

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

**THE  
OMBUDSMAN**

**2005**



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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-fifth Annual Report of the Nebraska Public Counsel's Office has been prepared as the annual report for the calendar year 2005, and is hereby respectfully submitted.

## FORWARD

This, the *Thirty-fifth Annual Report* of the Nebraska Public Counsel's Office, represents the twenty-fifth such report that I have prepared and distributed in my time as Nebraska's Ombudsman. In the "Message" section of our Annual Report two years ago, I expressed my doubts about the usefulness of the annual report as an institution, and voiced concerns about the expenditure of resources and effort involved in the preparation of these reports. It would be most accurate to say that my concerns in that regard are "lingering," and that I still believe that the notion of the ombudsman's annual report is something that needs to be rethought.

Included in this Annual Report is a long discussion of the whistleblower protection provisions of the Nebraska State Government Effectiveness Act. The Act, which was passed in 1993, provides legal protections to state employees who take on the role of whistleblowers, and who provide information about wrongdoing in state government. In 2005, the Nebraska Legislature passed LB 475, which required the Public Counsel to prepare a written notice of the rights and responsibilities of state employees under the Nebraska State Government Effectiveness Act. In light of that legislation, we felt that it would be an excellent time to reflect on the State Government Effectiveness Act, and explore what lessons we have learned about whistleblower protection through the implementation of that Act. The State Government Effectiveness Act has now been the law in Nebraska for a dozen years, and we wanted to use the prompting of LB 475 to carefully consider how the Act is working, and whether it is accomplishing its goals.

As was the case last year, we will be relying more on the internet as our means for the distribution of this report. As I suggested on this page last year, the ultimate point in "distributing" an annual report is that the annual report be accessible to those who want to read it. In the past, when we sent copies of the report to a few libraries and individuals, the report was arguably less accessible than is the case where it is available to countless people through the vast internet. Of course, such an approach would have been unimaginable 25 years ago, when I started writing these reports, but that shows how things can change, and represents a lesson for us all in how we need to be flexible and adapt to new possibilities.

**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 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 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 (Carla Jones, 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 sixteen 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. 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

### Whistleblower Protection Under the Nebraska State Government Effectiveness Act

During the 2005 legislative session, the Nebraska Legislature passed LB 475, a bill which required the Public Counsel's Office to prepare a "written notice of the rights and responsibilities of employees" under the Nebraska State Government Effectiveness Act. As has been explained earlier in this Report, the Nebraska State Government Effectiveness Act was a 1993 law that was essentially designed to provide legal protections to state employees who were whistleblowers disclosing wrongdoing in state government, and who were being subjected to retaliation by their supervisors. The basic assumption of the Act was that whistleblowers would be more likely to come forward with critical information about wrongdoing in state government, if they were given special legal protections that recognized their whistleblower status, and helped to shield them from retaliation. As a way of furthering the basic goals of the State Government Effectiveness Act, LB 475 of 2005 contemplated that state employees would be more likely to make disclosures of wrongdoing in state government, if they were fully informed of the existence of these legal protections.

Under LB 475, which is now found in **Neb. Rev. Stat.** §81-2711, state agencies were required to "distribute the notice (prepared by the Public Counsel's Office) to each employee in print or electronic format." The Public Counsel's Office drafted the LB475 notice and, in early 2006, distributed it to the agencies and employees, both through an email format, and as an enclosure in the Statehouse Observer, the newsletter distributed to all state employees. Other arrangements were made to have the notice distributed to University of Nebraska employees. A copy of the notice is included as Appendix B of this Report. The Public Counsel's Office also prepared a poster to be used in State agency commons areas, and that poster is included in this Report as Appendix C.

The implementation of LB 475 in 2005 offers us a timely opportunity to look back and reflect on the State Government Effectiveness Act, and to consider what we have learned about whistleblower protection through the implementation of that legislation. Now, some dozen years after its enactment, the Public Counsel's Office has had literally scores of opportunities to employ the provisions of the Act, and to see how the Act works in its practical application. We have not only been

thoroughly educated in the complex inner workings of the Act itself, but we have also learned valuable lessons about whistleblowers and whistleblower protection, in general.

As has been indicated, the Nebraska State Government Effectiveness Act was passed by the Legislature in 1993 with the hope that it would provide new ways to expose serious cases of inefficiency and misconduct in state government by using the state's own employees as a source of information. The authors and supporters of the Act fully understood that insiders would often be the very best sources of information about wrongdoing in state government. The supporters of the Act also appreciated that these internal sources, these whistleblowers, would be exposed to the threat of retaliation by their supervisors for their whistle blowing activities, and that real legal protections were needed, if whistleblowers were to encouraged to come forward.

The Legislature's basic plan for making legal protection of whistleblowers a reality in Nebraska state government involved giving the Public Counsel's Office the central role of investigating and responding to complaints by whistleblowers that they had been retaliated against by their employers. In effect, the Public Counsel's Office was designated as the "gatekeeper" of the system, with the often difficult job of determining which employees qualified for legal protection from retaliation. In the end, of course, the whistleblower's legal protection would have to be implemented by hearing officers, or by the courts, but access to the protections provided by the Act necessarily involved a "first stop" at the Public Counsel's Office. In implementing the Act, however, the Public Counsel's Office quickly learned that there were many complexities to the law that required careful analysis and application of the Act in each case.

## **Operation of the Act**

Under the Nebraska State Government Effectiveness Act, a state employee who considers himself or herself to be a whistleblower experiencing retaliation needs to establish a number of points, before being treated as a whistleblower by the Public Counsel's Office. First of all, the Public Counsel must be convinced that the employee has made a disclosure that involves an issue that rises to the level of whistleblower protection under the Act. The employee must not only have "blown the whistle" on misconduct within a state agency, but the Act requires that the employee "reasonably believe" that reported misconduct rises to the level of "wrongdoing," which is defined by the Act to include: (1) a violation of any law; (2) gross mismanagement or gross waste of funds; or (3) a situation that creates a

substantial and specific danger to public health or safety. If the misconduct that the employee in question has reported does not meet this statutory definition of “wrongdoing,” then the legal protections provided by the Act will not apply. However, it is clear from the language of the Act [**Neb. Rev. Stat. §81-2705(1)**] that the whistleblower would be entitled to legal protection, so long as he or she “reasonably believed” that the misconduct in question constituted “wrongdoing,” even though, in the end, it was, in fact, not “wrongdoing.”

A second qualification that the putative whistleblower must meet to receive legal protection under the Act basically involves the issue of “who heard the whistle blow.” A state employee who is a whistleblower does not receive legal protection for disclosing wrongdoing to just anyone. Under the Act, he or she must have made the disclosure either to the Public Counsel’s Office, or to an elected state official. Thus, a disclosure of wrongdoing to the news media, for example, would not make a state employee a protected whistleblower under the Act. Even making a disclosure to a law enforcement official, or to an appointed state officer, other than Public Counsel, would not qualify a state employee for protection under the Act. The provisions of the Act are very clear that the whistleblower must blow the whistle in the direction of either the Public Counsel’s Office, or an elected state official, if the legal protections of the Act are to apply.

The last preliminary issue that must be weighed in any case involving retaliation against a whistleblower is concerned with the critical question of timing. The basic concept of “retaliation” against a whistleblower implies that there must be a retaliatory intent on the part of the supervisor or agency committing the retaliation. In effect, retaliation against a whistleblower means that an action has been taken in reprisal for some prior action by the employee, namely the employee’s whistle blowing activity. With this in mind, obviously the whistleblower must show that he or she has blown the whistle at a time before the retaliatory action was taken or contemplated. There have been many instances over the years where the Public Counsel’s Office has been approached by state employees who were already in trouble with their boss, and who wanted to qualify for legal protection against the impending personnel action by, in effect, becoming whistleblowers after the fact. Clearly, however, this situation does not meet the expectations of the Act.

