

*Thirty-Third
Annual Report
of the
Nebraska
Public Counsel*

**THE
OMBUDSMAN**



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NEBRASKA PUBLIC COUNSEL'S OFFICE

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, it is the duty of the Public Counsel's Office to approach the relevant administrative agency with recommendations for 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

Section 81-8,251, R.R.S. 1943, 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 Thirty-second Annual Report of the Nebraska Public Counsel/Ombudsman has been prepared as the Annual Report for the calendar year 2003 and is hereby respectfully submitted.

FORWARD

This is the *Thirty-third Annual Report* of the Nebraska Office of the Public Counsel, covering calendar year 2003. This Annual Report differs from all others that the office has produced over the years in that it is going to be “published” substantially over the internet, rather than being reduced to the sort of ink and paper document that our grandparents would have expected, and that characterized the other 32 editions of the Public Counsel’s Annual Report. Other changes have been made as well.

Last year, in the “Message” section of the Public Counsel’s Annual Report, we discussed the institution of the annual report itself, its utility and cost-efficiency, and wondered whether the time had come for ombudsmen to present a different form of annual report, or none at all. I expressed concerns about the time taken in the preparation of the report, and the cost involved in printing and distribution, and I also expressed doubts about whether the communication of the substance of the annual reports was really worth the associated costs and effort. I also articulated concerns about how widely these reports are being read, and about whether there really was a meaningful audience for these reports. In the end, I explained that my own conclusions were “that the time has come for a change, not in the sense that the reports should be eliminated, so much as in the sense that they should be abbreviated and modified.” Well, this is another year, and so we are going to try something different.

One change will be in the length of the report. Sections offering sample cases, a prominent feature in our previous Annual Reports, have been eliminated. While the samples cases in earlier annual reports may arguably have added slightly to the reader’s understanding of what it is that an ombudsman does, it was felt that the slight gain for the reader in that regard did not offset the time spent in compiling the sample cases. If a political science professor, or any student of the ombudsman institution, for that matter, wants to review samples of our work over the years, then we would do just as well to provide copies of any (or many) of the twenty or more previous annual reports where descriptions of routine cases are offered. After all, we aren’t trying to lose weight or train for the Olympics here, and so, in this context at least, there really is no virtue in repetition for its own sake.

Another change is that we will be “publishing” this Annual Report on the internet, rather than printing hundreds or thousands of copies of the report. I admit that I

am not completely convinced that a virtual report is a complete substitute for one that can sit on a shelf, but I must also confess that I sometimes wonder how many of the copies of the annual reports that we have routinely distributed over the years have been consigned to the garbage, rather than being assigned to an honored spot in the library. The point, after all, is that the annual report be accessible to anyone who wants to read it, and by publishing it on the internet, we probably make it more accessible than it was twenty years ago, when you had to find a copy in a library somewhere. We will, of course, be printing a few copies of this report for inclusion in our own collection, and to be distributed to certain offices in Nebraska government and elsewhere.

This “publication” by internet will be experimental only, and it is entirely possible that in the ensuing years we will return to our previous practice. We are influenced to try this method now, in part, because of the need to conserve money at the end of a biennium when our funding has been reduced to help meet a revenue shortfall experienced by the State of Nebraska. While only time will tell what we might do with next year’s annual report, we do intend to ask for sufficient funding to cover the printing costs of a more orthodox annual reports in the future.

Marshall Lux, Ombudsman

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 prepared a "Model Ombudsman Statute" and in 1969 the American Bar Association adopted a resolution which 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 it 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, and 1999.

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 current Deputy Public Counsel for Corrections is Mr. Oscar Harriott.

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 last several years, addressed a number of 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). 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 current Deputy Public Counsel for Welfare Services is Ms. Marilyn McNabb.

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 eight full-time and three part-time employees, and one very loyal and helpful volunteer. All of the seven full-time staff members (Ombudsman Marshall Lux, Deputy Public Counsel Terry Ford, Deputy Public Counsel for Corrections Oscar Harriott, Deputy Public Counsel for Welfare Services Marilyn McNabb, and Assistant Public Counsels James Davis III, Carl Eskridge, Anna Hopkins, and Hong Pham) are actively involved in casework. The part-time employees (Sharon Holtgrewe, Marge Green, and Kris Stevenson) serve as clerical personnel and have significant contact with the public in fielding telephone calls and 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. Three 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 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 entire staff of the Public

Counsel's Office has an average of over fifteen 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 approximately twelve years. 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.

