

Dear Senators HEIDER, Souza, Jordan, and
Representatives WOOD, Packer, Chew:

The Legislative Services Office, Research and Legislation, has received the enclosed rules of the
Office of the Governor - Commission on Aging:

IDAPA 15.01.03 - Rules Governing the Ombudsman for the Elderly Program - Proposed Rule
(Docket No. 15-0103-1701).

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the
cochairmen or by two (2) or more members of the subcommittee giving oral or written notice to Research
and Legislation no later than fourteen (14) days after receipt of the rules' analysis from Legislative
Services. The final date to call a meeting on the enclosed rules is no later than 09/29/2017. If a meeting is
called, the subcommittee must hold the meeting within forty-two (42) days of receipt of the rules' analysis
from Legislative Services. The final date to hold a meeting on the enclosed rules is 10/30/2017.

The germane joint subcommittee may request a statement of economic impact with respect to a
proposed rule by notifying Research and Legislation. There is no time limit on requesting this statement,
and it may be requested whether or not a meeting on the proposed rule is called or after a meeting has
been held.

To notify Research and Legislation, call 334-4834, or send a written request to the address on the
memorandum attached below.



Eric Milstead
Director

Legislative Services Office

Idaho State Legislature

Serving Idaho's Citizen Legislature

MEMORANDUM

TO: Rules Review Subcommittee of the Senate Health & Welfare Committee and the House Health & Welfare Committee

FROM: Senior Legislative Research Analyst - Elizabeth Bowen

DATE: September 12, 2017

SUBJECT: Office of the Governor - Commission on Aging

IDAPA 15.01.03 - Rules Governing the Ombudsman for the Elderly Program - Proposed Rule (Docket No. 15-0103-1701)

The Idaho Commission on Aging submits notice of rulemaking at IDAPA 15.01.03. The proposed rule revises terminology in an existing rule and clarifies that:

- An ombudsman for the elderly program shall have access to long-term care facilities at certain times in order to investigate the facilities;
- The release of a facility resident's private health information to an ombudsman does not violate the Health Insurance Portability and Accountability Act (HIPAA); and
- The Office of the State Ombudsman for the Elderly shall disclose certain information pursuant to a court order or pursuant to consent by specific individuals.

Negotiated rulemaking was not conducted as it was not considered feasible; the changes to the rule are being made in order to better conform with the federal Older Americans Act. There is no anticipated negative fiscal impact on the state general fund. The Commission states that this rulemaking is authorized pursuant to Section 67-5003(3), Idaho Code.

cc: Office of the Governor - Commission on Aging
Sam Haws

**IDAPA 15 – OFFICE OF THE GOVERNOR
IDAHO COMMISSION ON AGING**

15.01.03 – RULES GOVERNING THE OMBUDSMAN FOR THE ELDERLY PROGRAM

DOCKET NO. 15-0103-1701

NOTICE OF RULEMAKING – PROPOSED RULE

AUTHORITY: In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking procedures. The action is authorized pursuant to Section 67-5003(3), Idaho Code.

PUBLIC HEARING SCHEDULE: Public hearing(s) concerning this rulemaking will be scheduled if requested in writing by twenty-five (25) persons, a political subdivision, or an agency, not later than September 20, 2017.

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

DESCRIPTIVE SUMMARY: The following is a nontechnical explanation of the substance and purpose of the proposed rulemaking:

This rulemaking amends terminology and complaint processing procedures to better reflect existing practices and the intent of the Older Americans Act. It also clarifies that disclosure of records must conform with the Older Americans Act. The changes revise the term ‘substate ombudsman’ to ‘local ombudsman’ to conform with applicable state statutes and common usage; clarify times at which the ombudsman shall have access to certain facilities for purposes of investigations; clarify that a facility’s release of resident information to the ombudsman for investigation purposes does not violate HIPAA; and clarify that the disclosure of ombudsman records must be consistent with the Older Americans Act.