Once all of these preliminary considerations under the Act have been weighed and resolved, the Public Counsel’s Office is at last in a position to launch a complete investigation of the alleged retaliation. Usually, the Public Counsel’s Office finds, in carrying out these investigations, that the critical issue involves the effort to determine whether the supervisor or agency had the requisite retaliatory intent.

Among other things, this means that it must be established that the individuals in the agency who were involved in taking the alleged retaliatory action had actual knowledge of the employee's role as a whistleblower. As might be expected, the agencies involved in these cases always offer non-retaliatory rationales for the personnel actions that have been taken against the whistleblowers, and the Public Counsel's job usually boils down to trying to determine whether these rationales are genuine, or are merely an attempt to hide a retaliatory intent behind a pretext for the personnel action that was taken against the whistleblowers. A precondition to establishing the existence of this retaliatory intent is convincing evidence that the responsible officials in the agency were, in fact, aware of the employee's role as a whistleblower, before the personnel action against the whistleblower was taken. Indeed, because this issue of knowledge is so important to making a case of retaliation, it is arguably desirable, in terms of the best interests of the employee who is the whistleblower, for there to be clear documentation that the agency knew about the employee's whistleblower role. Because of this, one of the very first decisions that any employee/whistleblower must make is to determine whether to try to remain an unknown source of information (unknown, that is, to the agency), or to come out of the shadows and, in effect, announce his or her whistle blowing activities to the employer.

After the Public Counsel's Office has investigated the whistleblower's allegation of retaliation, and has established the existence of retaliation by a preponderance of the evidence, the Public Counsel must render the findings of the investigation in writing by preparing a report. [The "preponderance of the evidence" standard, found in **Neb. Rev. Stat.** §81-2706(4), was originally a "reasonable grounds to believe" standard, but was changed by legislative amendment in 1997.] A copy of the Public Counsel's report must be sent to the complainant/whistleblower, as well as to the Governor, and relevant personnel appeals board. The Public Counsel's finding of retaliation then has significance in the context of the efforts by the complainant/whistleblower to present a legal challenge to the retaliatory personnel action through the established employee grievance mechanism.

The whistleblower protection elements of the State Government Effectiveness Act presume that the employee in question will be challenging the retaliatory personnel action through the employee grievance mechanism. This grievance mechanism exists independently of the Act, and can operate to the whistleblower's benefit, regardless of the activities of the Public Counsel's Office. However, the actions of the Public Counsel's Office in responding to a retaliation complaint may have a significant bearing on the state employee grievance process, because if the Public Counsel finds the existence of retaliation by a preponderance of the evidence, then

that finding is, in effect, an authorization for the whistleblower to petition the personnel appeals board for a stay of the retaliatory action pending a hearing on the issue of retaliation. Once the personnel appeals board is presented with the Public Counsel's finding of retaliation, the board has two alternative courses of action that it may take. The appeals board may either stay the personnel action taken against the whistleblower pending the outcome of a hearing, in which case the hearing must be held within 90 days, or the board, if it decides not to stay the action, must hold a hearing on the matter within no more than ten days. This critical "stay of action," which has the practical effect of preserving the *status quo ante* pending the outcome of the administrative process, and which is available only in retaliation cases, is one of the most significant protections provided to whistleblowers under the Act.

Eventually, the whistleblower will be allowed a full evidentiary hearing on the issue of retaliation, probably before a professional hearing officer. The employee will have all of the due process normally afforded in an administrative hearing, including the right to present witnesses, and to be represented by legal counsel. The evidentiary presumption in this hearing will be in favor of the whistleblower, and the employer must rebut that presumption or fail. Inevitably, the findings in the Public Counsel's investigation will set the parameters of the employee's basic case that there was retaliation. The Public Counsel's conclusion that retaliation has occurred, in effect, becomes the salient issue in the personnel appeal. If the hearing officer ultimately finds in favor of the employee, and the personnel board agrees with the hearing officer, then the personnel board may order that the employee be reinstated, and paid back wages. The employee can also be awarded attorney's fees. In addition, the board's decision is a "contested case" under the Administrative Procedure Act, and that decision can be appealed to the courts either by the employee, or by the agency. However, if the case is appealed by the agency, then the board's decision is not superseded pending the outcome of the appeal.

All of this is by way of providing a description, although admittedly incomplete, of how the State Government Effectiveness Act works in its practical application. It seems likely that many of the supporters of the Act when it was passed in 1993 did not appreciate how complicated the practical implementation of the Act would be. Because of all the complex twists and turns involved in the implementation of the Act, we in the Public Counsel's Office whose job it is to carry out the Act have found that we need to be extremely careful in how we represent the whistleblower protections to State employees. If we promise too much in the way of protections, then we may be promising something that the law cannot deliver, and that would

be extremely unfair to the employee involved. The simple truth is that there are many “technicalities” in the Act that may prevent it from being applicable in a particular case. Not all “whistleblowers” are whistleblowers under the law, not all “whistle blowing” events are matters that are covered under the law, and it is best that employees know those realities as soon as possible, so that they do not rely upon legal protections that are not there.

## **Efficacy of the Act**

For our part, now that the Public Counsel’s Office has had an opportunity to see the Act in operation for more than ten years, we feel that we are able to make some general observations about how effectively the Act has worked in relation to its legislative goals. In that regard, it would be fair to say that we have noted some, probably unavoidable, limitations in the effectiveness of the Act. One significant limitation that we have noted is the fact that, even in those cases where the Act does work to provide protection for a whistleblower, often too much time passes from the point of retaliation to the point where the case is resolved. In part, this is because, whenever retaliatory personnel action is taken against a whistleblower, inevitably there is a legal process involved in resolving the dispute, and any legal proceeding of that nature tends to take a long time to complete. Hearings have to be held, continuances may be granted, briefs and motions need to be submitted and, as attorneys spar back and forth, all of this “process” takes time, usually a matter of months. Indeed, it can even require a considerable amount of time for the Public Counsel’s Office to carry out its own role in the workings of the Act. Obviously, in any case where so much is at stake, the Public Counsel’s Office needs to do a particularly careful and complete investigation, and also needs to write a findings document, a report, that will stand up to scrutiny before a hearing officer, and potentially a judge. All of this takes time, and while that time passes, the whistleblower must deal with the uncertainty, and stress, of not knowing what his or her ultimate status will be.

Of course, because invoking whistleblower protection necessarily involves a legal process, it is also a practical necessity for the employee involved to be represented by an attorney. Inevitably, the agency that is accused of retaliation will have its own legal representation, and the employee will be at a significant disadvantage, if he or she does not have the help of a legal expert. The employee may eventually be reimbursed for the cost of this legal representation, but that comes at the end of the process, and there is always the risk that the employee will lose the case, and not recover attorney’s fees. Thus, even though there may be legal protections for a whistleblower in statute, the complex legal process, and the need for the employee

to hire a lawyer to find the way through that process, can be daunting, and can discourage even the most courageous whistleblower from coming forward.

All factors considered, it is fair to observe that, even with the legal protections of the Act, the employer-retaliator can accomplish at least some of its goals vis-à-vis the whistleblower. Regardless of the outcome of the legal process, there is a very real potential for the whistleblower to be emotionally traumatized by the events. It takes quite a strong emotional constitution, and sense of right and wrong, to be a whistleblower, and not everyone will be able to stand up well to the challenges of the experience. Also, even though the whistleblower may ultimately be vindicated by the legal process, it must be recognized that the whistleblower is likely to become a “pariah” in the eyes of some of his or her co-employees, particularly those in supervisory positions. Inevitably, the whistleblower will lose status in the agency, a sort of ongoing retaliation too subtle to measure, or control through the law. And, when other employees of the agency see what is happening to the whistleblower, then it is very possible that they will be discouraged from whistleblowing themselves, even if the whistleblower is ultimately reinstated. Thus, even if the retaliating agency cannot achieve, in the end, all that it would like in terms of punishing the whistleblower, it may still accomplish its other fundamental goal of discouraging any similar behavior by other employees of the agency.