A MESSAGE FROM THE OMBUDSMAN

A Little Ancient History – The Tribune of the Plebes

We all know the basic history – those of us who have spent significant time studying, or laboring in, the ombudsman institution. The roots of the ombudsman institution date back to 1809, when a Swedish king was deposed, and the Swedish *Riksdag*, or parliament, in formulating a new constitution, created the office of the *justitieombudsman*, literally an “attorney” or “representative for justice.” The intended role of this official was to keep an eye on the activities of government officials (cabinet ministers and members of the *Riksdag* excluded), to make sure that they executed the laws of the land appropriately. In fact, however, the roots of the institution go a bit deeper. The office of *justitieombudsman* was actually a mutation of a much earlier Swedish office, the *justitiekansler* (chancellor of justice), which was created in 1713 by royal decree of a Swedish king living in exile in Turkey. As with the later institution of the *justitieombudsman*, the basic role of the Swedish *justitiekansler* was to watch the actions of Swedish officials (in this case, on behalf of the king) to make certain that they administered the laws properly. The Swedish constitution of 1809 continued the institution of the *justitiekansler* as an officer to be appointed by the monarch, but it added the position of *justitieombudsman*, an official who was to perform much the same function, but who was to be appointed by, and answerable to, the *Riksdag*, the parliament, and not the monarch.

This is quite a fascinating history for those of us who have studied the ombudsman institution. (My source was the article on Sweden authored by Ulf Lundvik for Gerald Caiden’s *International Handbook of the Ombudsman*.) For one thing, it shows that the bureaucracy of the Swedish state was perceived as a source of power, and a potential source of mischief, quite separate from the institutions of the monarch and the legislature. Bureaucracy was regarded as being something that could not be relied upon to do its job, as something to be watched and controlled, and the *justitieombudsman* was seen as a way of accomplishing that. It is also quite clear from this history that the position of the *justitieombudsman*, the prototype of the ombudsman institution, was considered to be a part of the legislative element or “branch” of government, entirely separate and distinct from the executive, or monarch, and from the bureaucracy itself. The monarch had his or her watchdog in the *justitiekansler*. The *justitieombudsman* would perform the same role for the legislature. It is also interesting to speculate on the reasons why the Swedish *Riksdag* felt that it was necessary to supplement the preexisting

justitiekansler with its own version of the same officer. Perhaps the feeling was that the *justitieombudsman*, an official attached to the legislature, was needed, because the *justitiekansler*, who worked for the monarch, could not be trusted to do the job in a way that furthered the goals of the legislature.

The history of the *justitieombudsman* shows us, rather vividly, the true pedigree of the ombudsman (watchdog), but it is a history that really omits mention of one of the more important roles of the office, that of protector of ordinary citizens. In practice, the institution, in Sweden and elsewhere, has served as a significant tool for protecting the rights and interests of ordinary citizens who are being mistreated, or at least ignored, by a powerful and impersonal bureaucracy. Although, like all other ombudsmen, the *justitieombudsman* does not have the power to direct an agency to undo an action, or change a decision, the Swedish ombudsman, also like all others, does take citizen complaints, and can recommend remedial action. And so the institution of the ombudsman does not exist merely to make certain that administrative agencies behave, but the classic ombudsman is also, in fact, a citizen protector, as well as a watchdog.

The idea of a governmental institution designed to protect common citizens from the abuses of government has, of course, a history that is much longer than the history of the ombudsman. To the best of my knowledge, the first such institution, at least in the history of western civilization, was the *tribuni plebes*, the tribunes of the plebes, established as an integral part of the “constitution” of the Roman Republic, some 2,500 years ago. Rome of that time was already divided into distinct social classes; the wealthy patricians, who were members of the Roman Senate, and were able to protect their interests through that institution, and the impoverished plebeians, who were powerless, and subject to oppression by their wealthier neighbors. Patrician magistrates, acting in the name of the state, would often treat individual plebeians unfairly or abusively, ordering their punishment or execution with little justification, and with no recourse. Understandably, the plebeians grew tired of this arrangement, and in 494 B.C. the issue came to a head when the plebeians threatened to secede from the Roman state, abandon the city, and leave the patricians to their own devices. The result was a revolution of sorts, and certainly a transformation in the Roman state.

