legislature met these demands by adopting the Nebraska Unmarked Human Burial Sites and Skeletal Remains Protection Act, which established procedures that allowed the tribes to seek the repatriation of human remains and burial goods that were being held in the collections of the Historical Society and other museums across the state. The Ombudsman's Office was given an important role in this procedure by being designated by the Legislature as the body responsible to arbitrate any dispute that arose between the tribes and the museums in the repatriation process. The Ombudsman's Office was actually called upon to perform this arbitration role on two occasions in disputes between the Pawnee Tribe and the Historical Society.

In 1993, in an effort to find new ways to encourage efficiency and discourage misconduct in state government, the Nebraska Legislature passed the State Government Effectiveness Act. Among other things, the Act contemplated that the Ombudsman's Office would become a focal point for the investigation of allegations of significant wrongdoing in state agencies. The Act also provided for a new procedure designed to protect state employees who acted as whistleblowers to disclose wrongdoing in state government from being retaliated against by their supervisors. The Ombudsman's Office was given the key role in investigating and responding to these retaliation complaints and has, over the years, addressed many such cases. Early in 1997, the Nebraska Supreme Court found one important

provision of the Act to be unconstitutional under the theory that it was a violation of the principle of separation of powers. *State ex rel. Shepherd v. Nebraska Equal Opportunity Commission*, 251 Neb. 517, 557 N.W.2d 684 (1997). However, those constitutional objections, as well as several other perceived difficulties with the functioning of the Act, were addressed by the Nebraska Legislature in LB 15 of 1997, which was signed by the Governor on March 10, 1997.

One of the most important issues before the Nebraska Legislature in 1994 was an initiative to restructure the state's system for the delivery of welfare services. In the process of changing this system, it was recognized that the recipients of welfare services would need to have a special problem-solver to help in dealing with the redesigned welfare system. It was also recognized that the Legislature itself would benefit from having the input and expertise of a staff person who was directly involved in addressing the day-to-day problems that arose in the implementation of the new welfare system. Responding to these needs in much the same way that it had in 1976, the Legislature created the new position of Deputy Public Counsel for Welfare Services as a part of the legislation that ultimately enacted the changes to the state's welfare system. The Deputy Public Counsel for Welfare Services is Ms. Julie Pham.

In 2008, the Nebraska Legislature passed LB 467, which had been introduced by Senator Ernie Chambers. LB 467 made two significant changes to the Public Counsel's authority and focus. One part of LB 467 extended the Public Counsel's jurisdiction to include complaints that come from Nebraska's county and city jails. Since its inception, the authority of the Public Counsel's Office has been limited to addressing complaints that involve administrative agencies of State government. However, LB 467 changed that for the first time, and carved out a small segment of local governmental authority to place under the Public Counsel's jurisdiction. The State of Nebraska currently has over seventy active jail facilities that now fall under the Public Counsel's jurisdiction. The second element of LB 467 created a new position in the office for a Deputy Public Counsel for Institutions. This new position was created to provide for a person in the Public Counsel's Office who will have primary responsibility to examine complaints received from the state's non-correctional institutions, which includes the regional centers (mental health facilities), the state's veteran's homes, and the Beatrice Developmental Center, the State's only residential facility designed to treat, rehabilitate, and train the developmentally disabled. LB 467 also contemplated that the Public Counsel's jurisdiction and services would "follow" individuals involved in the State's system for behavioral health and developmental disability services who were transitioned out of State-run facilities to receive care in the community. Mr. Oscar Harriott, who

has been on the Public Counsel's staff for many years, was designated to serve as the Deputy Public Counsel for Institutions, and has being assisted in that capacity by Assistant Public Counsel Gary Weiss (and by Assistants Jerall Moreland and Marla Fischer-Lempke).

## STAFF

The chief asset of the Public Counsel's Office is not its statutory powers or mandate. It is not even the high level of support that the Office receives from the public and the Legislature, although those factors are certainly important to the Public Counsel's success. The chief asset of the Public Counsel's Office is its staff, the men and women who carry out the routine duties of the Office.

The staff of the Office of the Public Counsel consists of eleven full-time and two part-time employees. Ten of the full-time staff members - Public Counsel Marshall Lux, Deputy Public Counsel Carl Eskridge, Deputy Public Counsel for Corrections James Davis III, Deputy Public Counsel for Institutions Oscar Harriott, Deputy Public Counsel for Welfare Services Julie Pham, and Assistant Public Counsels Barb Brunkow, Jerall Moreland, April Dunning, Sean Schmeits, and Marla Fischer-Lempke (in October of 2013 Ms. Fischer-Lempke replaced Mr. Gary Weiss, who resigned after working in the office since 2008) - are actively involved in casework. Also, since July of 2012, Ms. Julie L. Rogers has served as the Inspector General of Nebraska Child Welfare, a position that is affiliated with the Public Counsel's Office pursuant to the Nebraska Child Welfare Act. The other employees of the Public Counsel's Office (Rebecca Dean, Carla Jones, and Kris Stevenson) serve mostly as case-intake personnel, and have significant contact with the public in the fielding of incoming telephone calls, emails, etc., and in providing immediate responses to questions from citizens.

It is, of course, always difficult to conveniently describe or characterize any group of people, even a group as small as the staff of the Nebraska Public Counsel's Office. The people who make up that staff are, after all, individuals, who bring diverse backgrounds and a wide range of unique talents to their jobs. Many of the professional employees of the Public Counsel's Office came to the office with previous experience in state government. Some had worked first in the office as volunteers before becoming permanent professional employees of the office. Four of the professionals in the office have law degrees, and some on the professional staff have advanced degrees in other areas as well. All of these backgrounds and associated talents contribute in many important ways to the success of the Public Counsel's Office. Viewed collectively, however, the most important characteristic of the staff of the Public Counsel's Office is its experience.

While the details of their backgrounds are remarkably diverse, one characteristic that many of the Public Counsel's Office staff have in common is their experience in

working for other agencies of Nebraska state government. Nearly every member of the Public Counsel's Office professional staff had prior experience working in Nebraska state government before joining the Public Counsel's Office. In some cases, that prior experience was extensive. The professional staff of the Public Counsel's Office has an average of nearly eighteen years of service with the State of Nebraska. This wide range of experience both in and out of the Public Counsel's Office has given the staff a meaningful exposure to the day-to-day functioning of state government and the issues that are common to its operation and have made the staff a true collection of professionals in the handling of complaints against state administrative agencies.

Beyond its experience in state government generally, the staff of the Public Counsel's Office has the additional advantage of continuity. The rate of turnover of the Public Counsel's staff is very low, even for such a relatively small office. The average Public Counsel's Office employee has been with the office for more than twelve years, an average which would be higher but for the addition of three new employees in 2008. This means that the employees of the Public Counsel's Office are not only experienced in the minutia of state government, but that they are also highly experienced in the fine art of complaint-handling. They have refined the needed human skills for dealing with people under stress. They have developed the analytical skills for untangling complicated issues presented in complaints. They have acquired the negotiation skills necessary for bringing citizens and bureaucrats together for the resolution of difficult problems.

Dealing effectively with citizen complaints requires an uncommon combination of talents and expertise. The professional training and background of the Public Counsel's staff is both diverse and extensive. That background together with the uncommon continuity of the staff has enabled the Public Counsel's Office to develop and maintain a strong foundation in what can truly be described as the profession of complaint handling.