Considering all of these factors, I think that it would not be accurate to suggest that the whistleblower protection statute has “worked,” if by “worked” we mean that it has encouraged a stampede of state employees to come forward with reports of wrongdoing in state government. We have not seen that, nor are we likely to see it, given the incredible challenges that face any whistleblower, even one protected by the law. However, I do believe that we can say that the whistleblower protection statute has “worked” in a couple of other very important respects.

First of all, the State Government Effectiveness Act has worked in the sense of providing justice to those state employees who have been whistleblowers, and who have been the victims of retaliation by their employer. Whistleblowers have many forms of motivation, but most of them, in my experience, have been motivated by a sense of outrage at what they see as wrongful action in their agency. These people, when they are confronted with retaliation, deserve the full protection of the law. Without the whistleblower protection statute, there would be retaliation with no hope of justice at the end of the day. With the whistleblower protection statute, justice is ultimately available to the whistleblower, even if it is imperfect and somewhat delayed.

Secondly, I am fully convinced that the whistleblower protection statute has also worked as a deterrent in many cases where employers might have been tempted to retaliate against an employee, but did not, because they did not want to become embroiled in the whistleblower protection process. The process which seems so daunting to the whistleblower, can also be quite intimidating to the employer, particularly where the employer is faced with the prospect that it may ultimately be embarrassed by the findings of the Public Counsel's Office, or by the conclusions of a hearing officer or a judge. Over the years, I have seen a significant number of cases where a genuine whistleblower was not subjected to retaliation by his or her supervisor, once it became clear to the employer that the employee involved knew his or her legal rights, and was already in contact with the Public Counsel's Office. Certainly, I cannot prove that the agencies involved in those cases would have retaliated but for the existence of the whistleblower protection process, but I do have the sense that, in some instances, it did make a difference, and that agency officials who might otherwise have been tempted to deal with a whistleblower in a harsh and retaliatory manner thought better of it, when they considered that they might be publicly embarrassed by the legal repercussions.

Whistleblower protection laws are based on a very simple principle – people who tell inconvenient truths should not be punished for it. However, when it comes to providing those people with legal protections, then matters are not quiet so simple. Meaningful legal protection necessarily comes through a legal process, and the words “simple” and “legal process” are rarely used in the same sentence. Even with the protection of the law, the role of a whistleblower can be difficult at best, and, for some, can be emotionally traumatizing. Whistle blowing will never be a popular or undemanding activity. Nevertheless, those few whistleblowers who do have the fortitude to come forward deserve to be protected from retaliation, and the system of legal protections devised through the State Government Effectiveness Act probably deals with this situation as well as could be hoped for, under difficult circumstances.

**Marshall Lux**  
**Ombudsman**

## COMPLAINT SUMMARIES

The following summaries are offered as thumbnail descriptions of the kind, source, and variety of a few of the routine complaints presented to Public Counsel's Office in 2005.

### **Department of Health and Human Services**

#### **Case #56**

The complainant lives in Oklahoma, and has an ex-wife who resides in Nebraska. The complainant's ex-wife has custody of their two children. The complainant said that he believes that the children have been subjected to physical abuse by his ex-wife and her new husband. He said that he has learned that the daughter (age about 8 years) was made a ward of the State, and was moved into a foster home. The complainant said that Nebraska's HHS had neglected to inform him of this situation. He believes that HHS should keep him informed of these changes in his daughter's status.

#### **Case #136**

The complainant stated that she has one child that is almost out of diapers and that they in dire need of her HHS benefits. The complainant said that her receipt of assistance with housing, food stamps, etc., had been delayed, because her caseworker kept losing her paperwork. The complainant said that she has turned the paperwork in to the caseworker three different times. She said has been told she has submitted everything that is necessary, but then the paperwork either disappears, or she is told that the Department needs more information for her to receive the benefits. She is afraid she will lose her apartment, if the matter is not resolved quickly.

#### **Case #935**

The complainant is a day care provider licensed by the State. Apparently, here were several infractions at the complainant's day care in 2002 and 2003, and the day care was placed on probation by HHS Licensing. However, by 2004, the day care facility was taken off of probation. Then, in September

of 2004, the day care facility was again placed on probation, because it was found to be short one staff person during an inspection. The complainant said that the staff person had showed up to work one hour late. In 2005, the day care facility again had one infraction, and now, in June, the complainant will have a hearing in which HHS is asking that her day care license be revoked. She does not know what to do.

#### **Case #1497**

The complainant is the mother of a son who is now only two months old. The complainant said that HHS has taken custody of this child, and she does not know where he is now residing. She said that the caseworker refuses to allow her to have any visits with her son. The complainant is a recent immigrant to this country, and she said she is very afraid that HHS may have someone who wants to adopt this child.

#### **Case #1724**

The complainant says that she is a professional translator who provides Spanish translations at one of the HHS local offices. Once a month, she turns in the paperwork to the HHS central office to be paid for her services. The complainant stated that she keeps getting the monthly check from HHS later and later, when measuring time from when she turns the information in to when she receives the check. The complainant said that the administrator who is supposed to be in charge of getting the check to her never seems to know what is going on with the check. The check used to be one week behind, then two weeks behind, and now it is up to four weeks after turning in the information before she receives the check. The complainant states that she needs this money to live on, and wants to know what the hold up is with her checks.

#### **Case #1967**

The complainant is the son of parents who are both residing in an assisted living facility. The son had applied for Medicaid benefits for his parents about eight months ago, but still has not received final approval. At this point, the complainant and his brothers are paying for the parents' assisted

living, and their money has been seriously depleted. In early November, the complainant received a verbal "OK" from the HHS caseworker that his parents were approved, but later he received a message that they were not approved, and that more information was needed. The complainant wants help in overcoming the many barriers to approval of Medicaid benefits for his parents.

## **Department of Motor Vehicles**

### **Case #455**

The complainant got his first driver's license in Nebraska in 1975, when he was 16 years old. A little later, he moved to Utah, and he had to surrender his Nebraska driver's license when he was licensed there. However, he only remained in Utah for about two weeks, and then he came back to Nebraska. He said that when he went to reinstate his Nebraska driver's license, the Department of Motor Vehicles had no record yet of his Nebraska license being surrendered to Utah. This all had happened a number of years ago, and now, when the complainant applies for jobs, prospective employers check his driving record, and the Nebraska records do not show that he existed before 2004. The complainant believes that this mix-up is the result of the situation that had occurred when he surrendered his license in Utah, and he wants to get his record corrected to show that he did have a driving record in Nebraska over the years of his residence in this State.

### **Case #733**

The complainant said that in February of 2005 he suffered a concussion, and then, because his birth date was in April, he went to renew his motor vehicle operator's license in that month. In completing the license application, he truthfully answered the question on the form about having a concussion in the last three months. It was only then that he learned that the Department of Motor Vehicles would not renew his operator's license until three months had passed from the time that he suffered the concussion. The complainant feels that this situation is not fair. He pointed out that no one had questioned his ability to drive during the 2½ months between when he was injured and when he applied for the renewal. He also pointed out that if the concussion had occurred at a time just after he had renewed his license, no one would

have known about it or questioned his ability to drive. Now, however, because of the timing of the concussion and the renewal of his license, the Department has taken his operator's license for a mere two weeks, and then he will have to take the driving test to get his license restored.