The Romans were not democrats, and the Roman Republic was by no means a democracy, as we would understand it, but the Romans were positive geniuses when it came to formulating institutions to control the power of government. The Romans, after all, had lived under despotic Etruscan kings, and their history taught them about the need to place institutional controls on those who held the power of the state in their hands. So when, in 494 B.C., the Romans were confronted with

the crisis of the threatened plebeian succession, they found their solution by devising a new institution to limit the power of government. That new institution was the *tribuni plebes*.

The *tribuni plebes* (there were differing numbers of tribunes at different times) were officials who were selected solely from among the ranks of the plebeians. These tribunes were not themselves magistrates, and could not inflict punishment, but they did have the power to intercede and, in effect, rescue any plebeian who was being mistreated by a Roman magistrate. (Eventually, the tribunes were even deemed to have the power to veto actions that were taken by Roman Senate itself, if those actions were deemed to be detrimental to the plebeians.) The tribunes were regarded as having a sacred status, and their person was declared to be sacrosanct, in order to protect them from being interfered with in the execution of their office. Because a tribune might be called upon at any time to intercede in a matter, the tribunes were required to be easily accessible, and the doors of their houses were expected to be open at all hours, in case someone needed their protection. The powers and influence of the *tribuni plebes* grew throughout the history of the Roman Republic, grew, in fact, to the point where the tribunes were eventually even able to compel the Roman counsels, the executives of the Roman Republic, to comply with the orders of the Senate, in a sense acting as ancient watchdogs to make sure that the executive powers were carried out as intended by the legislature.

The institution of the *tribuni plebes* was one of the greatest accomplishments of Roman government. Government, in ancient history, had always been about war, and taxes, and tribute, and power, and always about the endless efforts of the privileged classes to have their way. The *tribuni plebes* were something very different. The tribunes were an institution to protect the common people from the abuses of the state. It was a new idea, and an important one.

Ombudsmen are by no means tribunes, but the many parallels between the two institutions are fascinating. Like a tribune, an ombudsman is expected to intercede with government on behalf of the weak. As with a tribune, the power of an ombudsman is circumscribed, and is, in effect, more in the nature of reaction and intercession, than making policy and administering decisions. Like a tribune, an ombudsman is expected to be readily accessible, and to act quickly when help is needed. And, like a tribune, an ombudsman, because he or she is expected to frustrate the will of powerful people, must be protected by the system from interference by those who would wish the ombudsman ill.

Ever since 494 B.C., it seems, our civilization has been seeking ways to protect its weakest citizens from the abuses inherent in government. For the Romans of the early republic, the answer was the *tribuni plebes*, and it was a solution that worked for them. There are no tribunes today, and our typical answer, when we are confronted with people who are being victimized by big bureaucracy, is to point at the courts as the best alternative for remedy and recourse. But the truth is that, very often, the courts are not a satisfactory answer. The truth is that courts are usually a very expensive remedy, often too expensive to be available for ordinary citizens to use when they are confronted by abusive government. To have access to the courts today, you need to have money, and so our courts may work quite well as tribunes for the modern patricians, but as tribunes for the plebes they are a failure. Thus far, our best answer, for the plebeians of our own time, has been the institution of the ombudsman. The ombudsman is the modern tribune of the plebes.

Marshall Lux, Ombudsman

STATISTICAL ANALYSIS

The following tables illustrate the size, nature, and distribution of the caseload of the Nebraska Public Counsel's Office for 2003. The total caseload of the Public Counsel's Office for calendar year 2003 was 2,291 cases, a total which reflects approximately a 5% decline in the Public Counsel's caseload in relation to the caseload recorded in 2002. This decline is definitely a break in the pattern of consistent growth in caseload that has been experienced by the office throughout most of the last two decades, but it also was not a surprise.

Twenty years ago, in 1983, the annual caseload of the Public Counsel's Office was 1,008 cases. The annual caseload of the office grew consistently, and dramatically, over the ensuing years to the point that the Public Counsel's 2002 caseload total (2,482 cases) represented an increase of nearly 150% from the 1983 total. The 2002 caseload also represented by far the highest caseload in the long history of the Public Counsel's Office and, most importantly for analysis purposes, was a remarkable 11.6% increase over the previous high-water mark for the Public Counsel's caseload experienced in 1999. While it was gratifying to reach that lofty caseload total in 2002, when we really looked at that elevated 2002 caseload, we were constrained to predict that a caseload of that level would not be repeated in 2003. Our predictions were correct.