## ***COMPLAINT SAMPLES***

In the past, we have used this section of the Annual Report as a means of presenting “case summaries” reflecting the detailed allegations of actual cases handled by the office in the year in question. In this Annual Report, however, we are changing this approach in two respects. First, we are going to reduce the description to a “one line” summary of the issue involved in the cases presented. While this will offer much less in the way of a full explanation of the issues involved in the cases in question, it will allow us to feature a longer list of cases to give the reader a better sense of the kind of cases that the office works on over a year’s time. Secondly, we are going to limit the subject-area of the cases to Department of Health and Human Services cases exclusively. We are doing this as a means of demonstrating just how issues related to the operation of the Department of Health and Human Services have become such a significant part of our caseload.

<b>Case #</b>	<b>Subject</b>
3034	Disabled person applied for a Chore Worker over a month ago, but the interview is not until January 14
3032	Son has been recommended for a group home, but needs to have funding through Developmental Disabled Services
3024	Problems with getting on the AccessNebraska website
2925	Told that she must pay State back for ADC mistakenly paid due to caseworker error
2919	Needs child care services under the A & D waiver
2887	Cut in care-giver hours for disabled client
2880	Concerned about retaining Medicaid personal assistance services and respite care under A&D waiver
2871	Problems getting Medicaid coverage reinstated



- 2864 Has Medicaid coverage but share of cost went up, and needs a new article of medical equipment that he cannot afford
- 2859 Pregnant and homeless and cannot qualify for ADC or for Medicaid coverage
- 2836 Accessing the HIPP program
- 2814 Needs child care subsidies
- 2803 Wants to stop receiving ADC benefits because child support payments are being taken by the State
- 2800 Renewed SNAP and child care subsidy by the deadline, but benefits have been cancelled
- 2795 Determination of ineligibility for Developmental Disability services due to “dual diagnosis”
- 2764 Applied for Energy Assistance, but ended up losing all HHS benefits
- 2746 Applied for Energy Assistance, but was denied, and is having problems with getting into contact with AccessNebraska
- 2743 Needs health care assistance for mother who has Alzheimer's
- 2739 SNAP application denied due to felony conviction as a juvenile
- 2706 Difficulties with obtaining transportation between day and residential Developmental Disability services
- 2697 Medicaid is not paying the medical bills
- 2683 Cannot clarify whether his wife is going to be covered by Medicaid

- 2663 Seeking assistance with making utility payments
- 2631 SNAP over-payment to client due to an "administrative error"
- 2626 Developmental Disability waiting list for services and client needs priority treatment
- 2625 Problems with completing her reapplication for economic assistance
- 2609 Change in coverage for child care expenses for disabled child
- 2603 Her health insurance premium payment has not yet been processed by DHHS
- 2601 ADC benefits were reduced
- 2600 Managed care changed and is now receiving no benefits
- 2599 Medicaid benefits stopped without an explanation
- 2594 Family denied SNAP and child care benefits and problems due to misinformation being provided by AccessNebraska hotline workers
- 2585 Concerned about Medicaid coverage and the effect of the Affordable Care Act
- 2582 Issues with A&D Waiver Program changes
- 2559 Needs assistance in order to pay for utilities
- 2553 Therapist trying to find answers for the Medicaid questions of a client

- 2532 Recipient of Social Security Disability and Medicaid has some concerns about coverage available for paying for certain medical expenses
- 2465 Needs to have reliable transportation to the hospital for heart surgery
- 2445 Still waiting for approval of a used car purchase voucher
- 2382 ADC contingent on Employment First requirement
- 2348 Effective October 1 has to pay a co-pay for respite care
- 2339 Problems with Employment First and being denied a clothing voucher
- 2322 Notification that parents must pay for all routine child care for disabled child
- 2321 Medicaid share-of-cost seems to be too high
- 2301 Child care subsidy discontinued
- 2293 Because of ACCESSNebraska woman is unable to contact her step-father's Caseworker
- 2282 Has a Medicaid question but cannot get through on the new ACCESSNebraska system
- 2279 Guardian has concerns about the actions of his ward's Service Coordinator
- 2267 Difficulty in arranging for transportation for a needed trip to a doctor's appointment
- 2264 Cannot connect with ACCESSNebraska for an interview to requalify for Medicaid coverage

- 2240 Mother of an A&D Waiver case is having difficulties paying the \$5.00 per hour co-pay for daycare for her child
- 2234 Application for ADC denied
- 2225 Problems getting through to ACCESSNebraska
- 2221 Application for AFDC and Emergency Mortgage assistance was denied
- 2209 Needs medical assistance, but his Disability benefits have been garnished
- 2208 Suffering from PTSD due to sexual abuse as a child and needs to have assistance in filing for Disability benefits
- 2205 Denied Medicaid coverage for needed physical therapy
- 2190 Her daughter needs assistance, but they cannot get through to ACCESSNebraska
- 2180 Needs to be interviewed to requalify for daycare subsidy, but when she tries to contact ACCESSNebraska she is put on hold
- 2176 Her approval for payment of subsidy for day care has not yet been confirmed with the day care provider by DHHS
- 2173 Her mother's Medicaid was cancelled because recertification documents were sent to the wrong address
- 2136 Medicaid application were denied because the verification documents were not timely submitted
- 2131 Needs to change her appointment time for an interview, but cannot reach ACCESSNebraska

- 2127 Having problems with inadequate transportation services for medical appointments
- 2098 Experiencing continuing problems with making contact with the private transportation coordinator in order to arrange for transportation to doctor's appointments
- 2086 ADC card not delivered
- 2083 Her Medicare premium assistance has been canceled due to AccessNebraska error, and the failure to notify the recipient of a pending eligibility review
- 2060 Trying to provide information to the State to establish her eligibility for SNAP, but ACCESSNebraska has no record of her case
- 2057 Applied for Medicaid, but is unable to reach ACCESSNebraska and is now being told that she has to reapply
- 2044 Medicaid denial citing a need for an unrealistic spend-down
- 2029 Denied application for daycare subsidy
- 1974 Has lost her SNAP Card and is having a delay in the arrival of a replacement due to difficulties with ACCESSNebraska
- 1973 Nebraska Medicaid coverage has been denied for the payment of medical services that were provided in a Georgia hospital
- 1972 PASS benefits suspended
- 1969 Confusion about needed documentation in order to qualify for Medicaid coverage
- 1956 Terminal cancer patient told that she must be transferred to a nursing home in order to secure Medicaid coverage

- 1950 Found to be ineligible for Medicaid coverage
- 1949 ADC is interfering with child support
- 1943 Cannot get through to ACCESSNebraska
- 1933 Cannot get through to ACCESSNebraska to have an interview for Medicaid coverage purposes
- 1905 Needs to have a Medicaid card
- 1881 Has been dropped from Medicaid because he is not receiving SSI Disability
- 1875 Needs to contact ACCESSNebraska, but is being kept on hold and is unable to connect
- 1842 Problem in contacting ACCESSNebraska and being kept on hold with call never being answered
- 1841 Termination from the HIPPP Program
- 1839 ACCESSNebraska telephone system is apparently not working
- 1828 Trying to obtain an interview to requalify for benefits via a telephone call to ACCESSNebraska, but was placed on hold for three hours
- 1817 Disagrees with amendment of DHHS Regulations regarding in-home health care services
- 1812 Application for Medicaid coverage denied
- 1811 No response by DHHS to application for Energy Assistance
- 1807 DHHS set up a telephone interview with an AABD applicant,

but no one at ACCESSNebraska answered the applicant's telephone call at the appointed time

