



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 16, 1993

Ms. Mary Sapp
Executive Director
Texas Department on Aging
P.O. Box 12786
Austin, Texas 78711

Opinion No. DM-206

Re: Whether the Human Resources
Code section 101.063 provides immunity
to volunteer ombudsmen in the Texas
Department on Aging long term care
ombudsman program (RQ-484)

Dear Ms. Sapp:

You seek clarification of Attorney General Opinion DM-173 (1992) which addresses the immunity of volunteer ombudsmen in the Texas Department on Aging long term care ombudsman program. In that opinion we concluded that volunteer ombudsmen participating in the program are immune from suit while in the good faith performance of their official duties. Hum. Res. Code § 101.063.

You have informed us that prior to becoming a certified volunteer ombudsman, individuals routinely serve a three month internship under the supervision of a professional staff person or an experienced certified volunteer. You further state that the ombudsman program contains a class of volunteers referred to as friendly visitors. Their function is to visit residents in nursing facilities on an indefinite basis. Friendly visitors do not perform complaint investigations and receive little or no supervision. You ask if individuals serving in either of these categories are immune from suit as discussed in Attorney General Opinion DM-173. We conclude that the volunteers serving in the internship program are immune from suit for civil damages or criminal prosecution while in the course of good faith performance of their official duties.

Human Resources Code chapter 101, subchapter C, created the State of Texas Long Term Care Ombudsman Office. Hum. Res. Code § 101.052. Chapter 101, subchapter C, was adopted to conform the laws of this state to the requirements of the federal Older Americans Act of 1965 ("the act"). *Id.* § 101.053(a). The act requires that states participating in plans to monitor the provision of health and social services for the elderly establish a state long term care ombudsman program. 42 U.S.C. § 3021 *et seq.* In pursuit of its responsibilities, the office of the ombudsman is authorized to recruit volunteers and citizens' organizations to participate in the ombudsman program. Hum.

Res. Code § 101.056(a); 40 T.A.C. § 299.9(b)(5) - (6); (c)(1); (8).¹ Section 101.056 of the Human Resources Code provides:

(a) The office shall recruit volunteers and citizen organizations to participate in the ombudsman program. A paid staff member of an area agency on aging network or a nonprofit social service agency may be an ombudsman. *An ombudsman is a representative of the office.*

(b) The office shall provide training to ombudsmen as required by this subchapter and federal law.² [Emphasis added.]

The federal Older Americans Act of 1965 further provided that "[t]he State will ensure that no *representative* [of the office of the State Long Term Care Ombudsman] will be liable under State law for the good faith performance of official duties." 42 U.S.C. § 3027(a)(12)(I) (emphasis added). A representative is defined as standing or acting for another especially through delegated authority. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1000 (1983). The term is interchangeable with agent. BLACK'S LAW DICTIONARY 1170 (5th ed. 1979). We conclude that as representatives of the office of the ombudsman, the interns are immune from suit while in the good faith performance of their duties.

Furthermore, House Bill 541 of the 71st Legislature enacted Human Resources Code chapter 101, subchapter C and section 101.062. The bill analysis states in part:

The federal law requires each state to provide the ombudsman program access to residents of nursing homes *and to provide immunity for volunteer and staff.* [Emphasis added.]

House Comm. on Retirement and Aging, Bill Analysis, C.S.H.B. 541, 71st Leg. (1989) (by Reps. Richardson and Robnett). While it is clear that interns participating in the program are immune from suit, we are unclear whether the same is true for individuals

¹The state ombudsman is responsible for advocating the rights of nursing home residents and their families. The office of the ombudsman may use appropriate administrative, legal, and other remedies to assist elderly residents as provided by department rules. Assistance may be rendered by such means as: Intervening on behalf of elderly persons in nursing homes to assure quality of care; establishing standards for dependable and acceptable nursing home care; investigating and resolving complaints made by or on behalf of residents of long term care facilities; and monitoring nursing home compliance with federal, state and local laws. Hum. Res. Code § 101.053 - .054; 40 T.A.C. §§ 299.1, 299.5, 299.9.

²Furthermore, the office of the ombudsman is required to ensure that each ombudsman investigating complaints receives proper training and becomes approved as qualified to investigate complaints. Hum. Res. Code § 101.057(b). The internship program fosters this purpose by providing supervised practical experience.

participating in the program as friendly visitors. You have not provided us with sufficient information to address your question with regard to this group, therefore we shall reserve our response.

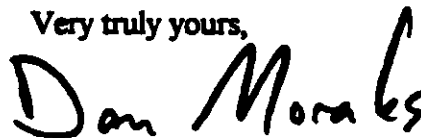
You also ask whether the Office of the Attorney General would be responsible for representation of the state ombudsman, volunteer ombudsmen, interns and friendly visitors "in the event of legal action taken against them in their official or individual capacity." Section 101.055 of the Human Resources Code provides that the Department on Aging shall ensure that the office of the ombudsman receives adequate legal advice and representation. Furthermore, as an employee of the state, the ombudsman is entitled to the legal counsel of the attorney general. Civ. Prac. & Rem. Code §§ 104.001, 104.004. The Human Resources Code and the Civil Practice and Remedies Code make no mention of attorney general representation for volunteers. However, we are of the opinion that this office should provide legal counsel to designated representatives of the state ombudsman as provided for in the 1992 amendments to the federal Older Americans Act. Therefore, we urge that you seek legislative clarification of this matter by introducing amendments to chapter 101 of the Human Resources Code to reflect the 1992 amendments to the Older Americans Act. In the absence of such legislation we are unable to provide a response to your second inquiry.

S U M M A R Y

Section 101.063 of the Human Resources Code, which provides that an ombudsman is not liable for civil damages or subject to criminal prosecution for good faith acts performed in the course of his or her official duties, applies to interns in the volunteer ombudsman program.

The state ombudsman is entitled to legal representation from the Office of the Attorney General. This representation will only be provided in instances where the action is being sought against the individual in his official capacity.

Very truly yours,



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