### **Case #1018**

A woman contacted the Public Counsel's Office on behalf of her brother, who is in the Army and stationed in Italy. The sister said that she had been talking with the Financial Responsibility office in the Department of Motor Vehicles concerning her brother's motor vehicle operator's license. She said that her brother's license was suspended over a year ago due to nonpayment of child support. However, since the related notice had been sent to the wrong address, the operator's license had been reinstated. Unfortunately, the letter of reinstatement was also sent to the wrong address, so the brother still does not have documentation that the license was reinstated. The family wants help getting the Department of Motor Vehicles to expedite the sending of the reinstatement documentation to the brother.

## **Department of Correctional Services**

### **Case #86**

The complainant, an inmate at the Omaha Correctional Center, said that he is scheduled to see the Parole Board in March. The complainant knows that, in order to satisfy the expectations of the Parole Board, he needs to have completed the substance abuse programming that is offered at the facility. However, the OCC staff is blocking his attempts to get the programming. The complainant said that he had similar problems in 2004.

### **Case #371**

The complainant is an inmate at the Tecumseh State Correctional Institution. The complainant states that he was recently assaulted by institutional staff in the form of an unprovoked "take down." During this "take down" by staff, the complainant's left knee was injured. The complainant said that he was

given a steroid shot in the knee, but he is continuing to have problems with the knee.

### **Case #842**

A woman wrote to the Public Counsel's Office concerning her son, who is an inmate at the Tecumseh State Correctional Institution. The mother said that the institution's administration had recently charged her son with having been involved in a fight, but that he has witnesses who say that he was not involved. The mother wants to know why the administration has given her son a Misconduct Report, punished him with segregation time, and are even talking about reclassifying him to long-term administrative confinement, when it appears that he is innocent.

### **Case #1027**

The complainant is an inmate at the Nebraska Correctional Center for Women. The complainant said that her classification makes her eligible to be transferred to work release, but she is being denied a transfer to the Community Corrections Center in Lincoln, because her husband is already living there. The complainant said that the staff told her she could not go to CCC-L, as long as her husband is there. The complaint stated there is already another couple at CCC-L, and she does not understand why the rules would prevent both spouses from being at the Center.

### **Case #1375**

The complainant, an inmate at the Tecumseh State Correctional Institution, said that his mother sent him a money order, but in filling out the order did not put her full first name on it. According to the TSCI staff, the mother's first and last name must appear on the money order for it to be processed. The complainant feels that this is not right, because his mother's first initial, last name, and address were on the money order, and so it should be obvious who the money order is from. The complainant understands that funds in the money order might be confiscated, and he wants to know why the funds cannot simply be returned to his mother.

## **Department of Revenue**

### **Case #576**

The complainant wants the Department of Revenue to be quicker in making its payment to him of the funds representing the overpayment made through income withholding. The complainant said that he has been told that the State of Nebraska is allowed up to 90 days to make the refund, and he wants to know if there is a statute which confirms this. The complainant wonders whether there might be a different rule in the case of a taxpayer submitting a tax return electronically.

### **Case #783**

The complainant said that he represents a veterans service organization that owns some real estate in a small Nebraska city. A memorial to America's World War II veterans is located on the land, and statues had been purchased for the memorial. Now, the organization is being told by the Nebraska Department of Revenue that they owe approximately \$8,000 in sales tax on the purchase of the statues. In light of the fact that the veterans group is a non-profit organization, the complainant wondered why the group was not exempt from this taxation.

### **Case #1986**

The complainant, an ophthalmologist, said that the Nebraska Department of Revenue is assessing sales/use taxes on prosthetic lens that are being placed in his patients' eyes. The complainant said that state law does not allow such taxation to be imposed in the case of prosthetic devices, and feels that this action by the Department of Revenue unfairly targets patients who suffer from visual/physical disabilities. The complainant said that this tax was being assessed over the objections of the medical community, and contrary to documentation.

## **Game and Parks Commission**

### **Case #1110**

The complainant wants to know why it is that none of the Game and Park Commission campgrounds in Nebraska offer water and septic facilities at the campgrounds. He says that for 18 years he has been having to camp in the State of South Dakota, because that state offers much better facilities at its campgrounds. He sited Gavin's Point as one of the spots he would like to camp in Nebraska. He stated that Nebraska has poured a lot of concrete by the campsites, but apparently is too cheap to provide the other services. The complainant said that he had already discussed this concern with many state officials.

## **Department of Roads**

### **Case #812**

In September, the complainant was driving her vehicle on Highway 75 north of Nebraska City. The complainant said that as she approached an Omni Engineering rock truck from behind, some rocks flew off of the truck, and hit her vehicle's windshield causing damage. The complainant said she had to replace her windshield, at the cost of \$215. She said she tried to have Omni's insurance pay for this, but the attorney for Omni told her that, since Omni is contracted through the Department of Roads, it was an issue of the Department of Roads. However, when the complainant filed a tort claim against the Department of Roads, the claim was denied.

### **Case #910**

The complainant owns property on US Highway 183 near the intersection with Interstate 80 at Elm Creek. The Department of Roads is replacing the overpass at that location at a cost of about \$8.5 million. The complainant said that he was told by Department of Roads staff that they could modify the overpass by closing portions for a time, and the related cost would be about half. However, the complainant was told that the Department of Roads is doing the job in the more expensive way, to keep the operator of the local truck stop happy. The complainant objects to this, and also objects

to the state's use of eminent domain in this case, where it is apparently being used for the benefit of a private party.

### **Case #1422**

The complainant is concerned that the school bus that stops on the rural highway in front of his drive could be rear-ended by another vehicle. The complainant said there is no turn off area at the location where the school bus can pull over and stop while the children are getting on and off of the bus. The complainant said that, within the next few years, there will be five or six children from the neighborhood who will be getting on the bus at that location, and something needs to be done to make the situation safer.

## **Department of Insurance**

### **Case #1588**

The complainant is in the business of filing certain claims with insurance companies on behalf of its customers, and is the authorized agent of those insured parties. The complainant contacted the Public Counsel's Office with a complaint about the responses that they had been receiving from the Department of Insurance in connection with the complaints they filed with the Department's consumer protection office on behalf of their customers. In some of the cases where the complainant had submitted complaints regarding the actions of insurance companies, the Department had rejected those complaints, because the complaints were not signed by the insured party. The complainant pointed out that they were handling these cases on behalf of, and as the authorized agent of, the actual insured parties, and argued that the Department of Insurance should accept the complaints under those circumstances.

## **State Patrol**

### **Case #844**

The complainant said that a construction company is paving a road in his area, and they use large trucks to haul asphalt to the construction site. The

complainant said that some of the trucks, in crossing a main road in the area, do not stop at the stop signs, or even slow down. The complainant said that school buses from the local schools use this crossing road, and he feels that there could be a very serious accident, because the busses expect the cross traffic to stop at the stop signs. The complainant said that he had called the State Patrol twice over this issue, but the problem persists. The complainant feels if the State Patrol would give out a few tickets, it would control this problem.

## **Department of Labor**

### **Case #1732**

The complainant, who receives unemployment compensation benefits, said that, when a person receives their weekly unemployment check, it is written on US Bank, which has the contract with the State of Nebraska. However, if the person does not have an account with US Bank, then each time that they cash their weekly unemployment check they are charged a \$5.00 fee for cashing the check. The complainant believes that this situation is wrong, because it means that each month a person on unemployment pays US Bank \$20 to receive their unemployment benefits, which takes money from the unemployed person that he or she needs to provide for their family. The complainant pointed out that most people on unemployment do not have the money to open a checking account with US Bank, or any other bank.

It is emphasized that the complaints that have been described in this section can be appropriately characterized as being routine cases of the Office of the Public Counsel. Many of the complaint cases worked on by the Public Counsel's Office in 2005 were similar, in many respects, to those which are described here. On the other hand, many other complaint cases that were handled by the Office of the Public Counsel in the last year were substantially different in subject matter, and some presented issues that were more complex, requiring elaborate investigative efforts.