- 1802 Denial of request for furniture assistance
- 1801 SNAP benefits have been cut
- 1787 Trying to qualify for Medicaid coverage, but was told that her health insurance costs will not count toward a "spend-down"
- 1751 Having problems establishing eligibility for ADC and Medicaid coverage
- 1736 Caring for children whose parent is in prison, and is now being told that she has been receiving benefits "fraudulently"
- 1727 Medicaid denied payment of her mother's OBGYN medical bills because the hospital had submitted the claims too late
- 1709 Problems encountered in establishing eligibility for HIPP program
- 1708 Dropped from the HIPP program
- 1707 No longer eligible for the HIPP program
- 1704 SNAP benefits being reduced
- 1689 Needs to schedule an appointment to qualify for SNAP benefits, but cannot get through to ACCESSNebraska
- 1647 Problems with arranging for approved home health care and transportation to medical appointments
- 1645 Family's daycare provider has not been paid by DHHS
- 1642 Medicaid and SNAP benefits suspended

- 1634 Difficulty qualifying for Medicaid and transportation services
- 1609 Needs approval of chore services, but having problems with using the AccessNebraska hotline
- 1603 Medicaid coverage was discontinued
- 1586 Notice that DHHS is discontinuing her daughter's participation in the HIPPI Program
- 1584 Having problems with arranging for transportation to medical appointments
- 1566 Family's Medicaid Waiver services were suddenly terminated by DHHS
- 1541 Subsidy for a disabled child is being reduced
- 1409 DHHS is threatening to sanction recipient's SNAP (food stamp) benefits
- 1384 Had to call ACCESSNebraska for interview on the renewal of SNAP benefits, but the line was constantly busy and could not get through
- 1355 Tried to contact ACCESSNebraska, but has to spend too much time waiting on hold
- 1346 Medicaid is demanding that a recipient repay DHHS for Medicaid benefits that were paid for the cost of a child's birth
- 1342 The application for child care subsidies and SNAP benefits is taking too long to resolve
- 1302 Application for Energy Assistance denied



- 1282 Medicaid recipient's share of payments for medications may be too high
- 1210 Needs to have help with copays for prescriptions, but cannot get through to ACCESSNebraska
- 1143 All Medicaid benefits have been discontinued
- 1140 Problems establishing eligibility for a child care subsidy
- 1138 Needs help to pay her rent
- 1133 Needs to arrange transportation from Beatrice to Lincoln for radiation treatments
- 1103 Medicaid had been providing cab fare for doctor's visits, but the transportation support has been discontinued
- 1101 Medicaid recipient denied transportation help
- 1074 Needs to renew Medicaid eligibility, but cannot get through to AccessNebraska
- 1072 Problems with son's Medicaid case because son needs a new legal guardian
- 1071 DHHS decides that a dental bill from 2010 is not covered by Medicaid
- 1067 Mother is providing care for a profoundly disabled son, but is having problems with Medicaid
- 1014 SNAP benefits reduced
- 980 Need of Medicaid and HIPP coverage for a child with autism
- 968 No response from DHHS to application for SNAP benefits

- 956 HHS demanding personal and medical information relating to her disabled son
- 949 Problem with getting through to ACCESSNebraska
- 933 Needs child care subsidy, but has received no answer from DHHS
- 921 Disabled and needs Medicaid coverage, but is being told that she needs to qualify for Social Security Disability first
- 903 Wants to know the status of his previous application for Medicaid coverage
- 888 Needs help with DHHS Developmental Disability and making a plan for their disabled daughter
- 859 Appealing a denial of SNAP and Medicaid benefits
- 850 Medicare places an unreasonable limit on coverage for the cost of feeding tubes
- 842 Constantly being cut off by the ACCESSNebraska telephone system
- 829 Needs treatment for a heart condition, but has been denied Medicaid coverage
- 828 Statement issued by DHHS relating to her benefits appears to be inaccurate
- 818 ACCESSNebraska is keeping them on hold for a very long time
- 793 Family needs information about Medicaid spend-down, and share-of-cost, but cannot get through to ACCESSNebraska Call Center

782 Being threatened with loss of Medicaid coverage

754 Having problems with getting needed paperwork processed in a timely manner by ACCESSNebraska

706 Inaccessibility of information from DHHS due to continuing problems with ACCESSNebraska

683 DHHS has miscalculated overpayment of benefits because of errors by ACCESSNebraska

660 Has been unsuccessful in trying to reach DHHS via ACCESS-Nebraska

617 Repayment of SNAP benefit from 2010 taken from party's 2012 tax refund

577 Is supposed to receive assistance with utilities, but the city will not agree to turn the utilities back on

556 Difficulties qualifying for Medicaid coverage and other benefits

507 Needs an extension of time to turn in SNAP application, but is not able to get through to ACCESSNebraska

456 Douglas County Clerk faxed a document to DHHS, but now the applicant needs confirmation that it was received

438 Denied SNAP benefits, and her Medicaid share of cost is over \$500

385 Medical bills are not being paid by Nebraska Medicaid

373 Request for help with paying for utilities was denied by DHHS

366 Medicaid is dictating the dosage of his Lipitor

- 308 Problems with getting through to ACCESSNebraska
- 304 Mother seeking Developmental Disability services for her autistic daughter
- 269 Missed deadline for re-certification of eligibility for benefits
- 244 Cannot get through to ACCESSNebraska for SNAP eligibility interview
- 240 Sister is losing Developmental Disability funding for needed care
- 235 Problems in accomplishing re-certification of eligibility for Medicaid coverage
- 194 Cannot reach DHHS for telephone interview related to the renewal of Medicaid eligibility due to AccessNebraska issues
- 145 Documented alien needs Medicaid coverage for her prenatal care
- 103 Needs help from DHHS with paying his utility bill
- 85 SNAP benefits cancelled without notice and is unable to reach Caseworker via ACCESSNebraska
- 74 Applicant for Medicaid coverage is unable to do interview via ACCESSNebraska due to being kept on hold
- 72 Needs to know the status of her application for Medicaid coverage
- 68 SNAP benefits reduced
- 45 Having problems with securing transportation to his medical

appointments and needs special medical supplies

25

Family is trying to obtain SNAP benefits for elderly father

17

Benefit amount determination by DHHS is incorrect

## STATISTICAL ANALYSIS

The following tables illustrate the size, and nature, of the caseload of the Nebraska Public Counsel's Office for calendar year 2013. The caseload total for 2013 reflects a remarkable increase in the workload of the Public Counsel's Office relative to all previous years in the 43 year history of the office. The total caseload of the Public Counsel's Office for calendar year 2013 was 3,042 cases. This caseload total not only reflects a substantial growth in the Public Counsel's caseload as compared with the previous year, but it is also – by far – the highest annual caseload total in the history of the Office.

In fact, 2012 had itself been a year of a substantial increase in the annual caseload of the Public Counsel's Office, as compared with the previous year. Specifically, the total caseload of the office increased between 2011 and 2012 by a factor of nearly 7%. Even so, the 2012 caseload total was slightly below the all-time high for the Public Counsel's annual caseload, which came in 2002, when the Office received a total of 2,482 cases. The annual caseload of the Office in 2013 – 3,042 cases – is now the highest caseload in the history of the Office.

It is useful to consider the following Table of the Public Counsel's annual caseload totals from calendar year 1999 through calendar year 2013:

1999	-	2,224 cases
2000	-	2,206 cases
2001	-	2,202 cases
2002	-	2,482 cases
2003	-	2,291 cases
2004	-	2,290 cases
2005	-	2,174 cases
2006	-	2,290 cases
2007	-	2,250 cases
2008	-	2,114 cases
2009	-	2,328 cases
2010	-	2,346 cases
2011	-	2,302 cases
2012	-	2,462 cases
2013	-	3,042 cases

As these totals suggest, the Public Counsel's annual caseload consistently hovered

in the range of about 2,200 cases-per-year from 1999 through 2007. The only significant exception to this pattern appeared in 2002, when the Public Counsel's annual caseload recorded its previous high at a total of 2,482 cases. However, this larger caseload in 2002 was partially the result of the implementation of the State's new system for collecting and distributing child support payments, which was started in January of 2002, and so there was some clear explanation for the unusually high caseload in 2002.