FEE SUMMARY: The following is a specific description of the fee or charge imposed or increased: N/A

FISCAL IMPACT: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year resulting from this rulemaking: N/A

NEGOTIATED RULEMAKING: Pursuant to Section 67-5220(2), Idaho Code, negotiated rulemaking was not conducted because it was not feasible. The changes being made are driven primarily by the requirement to conform with federal law, as established by the Older Americans Act.

INCORPORATION BY REFERENCE: Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the materials cited are being incorporated by reference into this rule: N/A

ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS: For assistance on technical questions concerning the proposed rule, contact Cathy Hart at (208) 577-2855

Anyone may submit written comments regarding this proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before September 27, 2017.

DATED this 4th day of August, 2017.

Cathy Hart
State Ombudsman
Commission on Aging
341 W. Washington
Boise, ID 83702
Phone: (208) 577-2855
Fax: (208) 334-3033

THE FOLLOWING IS THE PROPOSED TEXT OF DOCKET NO. 15-0103-1701
(Only Those Sections With Amendments Are Shown.)

010. DEFINITIONS.

Any item not specifically defined below shall have the same meaning as those defined in IDAPA 15.01.01, “Rules Governing Senior Services Program,” and the [Older Americans Act \(OAA\), Section 711](#), and Title 67, Chapter 50, Idaho Code. (7-1-98)

01. Access. Right to enter long-term care facility upon notification of person in charge. (7-1-98)

02. Affected Parties. Long-term care facilities, state or county departments or agencies, or others against whom a complaint has been lodged. (7-1-98)

03. Area III. Planning and service area made up of: Canyon, Valley, Boise, Gem, Elmore, Washington, Ada, Adams, Payette, and Owyhee counties. (7-1-98)

04. Complainant. The [substate local](#) ombudsman or any individual or organization who registers a complaint with the [substate local](#) ombudsman. (7-1-98)()

05. Complaint Investigation/Resolution. Activities related to receiving, analyzing, researching, observing, interviewing, verifying or resolving a complaint through advocacy, facilitation, conciliation, mediation, negotiation, representation, referral, follow-up, or education. (7-1-98)

06. Complaints. Allegations made by or on behalf of eligible clients, whether living in long-term care facilities or in the community. (7-1-98)

07. Designation. Process by which the Office approves the location of [substate local](#) ombudsman programs within AAAs and delegates to such programs the authority to carry out the purposes of the program. (7-1-98)()

~~108.~~ **Substate Local Ombudsman.** An individual associated with a designated local Ombudsman for the Elderly Program, who performs the duties of ombudsman. (7-1-98)()

~~109.~~ **Long-Term Care Facility.** Skilled nursing facilities as defined in IDAPA 16.03.02, Subsection 002.33, “Rules and Minimum Standards for Skilled Nursing and Intermediate Care Facilities,” and residential care facilities as defined in IDAPA 16.03.22, “Residential Care or Assisted Living Facilities in Idaho.” (7-1-98)

~~108.~~ **Non-Jurisdictional Complaints.** Complaints made by or on behalf of residents of long-term care facilities who are under the age of sixty (60) or complaints concerning persons outside the statutory jurisdiction of an ombudsman. (7-1-98)

~~0911.~~ **Office.** Office of the State Ombudsman for the Elderly pursuant to Title 67, Chapter 50, Idaho Code, Section 67-5009. (7-1-98)

~~112.~~ **Resident.** Resident as defined in IDAPA 16.03.22, “Residential Care or Assisted Living Facilities in Idaho.” (7-1-98)

011. -- 019. (RESERVED)

020. ADMINISTRATIVE REQUIREMENTS.

Each AAA [substate local](#) ombudsman program shall meet all administrative requirements as cited in OAA, Section 712 (a), and Title 67, Chapter 50, Idaho Code, Section 67-5009, unless granted a waiver by the [ICOA Office](#). (7-1-98)()

01. Procedures. All *substate local* ombudsmen shall follow procedures outlined in the *Ombudsman for the Elderly Office* Procedures Manual. (7-1-98)(____)

02. Space. Each AAA shall provide space assuring privacy for *substate local* ombudsmen to hold confidential meetings. (7-1-98)(____)