Prior to 2002, the Public Counsel's annual caseload totals had reached a clearly identifiable plateau at just over 2,200 cases per year. Indeed, the caseload totals for the years 1999 through 2001 were remarkably consistent – 2,224 cases in 1999, 2,206 cases in 2000, and 2,202 cases in 2001. Although the Public Counsel's Office received a much higher total of almost 2,500 cases in 2002, it was clearly understood that much of the elevated caseload in 2002 was the result of complaints connected with the implementation of the state's new system for administering the distribution of child support payments, a special circumstance which generated a spike in complaints that had not been experienced by the office before. In light of that special circumstance, it was realistically expected the upward trend implied by the 2002 caseload total would not continue, at least not in the years immediately following, and that in the immediate future the Public Counsel's Office would see a return to the 2,200 annual caseload range. In effect, that is exactly what happened, although the 2003 total of 2,291 cases is itself nearly a 4% increase of the caseload totals seen in 2000 and 2001.

In effect, the caseload total seen in 2002 was an aberration in what has otherwise been a fairly consistent pattern of steady growth in the Public Counsel's caseload.

Over most of the last twenty years, the Public Counsel's caseload has grown. In fact, in the twenty years culminating in 2001, the Public Counsel's annual caseload grew at a rate of about 5½% each year. Occasionally, as was seen in the years 1999 through 2001, the caseload experiences a plateau, where for two or more years the caseload remains essentially unchanged. If the Public Counsel's caseload for 2004 is in the same general range as the caseload experienced in 2003, then that would reflect a basic continuation of the pattern seen over the last two decades.

In our last two Annual Reports, we have made note of a development regarding the percentage of the jurisdictional complaints received by the Public Counsel's Office that were deemed to be justified in whole or in part. (The figure is calculated by comparing the year's statistics for the total number of cases deemed "justified" or "partially justified," as reflected in Table 2, with the total number of the "logged complaints," less the "pending complaints," and the non-jurisdictional complaints.) For instance, in 2001 we calculated that approximately 57% of the cases handled by the office in that year had been either justified or partially justified. Similarly, in 2002, some 58% of the Public Counsel's complaint cases were deemed to be justified in whole or in part. We were particularly concerned about these figures, because they seemed to be unusually high when compared to the same statistics for the years from 1996 through 2000. In those years, the annual percentage of the Public Counsel's complaints that had been judged to be either justified or partially justified had fallen within a range of from 46% to 50%, averaging 47% of the total over that five year span. In other words, the annual average of justified complaints received by the office appeared to have suddenly increased by some 10% in 2001 and 2002.

After observing this apparent growth in the proportion of justified case in 2001 and 2002, we carried out the same analysis of the 2003 statistics (reflected in Table 2) to see whether there would be a continuation of the trend of a higher percentage of justified cases. The result is mixed. In 2003, a total of 51½% of the complaints over which the Public Counsel's Office had jurisdiction were judged to be justified in whole or in part. This percentage is certainly lower than the 57% and 58% seen of justified cases in 2001 and 2002, but it is still somewhat higher than standard set for justified cases in the five year period before 2001. It will be interesting to see what the same statistics have to say for 2004.

**TABLE 1
SUMMARY OF CONTACTS 2003**

<u>Month</u>	<u>Total Inquiries</u>	<u>Information</u>	<u>Complaints</u>
January	216	27	189
February	185	19	166
March	176	25	151
April	178	21	157
May	232	29	203
June	185	25	160
July	210	23	187
August	196	25	171
September	178	15	163
October	212	24	188
November	155	22	133
December	168	18	150
TOTAL	2291	273	2018

Percent of Total Contacts	100%	12%	88%
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TABLE 2
OMBUDSMAN CONTACTS 2003