As the statistics in the above Table reflect, the Public Counsel's Office actually began to experience an elevation in its caseload in 2009, when the annual caseload total was 2,328 cases, an increase of almost 6% over the 2,200 plateau that the Office had recorded in most of the years from 1999 through 2007. The total annual caseload remained in the neighborhood of 2,300 cases from 2009 through 2011, but then 2012 produced the 7% increase mentioned earlier. This increase would prove to be but a mere foreshadowing of the substantial increase in the Public Counsel's caseload recorded in 2013. In fact, the 3,042 cases received by the Public Counsel's Office in calendar year **2013 was an increase of 23½%** over the 2012 total.

Those of us who work in the Public Counsel's Office suspected that the caseload increase of 6% in 2009, and the 7% increase in 2012, might very well prefigure a significant shift in the Office's caseload. However, this idea that we might be on the threshold of a new era of growth of the Public Counsel's caseload did not begin to suppose that we would see a growth in the caseload as dramatic as actually appeared in 2013. Caseload jumps of 6% and 7% are significant, but when the caseload goes up by a figure nearing 25% we are in a situation where something fundamental has changed.

The causes for this remarkable increase in the Public Counsel's caseload are many and complex, and arise from several factors/forces. One of these factors is all about a move that was made several years ago to extend the jurisdiction of the Public Counsel's Office to include complaints having to do with the operation of Nebraska's county and municipal jails. As that "jails-program" has gotten off the ground, it has increased the Public Counsel's caseload by several hundred cases. Another factor is the fact that in recent years the Public Counsel's Office has tried to encourage more members of the Nebraska Legislature to refer more constituent complaints to the Public Counsel's Office, with the result that the Office is now receiving a significant number of cases from that resource. Also, over the last several years there have been a couple of situations in the administration of the Nebraska Department of Health and Human Services that have generated a great deal of public attention, and not a few complaints as well. In particular, the Families Matter initiative, which sought

to privatize the State's child welfare system, and the ACCESSNebraska program, which has attempted to replace the traditional caseworker-centric approach to social services with new web-based computer programs and call centers, have generated a significant number of complaints that we would not have heard before. This is, in fact, particularly true in the case of the operation of the ACCESSNebraska call centers, which have been plagued with mistakes and long call-holding waits for the people who have called in seeking help with applying for public assistance. Cases like this are a natural subject-area for Ombudsman-intervention, and as the Section of this Report offering case samples reflects, the Public Counsel's Office did receive a large number of ACCESSNebraska-related cases in 2013.

As for the increase in the caseload of the Public Counsel's Office over the last several years in the area of jail-related cases, as indicated that had to do with the fact that in 2008 the Nebraska Legislature adopted LB 467, legislation which extended the Public Counsel's jurisdiction to include cases in that subject area. Formerly, the Public Counsel's jurisdiction had been limited strictly to administrative agencies of State government, but LB 467 has extended that jurisdiction to include complaints relating to the operation of county and municipal jails. Since that time, the number of jail-cases that the Public Counsel has received annually has been gradually increasing, as is reflected in the following Table:

2008	-	61 cases
2009	-	199 cases
2010	-	204 cases
2011	-	219 cases
2012	-	287 cases
2013	-	336 cases

In interpreting this Table, it is important to remember that the total for 2008 is for only a partial year. LB 467 was passed in 2008, and since the law did not go into effect until after the year had started, and since the Public Counsel's Office reports its statistics on a calendar year (rather than a Fiscal Year) basis, the caseload total for 2008 should be expected to be low. As the Table reflects, the total number of jail cases very quickly reached the 200 cases-per-year level, and remained there (while increasing slightly each year) in 2009, 2010, and 2011. In 2012, however, there was a significant increase in the number of jail cases, which went up by 31% over the total for the previous year. We have seen this trend repeated (on a somewhat lesser incline) in 2013, when the total number of jail-related cases went up by 17%, from 287 cases in 2012 to 336cases in 2013. We are expecting to see another, similar increase in this numbers in 2014, although it should be recognized that eventually



we will arrive at a “saturation point” in terms of the number of complaints emanating from Nebraska’s jails. It will be interesting and instructive to see where that point will fall, in terms of the annual jail-case total, and how soon we will be at that point.

**TABLE 1**  
**SUMMARY OF CONTACTS 2013**

<b>Month</b>	<b>Total Inquiries</b>	<b>Complaint</b>	<b>Information</b>
January	267	243	24
February	247	222	25
March	284	271	13
April	276	251	25
May	264	250	14
June	213	206	7
July	248	239	9
August	276	264	12
September	240	220	20
October	271	257	14
November	196	187	9
December	260	248	12
<b>TOTAL</b>	<b>3042</b>	<b>2858</b>	<b>184</b>
<b>% of Total</b>	<b>100%</b>	<b>94%</b>	<b>6%</b>

**TABLE 2  
OMBUDSMAN CONTACTS 2013**

	Total Logged Inquiries	Total Logged Complaint	Pending Complaint	Justified	Unjustified	Partially Justified	Discontinued	No Jurisdiction	No Jurisdiction But Assisted
January	267	243	14	46	37	77	43	8	19
February	247	222	17	51	32	62	36	15	9
March	284	271	25	66	43	68	48	10	12
April	276	251	42	51	41	59	44	3	11
May	264	250	29	39	50	55	37	22	18
June	213	206	26	49	39	40	37	9	6
July	248	239	41	51	43	46	26	21	11
August	276	264	43	62	49	48	45	10	7
September	240	220	31	53	49	31	36	14	6
October	271	257	44	40	63	43	50	11	6
November	196	187	32	43	28	29	30	12	13
December	260	248	67	30	43	51	43	8	6
<b>TOTAL</b>	<b>3042</b>	<b>2858</b>	<b>411</b>	<b>581</b>	<b>517</b>	<b>609</b>	<b>475</b>	<b>143</b>	<b>124</b>

<b>% of TOTAL</b>	<b>100%</b>	<b>94%</b>	<b>14%</b>	<b>19%</b>	<b>17%</b>	<b>20%</b>	<b>16%</b>	<b>5%</b>	<b>4%</b>
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## APPENDIX A - PUBLIC COUNSEL ACT

**81-8,240.** As used in sections 81-8,240 to 81-8,254, unless the context otherwise requires:

- (1) Administrative agency shall mean any department, board, commission, or other governmental unit, any official, or any employee of the State of Nebraska acting or purporting to act by reason of connection with the State of Nebraska, or any corporation, partnership, business, firm, governmental entity, or person who is providing health and human services to individuals under contract with the State of Nebraska and who is subject to the jurisdiction of the office of the Public Counsel as required by section 73-401, any regional behavioral health authority, any community-based behavioral health services provider that contracts with a regional behavioral health authority, and any county or municipal correctional or jail facility and employee thereof acting or purporting to act by reason of connection with the county or municipal correctional or jail facility; but shall not include (a) any court, (b) any member or employee of the Legislature or the Legislative Council, (c) the Governor or his personal staff, (d) any political subdivision or entity thereof, (e) any instrumentality formed pursuant to an interstate compact and answerable to more than one state, or (f) any entity of the federal government; and
- (2) Administrative act shall include every action, rule, regulation, order, omission, decision, recommendation, practice, or procedure of an administrative agency.