03. Supervision. *Substate Local* ombudsmen shall operate under the direct supervision of the Office for all complaint handling activities and are considered subdivisions of the Office. (7-1-98)(____)

04. Forms. All *substate local* ombudsmen shall utilize standardized forms provided by the Office. (7-1-98)(____)

05. Conflict of Interest. AAAs shall ensure that the *substate local* ombudsmen shall not be part of an organization that: (7-1-98)(____)

a. Is responsible for licensing and certifying skilled nursing or residential care facilities under IDAPA 16.03.22, “Rules for Licensed Residential and Assisted Living Facilities in Idaho”; (7-1-98)

b. Provides skilled nursing or living care or is an association of such a provider; or (7-1-98)

c. May impair the ability of the *substate local* ombudsmen to investigate and resolve complaints objectively and independently. (7-1-98)(____)

06. Travel Funds. Each AAA shall provide travel funds for the *substate local* ombudsman program to carry out activities related to complaint investigations. (7-1-98)(____)

07. Program Report. All *substate local* ombudsman programs shall comply with *ICOA’s the Office’s* reporting requirements. (7-1-98)(____)

08. Program Reviews. Each AAA shall submit to a program review of *substate local* ombudsman programs at reasonable intervals deemed necessary by the *ICOA Office*. (7-1-98)(____)

09. Adult Protection and Ombudsman Coordination. Each AAA shall ensure that Adult Protection staff and the *substate local* ombudsman maintain a written agreement establishing cooperative protocols in the investigation of complaints. (7-1-98)(____)

10. State Agreements. All *substate local* programs shall honor and carry out state-level agreements between the Office and other agencies of government. (7-1-98)(____)

021. STAFFING. Pursuant to the OAA, Section 712, in order to meet minimum requirements established for the position of *substate local* ombudsman, each AAA shall seek applicants having the following qualifications. (7-1-98)(____)

01. Minimum Qualifications. Any person hired to fill the position of *substate local* ombudsman on or after July 1, 1998, shall have: (7-1-99)(____)

a. A Bachelor’s degree or equivalent; (3-30-01)

b. Minimum of one (1) year’s experience working with the elderly; (7-1-98)

c. Ability to effectively communicate verbally and in writing; (7-1-98)

d. Knowledge of long-term care issues and resources; (7-1-98)

e. Demonstrated ability to interpret and apply relevant local, state and federal laws, rules, regulations, and guidelines; (7-1-98)

- f. Demonstrated ability to work independently; (7-1-98)
- g. Demonstrated skill in interviewing techniques; and (7-1-98)
- h. Demonstrated ability to collect data, conduct interviews and to form conclusions. (7-1-98)

02. Hiring. The Office shall be included in the process of interviewing and selecting applicants for the substate local ombudsman position. The AAA shall make the final selection from the top three (3) applicants. (7-1-98)()

022. -- 030. (RESERVED)

031. DESIGNATION OF AUTHORITY OF AAA.

The Office shall designate an entity as a substate local ombudsman. (7-1-98)()

01. Designation of Authority. Each AAA shall directly provide, through a contract agreement with the ICOA, a substate local ombudsman program employing at least one (1) full-time substate local ombudsman whose function shall be to carry out the duties of the ~~Ombudsman for the Elderly Program Office~~. AAAs I, II, IV, V and VI shall employ one (1) full-time substate local ombudsman; AAA III shall employ two (2) full-time substate local ombudsmen. An AAA may petition ~~ICOA the Office~~ in writing for a waiver of this requirement. (7-1-98)()

02. Grounds for Revocation or Termination. In revoking a designated substate local ombudsman program, the ~~ICOA Office~~ shall provide due process in accordance with applicable law and IDAPA 04.11.01, Section 000, et seq., "Idaho Rules of Administrative Procedure of the Attorney General." (7-1-98)()

a. Following termination of a substate local ombudsman program, the ~~ICOA Office~~ shall perform the duties of the substate local program. (7-1-98)()

b. Following termination of a substate local ombudsman program, the ~~ICOA Office~~ shall withdraw funding for the substate local program for the remainder of the funding period. (7-1-98)()

c. An AAA's appeal of ~~ICOA's the Office's~~ termination of its substate local ombudsman program shall be governed by the Adjudicatory Rules of Practice and Procedures in Claims Relating to Contracts and Grants Funded under Title III, OAA. (7-1-98)()

