



RICK SCOTT
GOVERNOR

CHARLES T. CORLEY
SECRETARY

September 30, 2011

Mr. Constantinos I. Miskis
Regional Administrator
Administration on Aging
Department of Health & Human Services
61 Forsyth Street, SW, Suite 5M69
Atlanta, GA 30303-8909

Dear Mr. Miskis:

Thank you for your correspondence of September 21, 2011, attempting to clarify the Administration's position on several programmatic concerns relating to the State of Florida's management and coordination of its Long-Term Care Ombudsman Program (LTCOP). The Department wishes to reiterate the fact that it is committed to ensuring the independence, objectivity and integrity of the State's Ombudsman Program, as the Department fully understands and respects the vital role the Program fulfills in safeguarding and responding to the needs of the State's most vulnerable populations. Further, the Department has always, and will continue to always, strive to follow the dictates of the Older Americans Act in its federally-mandated oversight and management of the State's Ombudsman Program.

To this end, the Department proposes the following corrective action measures to respond to the findings of the Administration's Compliance Review of the State of Florida Long-Term Care Ombudsman Program. Additionally, the Department will continue to eagerly await the requested materials and clarification it sought in its initial response to the Administration, and appreciates the Administration's promise to "continue to review [the Department's] request for materials that may be responsive" while the Department proceeds with a review and revision relating to the following programmatic concerns raised by the Administration.

Volunteer Designation

The Administration has noted that §712(a)(5) of the Older Americans Act (OAA) "requires that the designation of staff and volunteer local ombudsmen be the purview of the State Long-Term Care Ombudsman (LTCO)." Section 712(a)(5) of the OAA reads, in pertinent part, "[i]n carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity, and may designate an employee or volunteer to represent the entity."

4040 ESPLANADE WAY
TALLAHASSEE,
FLORIDA 32399-7000

phone 850-414-2000
fax 850-414-2004
TDD 850-414-2001

<http://elderaffairs.state.fl.us>

It remains the Department's belief that the above framework neither precludes nor proscribes the review, collaboration or input by the Department Secretary during and throughout the designation process, in large part because designated volunteers and employees of the LTCOP receive certain benefits and reimbursements by the State as part of their participation in the LTCOP. Moreover, §400.0065(2)(c), Florida Statutes, provides that, "[s]taff positions established for the purpose of coordinating the activities of each local council and assisting its members may be filled by the ombudsman after approval by the secretary." The Department remains unaware of any instance, and none have been indicated by the Administration, where the Department Secretary has prevented staff proposed for designation by the LTCO from participating in the LTCOP.

Regardless of the foregoing, the Department agrees to revise its current practices and procedures to ensure that the LTCO retains the ultimate authority over the initial designation of LTCOP staff and volunteers, and will avail itself of the Administration's recommendation to "develop uniform policies and procedures of broad applicability conducive to the purpose of the program and not in conflict with the above requirement which the LTCO must follow in all staff and volunteer designations."

Finally, in its most recent communication to the Department, the Administration failed to "provide statutory support for the proposition that an Agency Head is prohibited from de-designating ombudsman volunteers or employees, or rather that such de-designation is the exclusive domain of the LTCO," as the Department had requested. Therefore, the Department wishes to reiterate its earlier position that the OAA "is entirely silent as to the process and procedures for de-designation of ombudsman employees and volunteers. In fact, certain provisions of the OAA specifically state the State Agency is tasked with establishing policies and procedures regarding the duties of designated ombudsman employees or volunteers, and that the State Agency is responsible for establishing 'policies and procedures for monitoring local Ombudsman entities designated to carry out the duties of the Office.'"

Legislative Advocacy

The Administration has noted that §§ 712(a)(3)(G) and 712(h)(2) and (3) of the OAA "require that the LTCO carry out legislative advocacy in order to advocate for residents and their interests." Section 712(h)(2) of the OAA reads, in pertinent part, "[t]he State agency shall require the Office to ... analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate."

It is important for the Department to note, preliminarily, that the terms "lobbying" or "lobbyist" appear nowhere in the relevant OAA provisions governing the LTCO's duties and responsibilities. This is despite the fact that Congress has elsewhere recognized, and required the disclosure of, lobbyist activities in response to its overarching conclusion that, "responsible representative Government requires public awareness of the efforts of

paid lobbyists to influence the public decision making process in both the legislative and executive branches of the Federal Government,” and that, “the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.”¹

Section 11.045(1)(h), Florida Statutes, defines the term “lobbyist” as “a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity.” Moreover, §11.062, Florida Statutes, provides in relevant part that, “[n]o funds, exclusive of salaries, travel expenses, and per diem, appropriated to, or otherwise available for use by, any executive, judicial, or quasi-judicial department shall be used by any state employee or other person for lobbying purposes . . . [a]ny state employee of any executive, judicial, or quasi-judicial department who violates the provisions of this section shall have deducted from her or his salary the amount of state moneys spent in violation of this section.”