<u>Month</u>	<u>Total</u>	<u>Total</u>	<u>Pending</u>	<u>Justified</u>	<u>Unjustified</u>	<u>Partially</u>	<u>Discontinued</u>	<u>No</u>	<u>No</u>	<u>Info</u>	
	<u>Logged</u>	<u>Logged</u>	<u>Complaints</u>			<u>Justified</u>		<u>Jurisdiction</u>	<u>Provided</u>	<u>Cases</u>	
	<u>Inquiries</u>	<u>Complaints</u>							<u>Assistance</u>		
January	220	193	7	26	39	61	38	12	10	27	0
February	188	170	7	35	33	48	21	16	10	18	2
March	177	152	9	27	38	37	29	7	7	25	0
April	182	160	13	36	19	49	38	8	5	22	1
May	233	204	6	42	39	64	38	5	16	29	0
June	185	160	2	31	30	55	33	9	7	25	1
July	210	187	5	27	39	62	27	12	18	23	1
August	196	171	2	25	40	62	25	13	11	25	0
September	178	163	3	31	32	50	33	10	7	15	0
October	212	189	10	42	41	53	32	8	9	23	0
November	155	133	6	31	31	41	12	7	8	22	0
December	168	150	1	34	32	56	18	6	9	18	0
TOTAL	2304	2032	71	387	413	638	344	113	117	272	5

TABLE 3
ANALYSIS OF NO-JURISDICTION CASES - 2003

<u>Month</u>	<u>Total-No Jurisdiction Cases</u>	<u>Federal Jurisdiction</u>	<u>County Jurisdiction</u>	<u>Municipal Jurisdiction</u>	<u>Other Subdivision of Government</u>	<u>Legislative or Policy Issues</u>	<u>Issue Before Courts</u>	<u>Private Matters Between Individuals</u>	<u>Issues Involving Governor or Immediate Staff</u>
January	22	0	5	1	0	0	9	7	0
February	26	5	6	1	0	0	10	3	0
March	14	0	5	0	1	0	7	1	0
April	13	1	1	0	0	3	8	1	0
May	21	1	5	2	1	1	8	3	0
June	16	0	4	3	0	1	5	3	0
July	30	0	13	1	0	0	12	2	1
August	24	1	6	0	1	1	5	7	2
September	17	0	3	2	1	0	7	4	0
October	17	0	6	1	0	0	6	3	0
November	15	0	3	1	1	1	4	5	0
December	15	1	0	1	0	1	9	0	0
TOTAL	230	9	57	13	5	8	90	39	3

Percent of Total	100.0%	3.9%	24.8%	5.7%	2.2%	3.5%	39.1%	17.0%	1.3%
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TABLE 4

MEANS OF RECEIPT AND LOCATION 2003

	Location										Means of Receipt							
	Metropolitan Lincoln		Metropolitan Omaha		Non Metropolitan		Out Of State		State Institutions		Letter		Visit		Telephone		E-Mail	
Month	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	omp.	Info.
January	25	3	18	4	46	13	1	1	103	6	102	6	3	1	86	19	2	1
February	28	3	21	1	27	10	3	1	89	3	98	5	2	1	67	11	3	1
March	15	7	10	2	27	10	2	0	97	6	100	5	0	1	51	19	1	0
April	28	7	7	1	32	7	3	2	90	5	84	5	4	1	70	16	2	0
May	30	9	14	3	27	8	4	1	127	8	116	12	2	2	84	14	2	1
June	18	3	18	3	26	10	2	1	96	8	95	12	7	0	56	12	2	1
July	23	3	15	2	34	7	2	3	113	8	114	6	4	0	64	16	4	1
August	24	5	14	2	36	5	3	2	94	11	96	11	3	0	71	13	1	0
September	29	6	16	2	40	5	3	1	75	1	79	4	4	1	77	7	3	3
October	26	5	9	2	39	9	1	2	111	5	104	6	6	0	77	17	0	0
November	24	8	8	1	32	6	0	1	69	6	71	6	1	0	60	15	1	0
December	26	4	12	2	27	9	1	2	84	1	80	3	4	0	61	14	4	1
TOTAL	296	63	162	25	393	99	25	17	1148	68	1139	81	40	7	824	173	25	9

APPENDIX

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; 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 may see fit, within the amount available by appropriation, such assistants and employees as he may deem necessary to discharge his responsibilities under sections 81-8,240 to 81-8,254. He shall appoint and designate one of his assistants to be a deputy public counsel, and another assistant to be a deputy public counsel for corrections, 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. 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 his staff any of his 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 81-8,240 to 81-8,254, shall be subject to any penalties, sanctions, or restrictions in connection with his employment because of such complaint.

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*,
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