**81-8,241.** The office of Public Counsel is hereby established to exercise the authority and perform the duties provided by sections 81-8,240 to 81-8,254. The Public Counsel shall be appointed by the Legislature, with the vote of two-thirds of the members required for approval of such appointment from nominations submitted by the Executive Board of the Legislative Council.

**81-8,242.** The Public Counsel shall be a person well equipped to analyze problems of law, administration, and public policy, and during his term of office shall not be actively involved in partisan affairs. No person may serve as Public Counsel within two years of the last day on which he served as a member of the Legislature, or while he is a candidate for or holds any other state office, or while he is engaged in any other occupation for reward or profit.

**81-8,243.** The Public Counsel shall serve for a term of six years, unless removed by vote of two-thirds of the members of the Legislature upon their determining that he has become incapacitated or has been guilty of neglect of duty or misconduct. If the office of Public Counsel becomes vacant for any cause, the deputy public counsel shall serve as acting public counsel until a Public Counsel has been appointed for a full term. The Public Counsel shall receive such salary as is set by the Executive Board of the Legislative Council.

**81-8,244.** The Public Counsel may select, appoint, and compensate as he or she sees fit, within the amount available by appropriation, such assistants and employees as he or she deems necessary to discharge the responsibilities under sections 81-8,240 to 81-8,254. He or she shall appoint and designate one assistant to be a deputy public counsel, one assistant to be a deputy public counsel for corrections, one assistant to be a deputy public counsel for institutions, and one assistant to be a deputy public counsel for welfare services. Such deputy public counsels shall be subject to the control and supervision of the Public Counsel. The authority of the deputy public counsel for corrections shall extend to all facilities and parts of facilities, offices, houses of confinement, and institutions which are operated by the Department of Correctional Services and all county or municipal correctional or jail facilities. The authority of the deputy public counsel for institutions shall extend to all mental health and veterans institutions and facilities operated by the Department of Health and Human Services and to all regional behavioral health authorities that provide services and all community-based behavioral health services providers that contract with a regional behavioral health authority to provide services, for any individual who was a patient within the prior twelve months of a state-owned and state-operated regional center, and to all complaints pertaining to administrative acts of the department, authority, or provider when those acts are concerned with the rights and interests of individuals placed within those institutions and facilities or receiving community-based behavioral health services. The authority of the deputy public counsel for welfare services shall extend to all complaints pertaining to administrative acts of administrative agencies when those acts are concerned with the rights and interests of individuals involved in the welfare services system of the State of Nebraska. The Public Counsel may delegate to members of the staff any authority or duty under sections 81-8,240 to 81-8,254 except the power of delegation and the duty of formally making recommendations to administrative agencies or reports to the Governor or the Legislature.

**81-8,245.** The Public Counsel shall have power to:

- (1) Investigate, on complaint or on his or her own motion, any administrative act of any administrative agency;
- (2) Prescribe the methods by which complaints are to be made, received, and acted upon; determine the scope and manner of investigations to be made; and, subject to the requirements of sections 81-8,240 to 81-8,254, determine the form, frequency, and distribution of his or her conclusions,

recommendations, and proposals.

- (3) Conduct inspections of the premises, or any parts thereof, of any administrative agency or any property owned, leased, or operated by any administrative agency as frequently as is necessary, in his or her opinion, to carry out duties prescribed under sections 81-8,240 to 81-8,254;
- (4) Request and receive from each administrative agency, and such agency shall provide, the assistance and information the public counsel deems necessary for the discharge of his or her responsibilities; inspect and examine the records and documents of all administrative agencies notwithstanding any other provision of law; and enter and inspect premises within any administrative agency's control;
- (5) Issue a subpoena, enforceable by action in an appropriate court, to compel any person to appear, give sworn testimony, or produce documentary or other evidence deemed relevant to a matter under his or her inquiry. A person thus required to provide information shall be paid the same fees and travel allowances and shall be accorded the same privileges and immunities as are extended to witnesses in the district courts of this state, and shall also be entitled to have counsel present while being questioned;
- (6) Undertake, participate in, or cooperate with general studies or inquiries, whether or not related to any particular administrative agency or any particular administrative act, if he or she believes that they may enhance knowledge about or lead to improvements in the functioning of administrative agencies; and
- (7) Make investigations, reports, and recommendations necessary to carry out his or her duties under the State Government Effectiveness Act.

**81-8,246.** In selecting matters for his attention, the Public Counsel shall address himself particularly to an administrative act that might be:

- (1) Contrary to law or regulation;
- (2) Unreasonable, unfair, oppressive, or inconsistent with the general course of an administrative agency's judgments;
- (3) Mistaken in law or arbitrary in ascertainment of fact;
- (4) Improper in motivation or based on irrelevant considerations;
- (5) Unclear or inadequately explained when reasons should have been revealed; or

- (6) Inefficiently performed.

The Public Counsel may concern himself also with strengthening procedures and practices which lessen the risk that objectionable administrative acts will occur.

**81-8,247.** The Public Counsel may receive a complaint from any person concerning an administrative act. He shall conduct a suitable investigation into the things complained of unless he believes that:

- (1) The complainant has available to him another remedy which he could reasonably be expected to use;
- (2) The grievance pertains to a matter outside his power;
- (3) The complainant's interest is insufficiently related to the subject matter;
- (4) The complaint is trivial, frivolous, vexatious, or not made in good faith;
- (5) Other complaints are more worthy of attention;
- (6) His resources are insufficient for adequate investigation; or
- (7) The complaint has been too long delayed to justify present examination of its merit.

The Public Counsel's declining to investigate a complaint shall not bar him from proceeding on his own motion to inquire into related problems. After completing his consideration of a complaint, whether or not it has been investigated, the Public Counsel shall suitably inform the complainant and the administrative agency involved.

**81-8,248.** Before announcing a conclusion or recommendation that expressly or impliedly criticizes an administrative agency or any person, the Public Counsel shall consult with that agency or person.

**81-8,249.**

- (1) If, having considered a complaint and whatever material he deems pertinent, the Public Counsel is of the opinion that an administrative agency should (a) consider the matter further (b) modify or cancel an administrative act, (c) alter a regulation or ruling, (d) explain more fully the administrative act in question, or (e) take any other step, he shall state his recommendations to the administrative agency. If the Public Counsel so requests, the agency shall, within the time he has specified, inform him

about the action taken on his recommendations or the reasons for not complying with them.

- (2) If the Public Counsel believes that an administrative action has been dictated by a statute whose results are unfair or otherwise objectionable, he shall bring to the Legislature's notice his views concerning desirable statutory change.

**81-8,250.** The Public Counsel may publish his conclusions and suggestions by transmitting them to the Governor, the Legislature or any of its committees, the press, and others who may be concerned. When publishing an opinion adverse to an administrative agency he shall include any statement the administrative agency may have made to him by way of explaining its past difficulties or its present rejection of the Public Counsel's proposals.

**81-8,251.** In addition to whatever reports he may make from time to time, the Public Counsel shall on or about February 15 of each year report to the Clerk of the Legislature and to the Governor concerning the exercise of his functions during the preceding calendar year. In discussing matters with which he or she has dealt, the Public Counsel need not identify those immediately concerned if to do so would cause needless hardship. So far as the annual report may criticize named agencies or officials, it must include also their replies to the criticism. Each member of the Legislature shall receive a copy of such report by making a request for it to the Public Counsel.

**81-8,252.** If the Public Counsel has reason to believe that any public officer or employee has acted in a manner warranting criminal or disciplinary proceedings, he shall refer the matter to the appropriate authorities.