## STATISTICAL ANALYSIS

The following tables illustrate the size, nature, and distribution of the caseload of the Nebraska Public Counsel's Office for 2005. The total caseload recorded by the Public Counsel's Office in calendar year 2005 was 2,174 cases, a total which is about 100 cases fewer than the total caseload that was recorded by the Office in 2004. In our last annual report, we mentioned that the Public Counsel's 2004 caseload was most remarkable in that it "marked the continuation of a pattern that has persisted (with an aberration in 2002) since 1999." Much the same could be said about the caseload in 2005.

In 1999, the Public Counsel's caseload total was 2,224 cases, in 2000, 2,206 cases, in 2001, 2,202 cases, in 2003, 2,291 cases, and in 2004, 2,290 cases. (There was an exception to this pattern of approximately 2,200 cases annually in 2002, when the Public Counsel had a caseload total of almost 2,500 cases, resulting from an unusual influx of cases due to the implementation of the State's new child support enforcement system, and a wave of complaints resulting from the shakedown of that system.) Certainly, the Public Counsel's 2005 caseload total is in the 2,200 cases-annually neighborhood, so it would be correct to say that the 2005 caseload is essentially a continuation of the pattern that was set in 1999.

The basic reason why the caseload total for 2005 is slightly lower than 2004 is because of a significant drop in the number of Information cases in 2005. (In 2004 we had 360 Information cases, while in 2005 we had only 221 such cases.) This change in the nature of the Public Counsel's caseload is actually seen as a positive development. As a statistical category, the Information cases are those contacts that the Public Counsel receives that are requests for assistance in the form of questions, rather than complaints. (Please see page 10 of this Report.) In those cases, citizens may be looking for statutory provisions, or for an explanation of procedures, or for a referral to another agency, but are not actually complaining about anything. While the work that the Public Counsel's Office does on these cases is certainly of significant value to the citizens involved, Information cases differ from our Complaint cases in that they cannot mature into any meaningful governmental oversight, or result in recommendation of improvements to agency operations in the way that Complaint cases can. With this in mind, the fact that the Public Counsel's Office actually had more Complaint cases in 2005 (1,953) than in 2004 (1,930) can be seen as a positive development. The same can be said of the general trend in this area, which is quite clearly toward a higher ratio of Complaint cases to Information cases. For instance, in 1999, our 420 Information cases were

nearly 20% of our total caseload, while the 221 such cases in 2005 represented only 10% of the total. We definitely believe that it is desirable that this trend continue.

Looking at our caseload generally, it is worth noting that, in the 35 years of its existence, the Public Counsel's Office has had many peaks and plateaus in its caseload totals, but very few valleys. Our experience over the years is that the caseload has usually gone up, or it has stayed steady over a period of time, as has been seen in the years from 1999 to 2005. Our feeling, based on many years of experience in looking at these numbers, is that, after having these several years of steady numbers, the caseload total is due for an upswing. Certainly, the caseload of the Public Counsel's Office has historically been characterized by dramatic growth, such as the 120% increase in the total number of cases handled by the Public Counsel annually between 1983 and 1999. Complaint cases are the energy that make the Public Counsel's Office go, and while we are pleased with the steady caseloads of the last seven years, we are also very hopeful that 2006 will see a step forward in the development of our caseload.

**TABLE 1**  
**SUMMARY OF CONTACTS 2005**

<u>Month</u>	<u>Total Inquiries</u>	<u>Information</u>	<u>Complaints</u>
January	177	19	158
February	178	20	158
March	185	27	158
April	172	17	155
May	202	17	185
June	207	23	184
July	162	16	146
August	212	21	191
September	165	13	152
October	177	16	161
November	160	10	150
December	177	22	155
<b>TOTAL</b>	<b>2174</b>	<b>221</b>	<b>1953</b>
<b>Percent of Total Contacts</b>	<b>100%</b>	<b>10%</b>	<b>90%</b>

**TABLE 2  
OMBUDSMAN CONTACTS 2005**

<b>Month</b>	<b>Total Logged Inquiries</b>	<b>Total Logged Complaints</b>	<b>Pending Complaints</b>	<b>Justified</b>	<b>Unjustified</b>	<b>Partially Justified</b>	<b>Discontinued</b>	<b>No Jurisdiction</b>	<b>No Jurisdiction Provided Assistance</b>	<b>Total Logged Requests for Information</b>	<b>Info Cases Pending</b>
January	177	158	1	23	29	39	42	11	14	19	0
February	176	157	0	27	26	35	39	14	10	19	0
March	185	158	0	19	29	57	30	7	11	27	0
April	172	155	0	15	21	34	61	5	13	17	0
May	201	184	0	23	30	37	56	14	9	17	0
June	207	184	0	28	31	46	45	8	15	23	0
July	162	146	5	21	18	37	33	12	13	16	0
August	212	191	1	30	40	45	40	16	11	21	0
September	165	152	1	23	28	41	31	7	7	13	0
October	176	160	1	23	26	50	31	8	11	16	0
November	160	150	0	24	29	39	32	6	9	10	0
December	177	155	6	30	27	35	27	9	12	22	0
<b>TOTAL</b>	<b>2170</b>	<b>1950</b>	<b>15</b>	<b>286</b>	<b>334</b>	<b>495</b>	<b>467</b>	<b>117</b>	<b>135</b>	<b>220</b>	<b>0</b>
<b>Percent of Total Contacts</b>	<b>100%</b>	<b>90%</b>	<b>1%</b>	<b>13%</b>	<b>15%</b>	<b>23%</b>	<b>22%</b>	<b>5%</b>	<b>6%</b>	<b>10%</b>	<b>0%</b>

**TABLE 3**  
**ANALYSIS OF NO-JURISDICTION CASES - 2005**

<u>Month</u>	<u>Total-No Jurisdiction Cases</u>	<u>Federal Jurisdiction</u>	<u>County Jurisdiction</u>	<u>Municipal Jurisdiction</u>	<u>Other Subdivisions of Government</u>	<u>Legislative or Policy Issues</u>	<u>Issues Before Courts</u>	<u>Private Matters Between Individuals</u>	<u>Issues Involving Governor or Immediate Staff</u>
January	25	5	7	3	0	0	3	2	0
February	24	1	6	0	0	0	9	6	0
March	18	1	3	1	0	0	4	8	0
April	18	0	7	1	0	0	6	4	0
May	23	0	6	0	1	0	10	3	1
June	23	0	5	1	0	0	11	4	0
July	25	0	6	1	0	0	12	3	0
August	27	2	16	1	0	0	4	2	0
September	14	1	3	0	0	0	4	3	0
October	19	5	6	0	0	0	6	1	0
November	15	0	6	0	0	0	6	1	0
December	21	1	11	0	0	0	6	1	0
<b>TOTAL</b>	<b>252</b>	<b>16</b>	<b>82</b>	<b>8</b>	<b>1</b>	<b>0</b>	<b>81</b>	<b>37</b>	<b>1</b>
<b>Percent of</b>	<b>100%</b>	<b>6%</b>	<b>33%</b>	<b>3%</b>	<b>0%</b>	<b>0%</b>	<b>32%</b>	<b>15%</b>	<b>0%</b>

