

STATE OF IOWA



Telephone: (515) 281-3592  
Toll Free: 1-888-426-6283  
TTY: (515) 242-5065  
Fax: (515) 242-6007  
E-mail: [ombudsman@legis.iowa.gov](mailto:ombudsman@legis.iowa.gov)  
Website: <http://legis.iowa.gov/ombudsman>

KRISTIE HIRSCHMAN  
OMBUDSMAN

OFFICE OF OMBUDSMAN  
OLA BABCOCK MILLER BUILDING  
1112 EAST GRAND AVENUE  
DES MOINES, IOWA 50319

To: Oregon Senate Committee on Human Services, Mental Health and Recovery  
From: Kristie Hirschman, Ombudsman, Iowa Office of Ombudsman *KH*  
Re: SB 97  
Date: March 1, 2021

I am writing in support of strengthening the confidentiality provisions in the governing statute of Oregon's Residential Facilities Ombudsman.

The Iowa Office of Ombudsman (Ombudsman) celebrated its 50<sup>th</sup> anniversary last year. As such, we have significant experience as to the critical importance of the confidentiality of an ombudsman's records.

The relevant portions of Iowa Code Chapter 2C state the following regarding confidentiality:

**2C.8 Closed files.**

The ombudsman may maintain secrecy in respect to all matters including the identities of the complainants or witnesses coming before the ombudsman, except that the general assembly, any standing committee of the general assembly or the governor may require disclosure of any matter and shall have complete access to the records and files of the ombudsman. The ombudsman may conduct private hearings.

...

**2C.20 Immunities.**

No civil action, except removal from office as provided in chapter 66, or proceeding shall be commenced against the ombudsman or any member of the staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent, nor shall the ombudsman or any member of the staff be compelled to testify in any court with respect to any matter involving the exercise of the ombudsman's official duties except as may be necessary to enforce the provisions of this chapter.

We assure both complainants and witnesses who provide information to the Ombudsman that their identity will remain confidential if necessary and when possible. We make this assurance in order to obtain the most accurate and forthcoming information needed for an effective investigation. The need to maintain the investigative files confidentiality was recognized by a U.S. district court when we intervened in a lawsuit to stop a former employee from testifying about information related to an inmate's death. The court stated "the flow of information to the office from citizens would be threatened if it became known that the statutory assurances of

general confidentiality would not be respected in federal court. . . . anything which chills a citizen's willingness to come forward limits the office's effectiveness in the long run and may restrict the spectrum of available information." *Shabazz v. Scurr*, 662 F.Supp. 90, 92 (S.D. Iowa 1987).

Based on this same 1987 court decision, the federal District Court for Nebraska entered an order in 2019 in favor of the Nebraska Ombudsman's [Public Counsel] Motion to quash. (*Sabata v. Nebraska Department of Corrections*, No. 4:17-cv-3107 (D. Neb.))

This Court has previously accepted a federal evidentiary privilege for the office of Public Counsel and quashed a subpoena to the Public Counsel on that basis. See *Tlamka v. Serrell et al.*, 4:97CV3212 (D. Neb. Feb. 6, 2002)(Jaudzemis, M.J.)(unpublished). In doing so, Magistrate Judge Jaudzemis found persuasive guidance in *Shabazz v. Scurr*, 662 F. Supp. 90, 91-92 (S.D. Iowa 1987), wherein the Southern District of Iowa found that a limited federal privilege existed for a prison ombudsman in light of the unique function of the office and the Iowa statutes governing the privilege. Similar to the Office of Public Counsel, the prison ombudsman in *Shabazz* was authorized to investigate complaints against a state agency or official and to issue recommendations to the executive or legislative branch. The district court in *Shabazz* recognized that "Courts have a special interest in protecting the [prison ombudsman] office's problem-solving function" and that public policy favored respecting the confidentiality of communications to facilitate the office's problem-solving purpose. See *id. at 92*.

In addition, the investigative files often include information and records that do not originate from the Ombudsman's office, but were acquired from other agencies pursuant to our authority under Iowa Code chapter 2C to request and receive even confidential materials. Our authority to obtain confidential materials from other agencies rests in large part on the fact that the Ombudsman is required by law to maintain their confidentiality. *Citizens' Aide/Ombudsman v. Miller*, 543 N.W.2d 899, 903 (Iowa 1996) ("In *Grossheim* we dealt with similar tensions resulting from a citizens' aide investigation and resolved the dispute in favor of the investigation. We did so in great part by reconciling the investigatory rights with prison officials' need for confidentiality. To do so we relied on the continuing confidentiality of records in the hands of citizens' aide 198 N.W.2d at 407").

The Iowa Code provision the Iowa Supreme Court relied on in both *Miller* and *Grossheim* is current section 2C.9(4), which states "Confidential documents provided to the ombudsman by other agencies shall continue to maintain their confidential status. The Ombudsman is subject to the same policies and penalties regarding the confidentiality of the document as an employee of the agency."

In summary, allowing access to an ombudsman's investigative file or requiring an ombudsman to testify in judicial or administrative proceedings arising from a complaint both undermines the effectiveness of the investigative process when the ombudsman cannot assure complainants and witnesses confidentiality in their testimony and compromises an ombudsman's authority to receive confidential records from the agency under investigation.