**81-8,253.** No proceeding, opinion, or expression of the Public Counsel shall be reviewable in any court. Neither the Public Counsel nor any member of his staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance, except in a proceeding brought to enforce sections 81-8,240 to 81-8,254.

**81-8,254.** A person who willfully obstructs or hinders the proper exercise of the Public Counsel's functions, or who willfully misleads or attempts to mislead the Public Counsel in his inquiries, shall be guilty of a Class II misdemeanor. No employee of the State of Nebraska, who files a complaint pursuant to sections 81-82,40 to 81-8,254, shall be subject to any penalties, sanctions, or restrictions in connection with his employment because of such complaint.



## **APPENDIX B - Inspector General of Nebraska Child Welfare Act**

### **43-4301. Act, how cited.**

Sections 43-4301 to 43-4331 shall be known and may be cited as the Office of Inspector General of Nebraska Child Welfare Act.

**Source:** Laws 2012, LB821, § 8.

### **43-4302. Legislative intent.**

(1) It is the intent of the Legislature to:

(a) Establish a full-time program of investigation and performance review to provide increased accountability and oversight of the Nebraska child welfare system;

(b) Assist in improving operations of the department and the Nebraska child welfare system;

(c) Provide an independent form of inquiry for concerns regarding the actions of individuals and agencies responsible for the care and protection of children in the Nebraska child welfare system. Confusion of the roles, responsibilities, and accountability structures between individuals, private contractors, and agencies in the current system make it difficult to monitor and oversee the Nebraska child welfare system; and

(d) Provide a process for investigation and review to determine if individual complaints and issues of investigation and inquiry reveal a problem in the child welfare system, not just individual cases, that necessitates legislative action for improved policies and restructuring of the child welfare system.

(2) It is not the intent of the Legislature in enacting the Office of Inspector General of Nebraska Child Welfare Act to interfere with the duties of the Legislative Performance Audit Section of the Legislative Performance Audit Committee or the Legislative Fiscal Analyst or to interfere with the statutorily defined investigative responsibilities or prerogatives of any officer, agency, board, bureau, commission, association, society, or institution of the executive branch of state government, except that the act does not preclude an inquiry on the sole basis that another agency has the same responsibility. The act shall not be construed to interfere with or supplant the responsibilities or prerogatives of the Governor to investigate, monitor, and report on the activities of the agencies, boards, bureaus, commissions, associations, societies, and institutions of the executive branch under his or her administrative direction.

**Source:** Laws 2012, LB821, § 9.

**43-4303. Definitions; where found.**

For purposes of the Office of Inspector General of Nebraska Child Welfare Act, the definitions found in sections 43-4304 to 43-4316 apply.

**Source:** Laws 2012, LB821, § 10.

**43-4304. Administrator, defined.**

Administrator means a person charged with administration of a program, an office, or a division of the department or administration of a private agency or licensed child care facility.

**Source:** Laws 2012, LB821, § 11.

**43-4305. Department, defined.**

Department means the Department of Health and Human Services.

**Source:** Laws 2012, LB821, § 12.

**43-4306. Director, defined.**

Director means the chief executive officer of the department.

**Source:** Laws 2012, LB821, § 13.

**43-4307. Inspector General, defined.**

Inspector General means the Inspector General of Nebraska Child Welfare appointed under section 43-4317.

**Source:** Laws 2012, LB821, § 14.

**43-4308. Licensed child care facility, defined.**

Licensed child care facility means a facility or program licensed under the Child Care Licensing Act or sections 71-1901 to 71-1906.01.

**Source:** Laws 2012, LB821, § 15.

**43-4309. Malfeasance, defined.**

Malfeasance means a wrongful act that the actor has no legal right to do or any wrongful conduct that affects, interrupts, or interferes with performance of an official duty.

**Source:** Laws 2012, LB821, § 16.

**43-4310. Management, defined.**

Management means supervision of subordinate employees.

**Source:** Laws 2012, LB821, § 17.

**43-4311. Mifeasance, defined.**

Mifeasance means the improper performance of some act that a person may lawfully do.

**Source:** Laws 2012, LB821, § 18.

**43-4312. Obstruction, defined.**

Obstruction means hindering an investigation, preventing an investigation from progressing, stopping or delaying the progress of an investigation, or making the progress of an investigation difficult or slow.

**Source:** Laws 2012, LB821, § 19.

**43-4313. Office, defined.**

Office means the office of Inspector General of Nebraska Child Welfare and includes the Inspector General and other employees of the office.

**Source:** Laws 2012, LB821, § 20.

**43-4314. Private agency, defined.**

Private agency means a child welfare agency that contracts with the department or contracts to provide services to another child welfare agency that contracts with the department.

**Source:** Laws 2012, LB821, § 21.

**43-4315. Record, defined.**

Record means any recording, in written, audio, electronic transmission, or computer storage form, including, but not limited to, a draft, memorandum, note, report, computer printout, notation, or message, and includes, but is not limited to, medical records, mental health records, case files, clinical records, financial records, and administrative records.

**Source:** Laws 2012, LB821, § 22.

**43-4316. Responsible individual, defined.**

Responsible individual means a foster parent, a relative provider of foster care, or an employee of the department, a foster home, a private agency, a licensed child care facility, or another provider of child welfare programs and services responsible for the

care or custody of records, documents, and files.

**Source:** Laws 2012, LB821, § 23.

**43-4317. Office of Inspector General of Nebraska Child Welfare; created; purpose; Inspector General; appointment; term; certification; employees; removal.**

(1) The office of Inspector General of Nebraska Child Welfare is created within the office of Public Counsel for the purpose of conducting investigations, audits, inspections, and other reviews of the Nebraska child welfare system. The Inspector General shall be appointed by the Public Counsel with approval from the chairperson of the Executive Board of the Legislative Council and the chairperson of the Health and Human Services Committee of the Legislature.

(2) The Inspector General shall be appointed for a term of five years and may be reappointed. The Inspector General shall be selected without regard to political affiliation and on the basis of integrity, capability for strong leadership, and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, investigation, or criminal justice administration or other closely related fields. No former or current executive or manager of the department may be appointed Inspector General within five years after such former or current executive's or manager's period of service with the department. Not later than two years after the date of appointment, the Inspector General shall obtain certification as a Certified Inspector General by the Association of Inspectors General, its successor, or another nationally recognized organization that provides and sponsors educational programs and establishes professional qualifications, certifications, and licensing for inspectors general. During his or her employment, the Inspector General shall not be actively involved in partisan affairs.

(3) The Inspector General shall employ such investigators and support staff as he or she deems necessary to carry out the duties of the office within the amount available by appropriation through the office of Public Counsel for the office of Inspector General of Nebraska Child Welfare. The Inspector General shall be subject to the control and supervision of the Public Counsel, except that removal of the Inspector General shall require approval of the chairperson of the Executive Board of the Legislative Council and the chairperson of the Health and Human Services Committee of the Legislature.

**Source:** Laws 2012, LB821, § 24.

**43-4318. Office; duties; law enforcement agencies and prosecuting attorneys; cooperation; confidentiality.**

(1) The office shall investigate:

(a) Allegations or incidents of possible misconduct, misfeasance, malfeasance, or violations of statutes or of rules or regulations of the department by an employee of or person under contract with the department, a private agency, a licensed child care facility, a foster parent, or any other provider of child welfare services or which may provide a basis for discipline pursuant to the Uniform Credentialing Act; and

(b) Death or serious injury in foster homes, private agencies, child care facilities, and other programs and facilities licensed by or under contract with the department and death or serious injury in any case in which services are provided by the department to a child or his or her parents or any case involving an investigation under the Child Protection Act, which case has been open for one year or less. The department shall report all cases of death or serious injury of a child in a foster home, private agency, child care facility or program, or other program or facility licensed by the department to the Inspector General as soon as reasonably possible after the department learns of such death or serious injury. For purposes of this subdivision, serious injury means an injury or illness caused by suspected abuse, neglect, or maltreatment which leaves a child in critical or serious condition.