**TABLE 4  
MEANS OF RECEIPT AND LOCATION 2005**

Month	Location										Means of Receipt							
	Metropolitan Lincoln		Metropolitan Omaha		Non Metropolitan		Out Of State		State Institutions		Letter		Visit		Telephone		E-Mail	
	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.	Comp.	Info.
January	33	3	11	0	23	7	1	2	87	7	83	8	3	1	70	8	1	0
February	32	1	9	6	27	9	3	1	82	1	90	4	2	0	57	12	3	2
March	18	8	18	0	24	10	4	1	90	8	79	5	4	0	65	19	5	1
April	25	4	13	0	28	6	4	0	83	7	84	9	1	1	65	5	2	2
May	31	5	9	2	32	6	7	0	101	4	102	5	3	0	74	10	4	1
June	34	4	12	2	30	8	3	1	99	8	96	6	6	4	73	9	6	3
July	24	3	10	1	23	7	2	0	87	4	80	4	2	0	62	8	2	4
August	34	5	10	0	35	10	4	2	102	4	104	4	3	1	75	15	6	1
September	17	3	15	1	37	6	2	0	74	2	77	3	6	0	62	10	3	0
October	23	4	11	1	32	5	3	1	86	5	79	2	1	0	74	14	3	0
November	23	1	9	2	19	2	0	1	95	3	93	5	3	0	52	3	1	2
December	32	6	7	0	26	10	5	2	85	4	84	5	3	0	61	17	5	0
<b>TOTAL</b>	<b>326</b>	<b>47</b>	<b>134</b>	<b>15</b>	<b>336</b>	<b>86</b>	<b>38</b>	<b>11</b>	<b>1071</b>	<b>57</b>	<b>1051</b>	<b>60</b>	<b>37</b>	<b>7</b>	<b>790</b>	<b>130</b>	<b>41</b>	<b>16</b>

**TABLE 5**  
**OFFICE OF THE OMBUDSMAN - 2003 AGENCY CONTACTS**

AGENCY	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Accountability & Disclosure	0	0	0	0	0	0	0	0	0	0	0	0	0
Administrative Services	4	0	1	1	5	2	3	1	4	4	2	3	31
Aging	0	0	0	0	0	0	0	0	0	0	0	0	0
Agriculture	0	0	1	0	1	0	0	0	0	0	0	0	2
Arts Council	0	0	0	0	0	0	0	0	0	0	0	0	0
Attorney General	1	2	0	0	1	2	1	0	0	0	0	0	7
Auditor	0	0	0	0	0	0	0	0	1	0	0	0	1
Banking	0	0	0	0	0	0	0	0	1	0	0	0	1
Brand Committee	0	0	0	0	0	0	0	0	0	0	0	0	0
Claims Board	0	0	0	0	0	0	0	0	0	0	0	0	0
Corrections	92	81	87	81	118	110	104	102	84	110	72	87	1161
County	5	11	7	6	10	6	14	6	3	8	3	4	86
Courts	11	13	11	9	6	9	16	8	10	12	6	11	128
Crime Commission	0	1	0	1	0	0	0	0	0	0	0	0	2
Economic Development	0	1	0	1	0	0	1	0	0	1	0	1	5
Ed. Lands & Funds	0	0	0	0	0	0	0	0	0	0	0	0	0
Education	2	3	3	2	2	0	1	0	2	2	1	1	19
Environmental Quality	0	0	2	4	3	1	2	0	0	0	1	0	13
Equal Opportunity	2	0	0	0	0	2	0	2	1	0	1	2	10
Ethanol Authority	0	0	0	0	0	0	0	0	0	0	0	0	0
Educational Television	0	0	0	0	0	0	0	0	0	0	0	0	0
Fair Board	0	0	0	0	0	0	0	0	0	0	0	1	1
Federal	8	8	3	4	5	2	2	3	1	2	3	1	42
Fire Marshal	0	0	0	0	0	1	0	0	0	0	1	0	2
Foster Care Rev Bd	0	0	0	0	0	0	0	0	0	0	0	1	1
Game and Parks	2	4	0	0	1	0	0	1	0	0	0	0	8
Governmental Subdivision	0	0	1	0	0	0	0	0	1	0	0	1	3
Governor	0	0	0	0	0	0	1	1	0	0	1	0	3
Health	1	0	0	0	0	0	0	0	0	0	0	0	1
Hearing Impaired	0	0	0	0	0	0	0	0	0	0	1	0	1
HHS Benefits	14	11	6	13	14	4	8	13	17	9	7	10	130
HHS BSDC	1	1	0	0	0	1	0	0	0	0	6	0	9
HHS Child Welfare	16	16	9	11	23	15	12	12	15	13	16	12	173
HHS Misc	7	6	7	4	5	3	11	9	13	9	7	6	90
HHS Regional Centers	14	2	9	12	12	5	6	6	5	8	4	7	90
HHS Regulation	0	1	1	3	0	1	0	0	1	0	1	1	9
HHS Vets Homes	0	0	0	1	0	0	1	0	0	0	1	1	4
HHS Visually Impaired	0	0	0	0	0	0	0	0	0	0	0	0	0
Historical Society	1	0	0	1	0	0	0	0	0	1	1	0	4

(continued on next page)

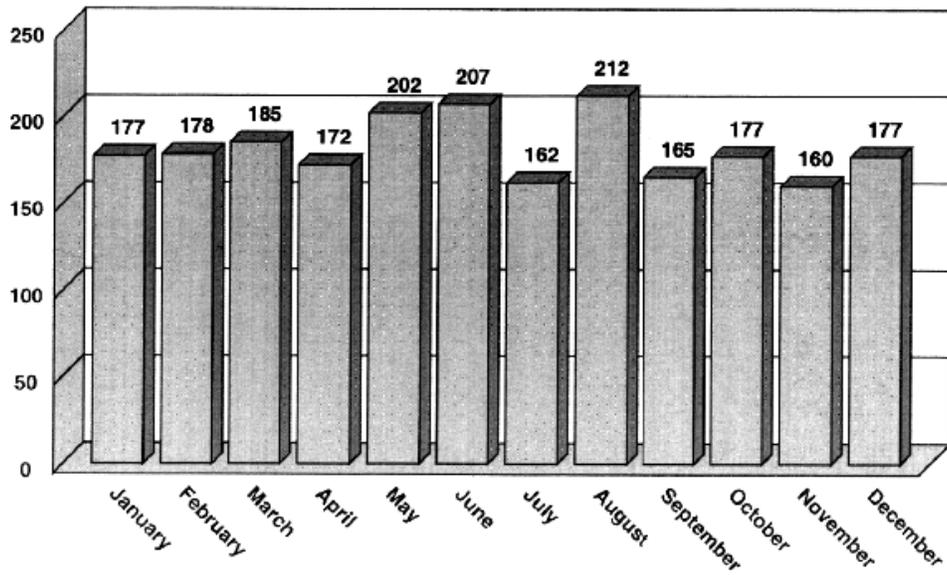
AGENCY	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Indian Comm	0	0	0	0	0	0	0	0	0	0	0	0	0
Institutions	0	0	0	0	0	0	0	0	0	0	0	0	0
Insurance	1	1	1	1	0	1	0	0	3	0	0	1	9
Investment Council	0	0	0	0	0	0	0	0	0	0	1	0	1
Labor	6	2	1	0	0	1	2	1	1	2	1	2	19
Legislative	12	13	17	9	16	15	10	15	1	15	12	8	144
Library Comm	0	0	0	0	0	0	0	0	0	0	0	0	0
Liquor Control	0	0	0	0	0	0	0	0	0	0	0	0	0
Mexican Amer Comm	0	0	0	0	1	0	0	0	0	0	0	0	1
Motor Vehicles	5	3	4	4	3	1	4	7	2	3	2	4	42
Mtr Veh Dealers Lic Bd	2	0	0	0	0	0	0	0	0	0	0	0	2
Municipal	3	4	1	0	3	4	1	2	1	1	0	0	21
National Guard	0	0	0	0	0	1	0	1	0	0	0	0	2
Natural Resources	0	0	0	1	0	0	1	0	0	0	0	0	2
Pardons Board	0	0	0	0	1	1	0	1	1	0	0	0	4
Parole Board	5	9	7	4	6	3	10	6	10	8	8	4	82
Patrol	3	3	1	3	1	1	4	5	2	4	1	3	31
Personnel	0	0	0	0	0	0	0	0	0	0	0	0	0
Private Matter	10	6	5	5	5	7	5	10	10	5	10	2	81
Probation Adm	0	1	0	0	0	0	1	0	0	0	0	1	3
Public Service Comm	0	0	0	1	1	0	0	0	0	0	0	2	4
Real Estate Comm	0	0	0	0	0	1	0	0	0	1	0	0	2
Retirement Systems	1	0	0	0	1	0	0	2	2	0	0	0	6
Revenue	1	1	0	0	1	0	1	0	1	2	0	1	9
Risk Management	0	0	0	0	0	0	0	0	0	0	0	0	0
Roads	3	1	1	3	2	2	2	1	0	4	0	1	21
Secretary of State	2	0	2	1	1	0	1	0	0	1	0	0	8
St. Board of Equalization	0	0	0	0	0	0	0	0	0	0	0	0	0
St. Surveyor	0	0	0	0	0	0	0	1	0	0	0	0	1
State Colleges	0	0	0	0	0	0	0	0	0	0	0	0	0
Status of Women	0	0	0	0	0	0	0	0	0	0	0	0	0
Electrical Division	0	0	0	0	0	0	0	0	0	0	0	0	0
Treasurer	1	2	0	2	1	3	7	1	3	4	2	1	28
University	0	1	2	3	1	0	0	2	2	1	0	0	12
Veterans Affairs	0	0	0	0	0	0	0	0	0	0	0	1	1
Commission for the Blind	0	0	0	0	0	0	0	0	0	0	0	0	0
Racing Commission	0	0	0	0	0	0	0	0	0	0	0	0	0
Capitol Commission	0	0	0	0	0	0	0	0	0	0	0	0	0
HHS-Juv Justice	0	0	0	0	0	0	0	0	0	0	0	0	0
<b>TOTALS</b>	<b>236</b>	<b>208</b>	<b>190</b>	<b>191</b>	<b>250</b>	<b>205</b>	<b>232</b>	<b>219</b>	<b>298</b>	<b>230</b>	<b>172</b>	<b>181</b>	<b>2512</b>