032. HANDLING OF COMPLAINTS.

The ~~Ombudsman for the Elderly Program Office~~ has jurisdiction to accept, identify, investigate, and resolve complaints made by, or on behalf of, persons aged sixty (60) or older, living in the community or in long-term care facilities. The Office and the substate local ombudsmen shall ensure that persons aged sixty (60) or older have regular and timely access to services provided through the Office. The ~~Ombudsman for the Elderly Program Office~~ shall represent the interests of older persons before governmental agencies and shall seek to protect the health, safety, welfare and rights of older persons. (7-1-98)()

01. Non-Jurisdictional Complaints. Substate Local ombudsmen may respond to complaints made by or on behalf of under age sixty (60) long-term care residents where such action will: (7-1-98)()

- a. Benefit other residents; or (7-1-98)
- b. Provide the only viable avenue of assistance available to the complainant. (7-1-98)

02. Conflict of Interest. Substate Local ombudsmen shall refer to the Office any complaint involving AAA staff or contractors. (7-1-98)()

03. Complaints. Complaints concerning substate local ombudsmen, or relative to a substate local ombudsman's official duties, shall be directly referred to the ~~ICOA Office~~. The ~~ICOA Office~~, upon completing an investigation of such complaint, shall provide findings and recommendations to the AAA. (7-1-98)()

04. Guardianship. The substate local ombudsmen shall not serve as an ex-officio or appointed member of any Board of Community Guardian, nor file an affidavit to the court for guardianship. (7-1-99)()

05. Court Visitor. The substate local ombudsmen shall not act as court visitor in any guardianship/conservatorship proceeding concerning a past or current client. (7-1-98)()

06. Legal Documents. Substate Local ombudsmen shall not, in their capacity as ombudsmen, act as a notary or a witness of signatures for legal documents. (7-1-98)()

033. ACCESS.

The Office shall ensure that representatives of the Office have access to long-term care facilities and residents as well as appropriate access to medical and social records, and resident representative contact information needed to investigate complaints. (7-1-98)()

01. Visitation. For visitation purposes, substate local ombudsmen shall have access to long-term care facilities during regular business hours. Visiting substate local ombudsmen shall: (7-1-98)()

- a. Notify the person in charge upon entering the facility; (7-1-98)
- b. Be allowed to visit common areas of the facility and the rooms of residents if consent is given by the resident; and (7-1-99)
- c. Communicate privately and without restriction with any resident who consents to the communication. (7-1-98)

02. Investigation. Substate Local ombudsmen shall have access to long-term care facilities at any time for the purpose of conducting investigations. A substate local ombudsman conducting an investigation shall: (7-1-98)()

- a. Notify the person in charge upon entering the facility; (7-1-98)
- b. Be allowed to visit common areas of the facility and the rooms of residents if consent is given by the resident; (7-1-98)
- c. Seek out residents who consent to communicate privately; (7-1-98)
- d. Communicate privately and without restriction with any resident who consents to the communication; and (7-1-98)
- e. Inspect a resident's records under conditions set forth in the OAA, Section 712. (7-1-98)

f. Inspect facility administrative records, policies, and documents that are accessible to the resident and general public. ()

03. Privacy. Substate Local ombudsmen shall have statutory authority to visit facilities and residents in facilities unescorted by facility personnel. See Section 67-5009, Idaho Code. (7-1-98)()

04. HIPAA. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 CFR 164, subparts A and E, does not preclude release by the facility of resident private health information or other resident identifying information to the Office. ()

034. -- 040. (RESERVED)

041. WRITTEN CONSENT.

The Office shall ensure appropriate access to review medical and social records of a resident. (See OAA, Section 712) (7-1-98)