(2) Any investigation conducted by the Inspector General shall be independent of and separate from an investigation pursuant to the Child Protection Act. The Inspector General and his or her staff are subject to the reporting requirements of the Child Protection Act.

(3) Notwithstanding the fact that a criminal investigation, a criminal prosecution, or both are in progress, all law enforcement agencies and prosecuting attorneys shall cooperate with any investigation conducted by the Inspector General and shall, immediately upon request by the Inspector General, provide the Inspector General with copies of all law enforcement reports which are relevant to the Inspector General's investigation. All law enforcement reports which have been provided to the Inspector General pursuant to this section are not public records for purposes of sections 84-712 to 84-712.09 and shall not be subject to discovery by any other person or entity. Except to the extent that disclosure of information is otherwise provided for in the Office of Inspector General of Nebraska Child Welfare Act, the Inspector General shall maintain the confidentiality of all law enforcement reports received pursuant to its request under this section. Law enforcement agencies and prosecuting attorneys shall, when requested by the Inspector General, collaborate with the Inspector General regarding all other information relevant to the Inspector General's investigation. If the Inspector General in conjunction with the Public Counsel determines it appropriate, the Inspector General may, when requested to do so by a law enforcement agency or prosecuting attorney, suspend an investigation by the office until a criminal investigation or prosecution is completed or has proceeded to a point that, in the judgment of the Inspector General, reinstatement of the Inspector General's investigation will not impede or infringe upon the criminal investigation or prosecution. Under no circumstance shall the Inspector General interview any minor who has already been interviewed by a law enforcement agency, personnel of the Division of Children and Family Services of the department, or staff of a child advocacy center in connection with a relevant ongoing investigation of a law enforcement agency.

**Source:** Laws 2012, LB821, § 25.

**43-4319. Office; access to information and personnel; investigation.**

(1) The office shall have access to all information and personnel necessary to perform the duties of the office.

(2) A full investigation conducted by the office shall consist of retrieval of relevant records through subpoena, request, or voluntary production, review of all relevant records, and interviews of all relevant persons.

**Source:** Laws 2012, LB821, § 26.

**43-4320. Complaints to office; form; full investigation; when.**

(1) Complaints to the office may be made in writing. The office shall also maintain a toll-free telephone line for complaints. A complaint shall be evaluated to determine if it alleges possible misconduct, misfeasance, malfeasance, or violation of a statute or of rules and regulations of the department by an employee of or a person under contract with the department, a private agency, or a licensed child care facility, a foster parent, or any other provider of child welfare services or alleges a basis for discipline pursuant to the Uniform Credentialing Act. All complaints shall be evaluated to determine whether a full investigation is warranted.

(2) The office shall not conduct a full investigation of a complaint unless:

(a) The complaint alleges misconduct, misfeasance, malfeasance, violation of a statute or of rules and regulations of the department, or a basis for discipline pursuant to the Uniform Credentialing Act;

(b) The complaint is against a person within the jurisdiction of the office; and

(c) The allegations can be independently verified through investigation.

(3) The Inspector General shall determine within fourteen days after receipt of a complaint whether it will conduct a full investigation. A complaint alleging facts which, if verified, would provide a basis for discipline under the Uniform Credentialing Act shall be referred to the appropriate credentialing board under the act.

**Source:** Laws 2012, LB821, § 27.

**Cross References**

**Uniform Credentialing Act**, see section 38-101.

**43-4321. Cooperation with office; when required.**

All employees of the department, all foster parents, and all owners, operators, managers, supervisors, and employees of private agencies, licensed child care facilities, and other providers of child welfare services shall cooperate with the office. Cooperation includes, but is not limited to, the following:

(1) Provision of full access to and production of records and information. Providing access to and producing records and information for the office is not a violation of confidentiality provisions under any law, statute, rule, or regulation if done in good faith for purposes of an investigation under the Office of Inspector General of Nebraska Child Welfare Act;

(2) Fair and honest disclosure of records and information reasonably requested by the office in the course of an investigation under the act;

- (3) Encouraging employees to fully comply with reasonable requests of the office in the course of an investigation under the act;
- (4) Prohibition of retaliation by owners, operators, or managers against employees for providing records or information or filing or otherwise making a complaint to the office;
- (5) Not requiring employees to gain supervisory approval prior to filing a complaint with or providing records or information to the office;
- (6) Provision of complete and truthful answers to questions posed by the office in the course of an investigation; and
- (7) Not willfully interfering with or obstructing the investigation.

**Source:** Laws 2012, LB821, § 28.

**43-4322. Failure to cooperate; effect.**

Failure to cooperate with an investigation by the office may result in discipline or other sanctions.

**Source:** Laws 2012, LB821, § 29.

**43-4323. Inspector General; powers; rights of person required to provide information.**

The Inspector General may issue a subpoena, enforceable by action in an appropriate court, to compel any person to appear, give sworn testimony, or produce documentary or other evidence deemed relevant to a matter under his or her inquiry. A person thus required to provide information shall be paid the same fees and travel allowances and shall be accorded the same privileges and immunities as are extended to witnesses in the district courts of this state and shall also be entitled to have counsel present while being questioned.

**Source:** Laws 2012, LB821, § 30.

**43-4324. Office; access to records; subpoena; records; statement of record integrity and security; contents; treatment of records.**

(1) In conducting investigations, the office shall access all relevant records through subpoena, compliance with a request of the office, and voluntary production. The office may request or subpoena any record necessary for the investigation from the department, a foster parent, a licensed child care facility, or a private agency that is pertinent to an investigation. All case files, licensing files, medical records, financial and administrative records, and records required to be maintained pursuant to applicable licensing rules shall be produced for review by the office in the course of an investigation.

(2) Compliance with a request of the office includes:

(a) Production of all records requested;

- (b) A diligent search to ensure that all appropriate records are included; and
  - (c) A continuing obligation to immediately forward to the office any relevant records received, located, or generated after the date of the request.
- (3) The office shall seek access in a manner that respects the dignity and human rights of all persons involved, maintains the integrity of the investigation, and does not unnecessarily disrupt child welfare programs or services. When advance notice to a foster parent or to an administrator or his or her designee is not provided, the office investigator shall, upon arrival at the departmental office, bureau, or division, the private agency, the licensed child care facility, or the location of another provider of child welfare services, request that an onsite employee notify the administrator or his or her designee of the investigator's arrival.
- (4) When circumstances of an investigation require, the office may make an unannounced visit to a foster home, a departmental office, bureau, or division, a licensed child care facility, a private agency, or another provider to request records relevant to an investigation.
- (5) A responsible individual or an administrator may be asked to sign a statement of record integrity and security when a record is secured by request as the result of a visit by the office, stating:
- (a) That the responsible individual or the administrator has made a diligent search of the office, bureau, division, private agency, licensed child care facility, or other provider's location to determine that all appropriate records in existence at the time of the request were produced;
  - (b) That the responsible individual or the administrator agrees to immediately forward to the office any relevant records received, located, or generated after the visit;
  - (c) The persons who have had access to the records since they were secured; and
  - (d) Whether, to the best of the knowledge of the responsible individual or the administrator, any records were removed from or added to the record since it was secured.
- (6) The office shall permit a responsible individual, an administrator, or an employee of a departmental office, bureau, or division, a private agency, a licensed child care facility, or another provider to make photocopies of the original records within a reasonable time in the presence of the office for purposes of creating a working record in a manner that assures confidentiality.
- (7) The office shall present to the responsible individual or the administrator or other employee of the departmental office, bureau, or division, private agency, licensed child care facility, or other service provider a copy of the request, stating the date and the titles of the records received.
- (8) If an original record is provided during an investigation, the office shall return the original record as soon as practical but no later than ten working days after the date of the compliance request.
- (9) All investigations conducted by the office shall be conducted in a manner designed



to ensure the preservation of evidence for possible use in a criminal prosecution.