**TABLE 6**  
**CASE DURATION REPORT 2005**

Days Open	Record Count	% of Total
1	122	6
2	113	6
3	64	3
4	66	3
5	82	4
6	89	5
7	102	5
8	60	3
9	38	2
10	36	2
11	25	1
12	37	2
13	37	2
14	35	2
15	32	2
16	12	1
17	15	1
18	10	1
19	22	1
20	15	1
21 to 30	141	7
31 to 60	153	8
Over 60	605	32
<b>Total Count</b>	<b>1911</b>	<b>100%</b>

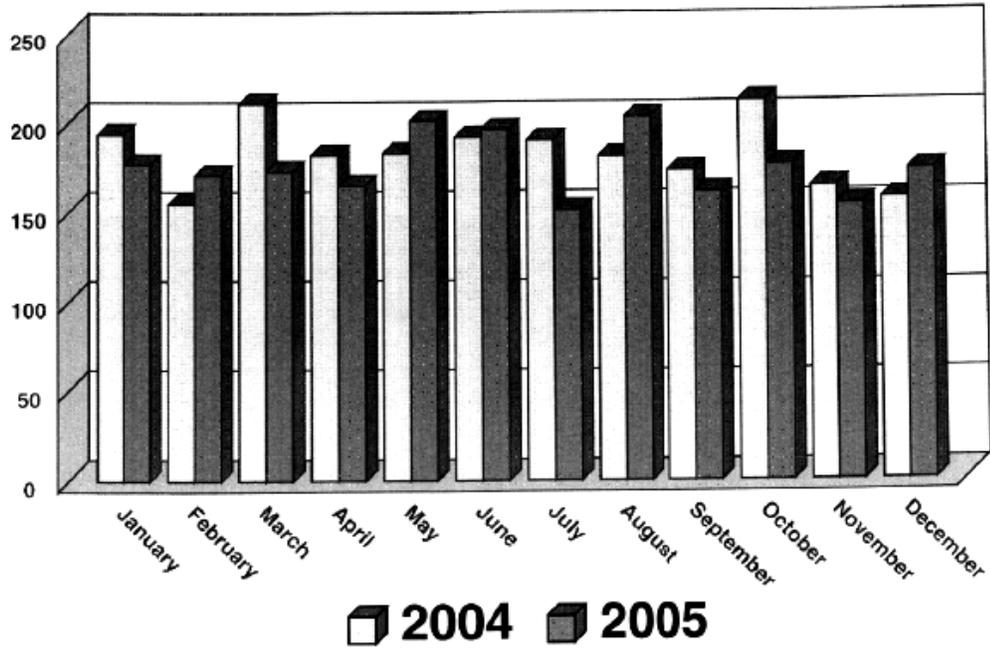
# Total New Cases

## by Month - 2005

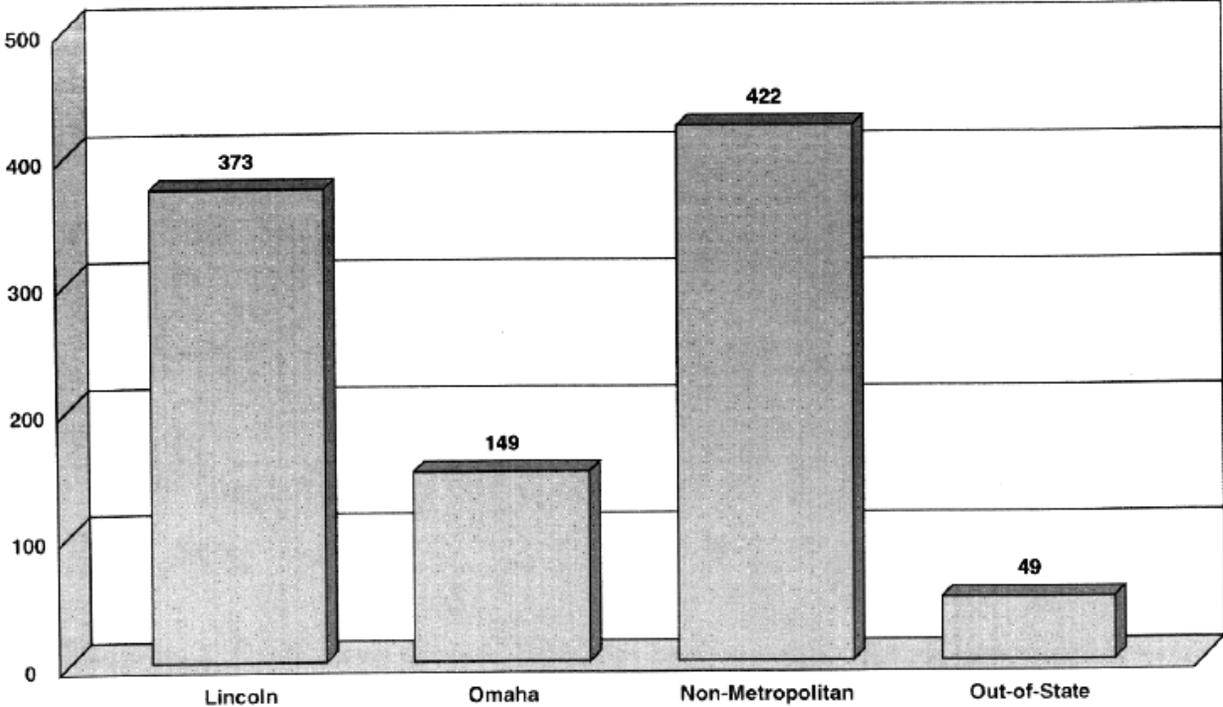


# Total New Cases

## Monthly Comparisons for - 2004 and 2005



# Non-Institution Cases by Location - 2005



# 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; 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.

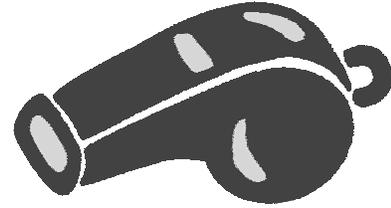
**81-8,252.** If the Public Counsel has reason to believe that any public officer or employee has acted in a manner warranting criminal or disciplinary proceedings, he shall refer the matter to the appropriate authorities.