Such statutory guidance closely mirrors similar Federal language providing that, “[n]o part of the money appropriated by any enactment of Congress shall, *in the absence of express authorization by Congress*, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation [. . .].”² It is clear to the Department that, at both the state and federal levels, close legislative attention is paid to the notion that public funding should not be obligated or expended to lobby *itself* – that is, state or federal legislative bodies. Therefore, in light of the fact that Congress has not yet expressly authorized “lobbying” or registration as a “lobbyist” in the OAA, the Department requests additional clarification of the parameters under which the LTCO may use appropriated funds for specific lobbying efforts.

The Department has never articulated a steadfast policy which has had the effect of prohibiting or preventing the LTCO from undertaking legislative advocacy activities. To the extent that the Department’s statements were misconstrued as requiring registration as a lobbyist to undertake those activities, the Department regrets that misunderstanding. The lack of a requirement to be registered as a lobbyist in Florida to participate in full legislative advocacy as engaged in by the LTCO is demonstrated by the LTCO’s past legislative advocacy activities. In its initial response to the Administration, the Department revealed that it is “aware of numerous occasions during which the LTCO has

¹ 2 U.S.C.A. §1601

² 18 U.S.C.A. §1913 (emphasis added).

maintained unfettered independent access to legislators, legislative staff, and legislative committees in performance of the LTCO's OAA-tasked legislative advocacy requirements," and that, "[a]t no time has the Department hindered the Ombudsman from pursuing contact with the Florida Legislature; in fact, in many instances, the Department has appeared before the Legislature to advocate for the Ombudsman in his absence." The Administration has, to date, not responded to the Department's request to "provide [the Department] with specific circumstances where the Ombudsman has been prohibited from pursuing a legislative agenda."

In this regard, the Department finds that proposing or suggesting adequate corrective measures, absent a policy or document explicitly articulating a prohibition against permitting the LTCO to register as a lobbyist, is difficult. Moreover, it is equally difficult to contemplate similar corrective measures with regard to the LTCO's perceived or suggested constraint against independent legislative advocacy where the Administration has yet to provide the Department with specific instances where such advocacy has been prohibited. This is especially true where the Department has informed the Administration of ample evidence demonstrating the LTCO's persistent and unabated access to legislators, legislative staff, and legislative committees. Although the LTCO has not been hindered in legislative advocacy, the Department agrees to coordinate the LTCO's registration as a lobbyist in the State of Florida.

Information Dissemination

Finally, the Administration has noted that §712(h)(3) of the OAA should be interpreted in a manner such that "Florida's policies and practice [permit] and support the LTCO to both initiate communication with and respond to press and other avenues of information dissemination without prior approval or concurrence from outside the LTCOP." Section 712(h)(3) of the OAA provides, in pertinent part, that the State agency shall "require the [LTCOP] to provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding the problems and concerns of older individuals residing in long-term care facilities, and recommendations related to the problems and concerns."

The Department wishes to reiterate its earlier assertion that, in the Department's estimation, "the OAA does not preclude a collaborative vetting or approval process between the LTCOP and the State agency regarding communications to the public or other interested parties. Information disseminated by the LTCOP is written by the program's Public Relations Manager/Community Program Manager (CPM) and only in the instance of press releases is the information routed through the LTCO and other Department staff for [largely ministerial] purposes such as ensuring against grammatical and punctuation errors and maintaining uniformity in messaging. For media inquiries, there is no oversight approval process."

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Although the Department's "Ombudsman Program Communications Procedures" permit the LTCOP to respond to media inquiries, coordinate media coverage, publish its quarterly newsletter, issue the Annual Report required under §400.0065(1)(i), Florida Statutes, conduct community outreach, maintain its program website, disseminate information via various social media outlets, and formulate advertising without requiring prior approval through various departmental channels, the Administration has correctly indicated that such document does prescribe an "official approval process" prior to the issuance of media releases and advisories.

Consequently, and in consideration of the Administration's stated concern that "the LTCOP must be able to freely and without the need for prior approval communicate with the media in order to advocate for residents and their interests," the Department agrees to amend its "Ombudsman Program Communications Procedures" to remove the requirement that media releases and advisories be subject to an official approval process prior to release. Instead, the Department will redraft such Procedures to clearly indicate that, although the LTCOP retains the ultimate ability to generate media releases and advisories "as the Office determines to be necessary," as well as the concomitant authority to accept or reject departmental input pertaining to LTCOP media releases, there exists an appropriate mechanism within such Procedures for the collaborative vetting and coordination of efforts between the Department and the LTCOP. As the burden is on the state unit under the OAA to establish and operate the LTCOP, such consultative measures are necessary to ensure the LTCOP is operating within the boundaries of both state and federal law.

The Department wishes to thank the Administration for its review and guidance pertaining to the above issues, and will remain available and responsive to further instruction relating to these proposed corrective measures.

Sincerely,

A handwritten signature in cursive script, reading "Charles T. Corley". The signature is written in black ink and is positioned above the typed name and title.

Charles T. Corley
Secretary