**Source:** Laws 2012, LB821, § 31.

**43-4325. Reports of investigations; distribution; redact confidential information; powers of office.**

(1) Reports of investigations conducted by the office shall not be distributed beyond the entity that is the subject of the report without the consent of the Inspector General.

(2) Except when a report is provided to a guardian ad litem or an attorney in the juvenile court pursuant to subsection (2) of section 43-4327, the office shall redact confidential information before distributing a report of an investigation. The office may disclose confidential information to the chairperson of the Health and Human Services Committee of the Legislature when such disclosure is, in the judgment of the Public Counsel, desirable to keep the chairperson informed of important events, issues, and developments in the Nebraska child welfare system.

(3) Records and documents, regardless of physical form, that are obtained or produced by the office in the course of an investigation are not public records for purposes of sections 84-712 to 84-712.09. Reports of investigations conducted by the office are not public records for purposes of sections 84-712 to 84-712.09.

(4) The office may withhold the identity of sources of information to protect from retaliation any person who files a complaint or provides information in good faith pursuant to the Office of Inspector General of Nebraska Child Welfare Act.

**Source:** Laws 2012, LB821, § 32.

**43-4326. Department; provide direct computer access.**

The department shall provide the Public Counsel and the Inspector General with direct computer access to all computerized records, reports, and documents maintained by the department in connection with administration of the Nebraska child welfare system.

**Source:** Laws 2012, LB821, § 33.

**43-4327. Inspector General's report of investigation; contents; distribution.**

(1) The Inspector General's report of an investigation shall be in writing to the Public Counsel and shall contain recommendations. The report may recommend systemic reform or case-specific action, including a recommendation for discharge or discipline of employees or for sanctions against a foster parent, private agency, licensed child care facility, or other provider of child welfare services. All recommendations to pursue discipline shall be in writing and signed by the Inspector General. A report of an investigation shall be presented to the director within fifteen days after the report is presented to the Public Counsel.

(2) Any person receiving a report under this section shall not further distribute the report or any confidential information contained in the report. The Inspector General, upon

notifying the Public Counsel and the director, may distribute the report, to the extent that it is relevant to a child's welfare, to the guardian ad litem and attorneys in the juvenile court in which a case is pending involving the child or family who is the subject of the report. The report shall not be distributed beyond the parties except through the appropriate court procedures to the judge.

(3) A report that identifies misconduct, misfeasance, malfeasance, or violation of statute, rules, or regulations by an employee of the department, a private agency, a licensed child care facility, or another provider that is relevant to providing appropriate supervision of an employee may be shared with the employer of such employee. The employer may not further distribute the report or any confidential information contained in the report.

**Source:** Laws 2012, LB821, § 34.

**43-4328. Report; director; accept, reject, or request modification; when final; written response; corrected report; credentialing issue; how treated.**

(1) Within fifteen days after a report is presented to the director under section 43-4327, he or she shall determine whether to accept, reject, or request in writing modification of the recommendations contained in the report. The Inspector General, with input from the Public Counsel, may consider the director's request for modifications but is not obligated to accept such request. Such report shall become final upon the decision of the director to accept or reject the recommendations in the report or, if the director requests modifications, within fifteen days after such request or after the Inspector General incorporates such modifications, whichever occurs earlier.

(2) Within fifteen days after the report is presented to the director, the report shall be presented to the foster parent, private agency, licensed child care facility, or other provider of child welfare services that is the subject of the report and to persons involved in the implementation of the recommendations in the report. Within forty-five days after receipt of the report, the foster parent, private agency, licensed child care facility, or other provider may submit a written response to the office to correct any factual errors in the report. The Inspector General, with input from the Public Counsel, shall consider all materials submitted under this subsection to determine whether a corrected report shall be issued. If the Inspector General determines that a corrected report is necessary, the corrected report shall be issued within fifteen days after receipt of the written response.

(3) If the Inspector General does not issue a corrected report pursuant to subsection (2) of this section, or if the corrected report does not address all issues raised in the written response, the foster parent, private agency, licensed child care facility, or other provider may request that its written response, or portions of the response, be appended to the report or corrected report.

(4) A report which raises issues related to credentialing under the Uniform Credentialing Act shall be submitted to the appropriate credentialing board under the act.

**Source:** Laws 2012, LB821, § 35.

## **Cross References**

**Uniform Credentialing Act**, see section 38-101.

### **43-4329. Report or work product; no court review.**

No report or other work product of an investigation by the Inspector General shall be reviewable in any court. Neither the Inspector General nor any member of his or her staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his or her official cognizance except in a proceeding brought to enforce the Office of Inspector General of Nebraska Child Welfare Act.

**Source:** Laws 2012, LB821, § 36.

### **43-4330. Inspector General; investigation of complaints; priority and selection.**

The Office of Inspector General of Nebraska Child Welfare Act does not require the Inspector General to investigate all complaints. The Inspector General, with input from the Public Counsel, shall prioritize and select investigations and inquiries that further the intent of the act and assist in legislative oversight of the Nebraska child welfare system. If the Inspector General determines that he or she will not investigate a complaint, the Inspector General may recommend to the parties alternative means of resolution of the issues in the complaint.

**Source:** Laws 2012, LB821, § 37.

### **43-4331. Summary of reports and investigations; contents.**

On or before September 15 of each year, the Inspector General shall provide to the Health and Human Services Committee of the Legislature and the Governor a summary of reports and investigations made under the Office of Inspector General of Nebraska Child Welfare Act for the preceding year. The summaries shall detail recommendations and the status of implementation of recommendations and may also include recommendations to the committee regarding issues discovered through investigation, audits, inspections, and reviews by the office that will increase accountability and legislative oversight of the Nebraska child welfare system, improve operations of the department and the Nebraska child welfare system, or deter and identify fraud, abuse, and illegal acts. The summaries shall not contain any confidential or identifying information concerning the subjects of the reports and investigations.

**Source:** Laws 2012, LB821, § 38.

## Bibliography

Anyone interested in learning more about the ombudsman concept as that concept has been implemented through the Nebraska Office of the Public Counsel is invited to read the following materials:

Frank, *The Nebraska Public Counsel - The Ombudsman*, 5 Cumberland-Samford L. Rev. 30 (1974).

Lux, "State Ombudsman Office: Cost Effectiveness Estimates." *Journal of Health and Human Resources Administration* 15 (Winter 1993): 306-312.

Miewald and Comer, "Complaining As Participation: The Case of the Ombudsman." *Administration and Society* 17 (February 1986): 481-499.

Miewald and Comer, "The Nebraska Ombudsman: An American Pioneer." *International Handbook of the Ombudsman - Country Surveys*, edited by Gerald E. Caiden, Connecticut; Greenwood Press, 1983.

Wyner, *Complaint Resolution in Nebraska: Citizens, Bureaucrats and the Ombudsman*, 54 Neb. L. Rev. 1 (1975).

Wyner, *The Nebraska Ombudsman: Innovation in State Government*. Berkeley: Institute of Government Studies, University of California, 1974.