**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 81-82,40 to 81-8,254, shall be subject to any penalties, sanctions, or restrictions in connection with his employment because of such complaint.

## APPENDIX B

### Rights & Responsibilities Under the State Government Effectiveness Act



The Nebraska State Government Effectiveness Act prohibits agencies of state government from retaliating against employees who report wrongdoing in state government to proper authorities, and provides certain protections for employees who are “whistleblowers” covered by the Act.

This protection generally applies to any state employee who makes a report of “wrongdoing” to the Nebraska Ombudsman’s Office, or to any elected state official.

Any employee who experiences retaliation from an employer for making a report of wrongdoing that is covered under the Act may make a complaint to the Nebraska Ombudsman’s Office.

#### *What kind of “wrongdoing” is covered by the Act?*

To be covered by the State Government Effectiveness Act, the employee making the report must reasonably believe that the “wrongdoing” being reported involves:

- A violation of any law;
- “Gross” mismanagement or “gross” waste of funds; or
- A situation that creates a “substantial and specific” danger to public health or safety.

Any report of information by an employee that does not meet this criteria will not be covered by the Act.

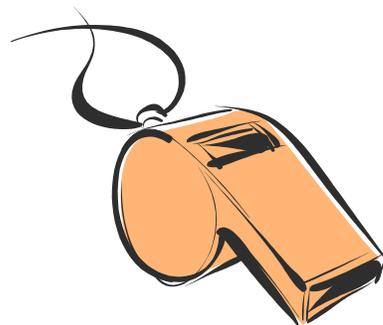
#### *To whom should the wrongdoing be reported?*

The wrongdoing must be reported by the employee either to the Nebraska Ombudsman’s Office, or to any elected state official (i.e., a member of the Nebraska Legislature, the State Auditor, the State Attorney General, etc.). Reports made to other officials or individuals are not covered by the Act.

#### *What are the rights of a whistleblower who is covered by the Act?*

An employing agency is forbidden from taking any personnel action against an employee in retaliation for making a report of wrongdoing that is covered by the Act. The prohibited retaliatory actions could consist of any actual or threatened involuntary personnel action taken against an employee, including:

- Dismissal;
- Demotion;
- Transfer;
- Reassignment;
- Suspension;
- Reprimand;
- Admonition;
- Reduction in rank;
- Reclassification;
- Withholding work; or
- Requiring a fitness-for-duty examination.



Any state employee who has grounds to believe that retaliation in violation of the Act has happened or is imminent may take their retaliation complaint to the Nebraska Ombudsman's Office for investigation and possible corrective action. The Ombudsman's Office will investigate to determine whether there was retaliation in violation of the Act and, if the Ombudsman's Office believes that a preponderance of evidence shows that retaliation occurred or is about to occur, then the Ombudsman's Office will prepare a written finding that the employee may use to challenge the employer's personnel action through grievance channels and through the courts.

***What remedies are available to a whistleblower under the Act?***

Once an employee has a finding from the Ombudsman's Office supporting the employee's allegation of retaliation, the employee then has the right to petition the State Personnel Board, or other relevant administrative authority, for a hearing within 90 days. The State Personnel Board, or other administrative authority, has the power to temporarily stay or reverse the employer's alleged retaliatory action against the employee pending the holding of the hearing. If personnel action against the employee is not stayed or reversed pending the hearing, then the State Personnel Board, or other administrative authority, must hold a hearing on the matter within ten days. The employee has a right to have legal counsel at this hearing. If the hearing results in a finding sustaining the employee's allegation of retaliation, then the State Personnel Board, or other administrative authority, may order the employer to pay the employee back pay, and reasonable attorney's fees, along with such other relief as is deemed appropriate. If the employee is dissatisfied with the outcome of the administrative hearing, then he or she may appeal to the courts.

***Are there limits to a whistleblower's protections under the Act?***

There are several important limitations under the Act that potential whistleblowers must be aware of:

- The protections of the Act only apply to employees of state administrative agencies. Legislative staff, the Governor's personal staff, and employees of the courts are not covered.
- For the protections of the Act to apply in a particular case, it must be established that the sanction taken against the employee by the employer had a retaliatory intent, that is, that the employer knew about the employee's whistle blowing activity, and was motivated by an intent to retaliate.
- An employee may not make an allegation of wrongdoing frivolously, or in an attempt to treat a personnel issue as an allegation of wrongdoing. Intentional misuse of the Act by an employee may be reported to the employing agency, and may be cause for disciplinary action against the offending employee.
- It may be important to establish that the alleged retaliatory action was taken within two years of the time of the employee's whistle blowing activities. In cases where the retaliation happened within two years of the whistle blowing, the Personnel Board has the authority to temporarily stay or reverse the employer's alleged retaliatory action against the employee pending the holding of the hearing.

***Nebraska Ombudsman's Office  
P. O. Box 94604  
Lincoln, Nebraska 68509-4712***

***402-471-2035 Toll Free 800-742-7690  
Email: [ombud@unicam.state.ne.us](mailto:ombud@unicam.state.ne.us)  
Web Site: [www.unicam.state.ne.us/offices/ombud.htm](http://www.unicam.state.ne.us/offices/ombud.htm)***

***The State Government Effectiveness Act recognizes the importance of ordinary state employees in helping to protect against violations of the law, and fiscal waste and mismanagement in state government. The salvation of the state is in the watchfulness of its citizens, and the best eyes and ears of the citizens are the conscientious employees of state government.***

## APPENDIX C

# WHISTLEBLOWERS



### These Are Your Rights Under the State Government Effectiveness Act

The Nebraska State Government Effectiveness Act prohibits agencies of state government from retaliating against employees who report wrongdoing in state government to proper authorities, and provides certain legal protections for employees who are “whistleblowers” covered by the Act.

These protections generally apply to any state employee who makes a report of “wrongdoing” to the Nebraska Ombudsman’s Office, or to any elected state official. “Wrongdoing” covered under the Act would include:

- A violation of any law;
- Gross mismanagement or gross waste of funds; or
- A situation that creates a substantial and specific danger to public health or safety.

An employing agency is forbidden from taking any personnel action against a state employee in retaliation for making a report of wrongdoing that is covered by the Act.

Any employee who experiences retaliation from an employer for making a report of wrongdoing that is covered under the Act may make a complaint to the Nebraska Ombudsman’s Office.

If the Ombudsman’s Office finds, after investigating the matter, that retaliation has occurred, then the personnel action against the employee may be stayed or suspended pending a hearing, and the employee may challenge the employer’s personnel action through grievance channels and, eventually, through the courts.

Ultimately, administrative authorities and/or the courts, may grant the employee such relief as is deemed appropriate, including back pay, and reasonable attorney’s fees.

For more detailed information regarding your legal rights under the *Nebraska State Government Effectiveness Act*, please contact:



*Nebraska Ombudsman’s Office*  
P. O. Box 94604  
Lincoln, Nebraska 68509-4712

402-471-2035 Toll Free 800-742-7690

Web Site: [www.unicam.state.ne.us/offices/ombud.htm](http://www.unicam.state.ne.us/offices/ombud.htm)

Email: [ombud@unicam.state.ne.us](mailto:ombud@unicam.state.ne.us)

## 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:

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