01. Resident Written Consent. Access to confidential records requires the written consent of the resident or legal representative. (7-1-98)

02. Lack of Consent. If the client is unable to provide written or oral consent, or the legal representative is unavailable to provide consent, the substate local ombudsman, with approval of the Office may inspect available client records, including medical records that are necessary for investigation of a complaint. (7-1-98)()

03. Consent Refused. If a substate local ombudsman has been refused access to records by legal representative but has reasonable cause to believe that the legal representative is not acting in the best interest of the client, the substate local ombudsman may, with the approval of the Office, inspect client records, including medical records. (7-1-98)()

04. Requirements for Informing Client or Resident. The substate local ombudsman shall inform the complainant or resident regarding: (7-1-98)()

- a. Who will receive the information; (7-1-98)
- b. What information will be disclosed; and (7-1-98)
- c. The purpose for which the information is being disclosed. (7-1-98)

042. CONFIDENTIALITY.

The Office shall be the custodian of all substate local ombudsman program records including, but not limited to, records and files containing personal information relative to complainants and residents of long-term care facilities. Requests for release of confidential information shall be submitted to the Office for approval or denial. Release of information shall be granted pursuant to OAA, Section 721(e). (7-1-98)()

01. Storage of Records. Client records shall be maintained in locked storage. Case records inactive for two (2) years or longer may be expunged. As required by law, release of these records shall be limited to persons authorized by the Office. (7-1-98)

02. Performance Evaluations. For performance evaluation purposes, direct supervisors shall have access to client files maintained by substate local ombudsmen. (7-1-98)()

03. Confidential Records. Records to be safeguarded include, but are not limited to, long-term care and community-based complaint files including: (7-1-98)

- a. Notes of interviews with complainants and clients or collateral contacts; (7-1-98)
- b. All copies of residents' medical records or diagnoses; (7-1-98)
- c. All records relevant to complaint investigations; (7-1-98)
- d. All memoranda generated by the Office or by another agency office during the evaluation and resolution of a complaint; (7-1-98)
- e. All photographs, video tapes, tape recordings, etc. pertaining to complaint investigation; (7-1-98)
- f. All memoranda or letters generated during evaluation or resolution of a complaint; (7-1-98)
- g. Written documentation that parties affected by ombudsman opinions or recommendations have been notified; and (7-1-98)
- h. Information containing unverified complaints about long-term care facility owners, administrators, staff or other persons involved in the long-term care system or in other service programs. (7-1-98)

04. Request for Anonymity. The ombudsman shall honor a resident's or complainant's request to remain anonymous. If investigation of a complaint requires that a resident's or complainant's name be divulged in order for the investigation to proceed, the ombudsman shall so inform the resident or complainant. If the resident or complainant insists on maintaining anonymity, the ombudsman may terminate the investigation. (7-1-98)

043. DISCLOSURE.

The Office ~~shall be~~ is the only entity ~~having authority to authorize disclosure of substate~~ authorized to disclose ombudsmen program files, records, or information, maintained by the program except when the ICOA is subpoenaed by the court to disclose pertinent records Identifying information of any resident or complainant shall be disclosed only with proper consent or in response to a court order. The Office, in its sole discretion, may delegate the disclosure of ombudsman program files, records, or information to a local ombudsman. (7-1-98)()

01. Court Order. Identifying information of a resident, complainant, or both may be disclosed, with or without the consent of the resident, complainant, or both, pursuant to a court order issued by a court of competent jurisdiction. ()

02. Resident Consent. Without a court order, identifying information of a resident shall be disclosed only if the resident or his representative communicates informed consent to the disclosure and the consent is given in writing, orally, visually or through the use of auxiliary aids and services; and such consent is documented by a representative of the Office in accordance with procedures. ()

03. Complainant Consent. Without a court order, identifying information of a complainant shall be disclosed only if the complainant communicates informed consent to the disclosure and the consent is given in writing, orally, visually or through the use of auxiliary aids and services; and such consent is documented by a representative of the Office in accordance with procedures. ()

044. -- 999. (RESERVED)