Administrative Conference of the United States

A REAPPRAISAL – THE NATURE AND VALUE OF OMBUDSMEN IN FEDERAL AGENCIES

PART 1: EXECUTIVE SUMMARY

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Executive Summary

Introduction

Twenty-six years ago, the Administrative Conference of the United States (ACUS) sponsored a 117-page report entitled *Ombudsmen in Federal Agencies: The Theory and the Practice* that supported its Recommendation urging "the President and Congress to support federal agency initiatives to create and fund an effective ombudsman in those agencies with significant interaction with the public." At that time, although only a few federal agencies had established ombuds programs, there was enough additional evidence from the use of ombuds in other countries, higher education in the United States and private sector organizations for the authors of the report to be optimistic about ombuds providing valuable service at the federal level. Though this 1990 Report did inspire a movement for the growth of ombuds in the federal government, that growth had to overcome several obstacles along the way and took many years to gain momentum. The movement has now matured, and ombuds offices and programs have proliferated in government departments and agencies, especially in the last few years. In response to this marked growth and development, ACUS contracted with chiResolutions, LLC to conduct a study in order to reevaluate the 1990 recommendation and examine what is happening today among federal ombuds in terms of who they are, what they do, why they do it, how they do it, and the value they bring. More specifically, ACUS and the research team sought to shed light on the following key areas to better understand the current landscape of ombuds offices and services in the federal sector:

- Which agencies currently make use of ombudsmen?
- What are the variety of ombuds offices in the federal sector?
- What standards do they follow and is there consistency in the standards?
- How do ombuds define their role and function?
- What is the scope of their activities?
- What skill sets and personal characteristics do they display?
- What value do they add to their agencies?
- What are promising best practices for the establishment, organization and operation of federal ombuds offices?
- How might the establishment or expanded use of ombuds benefit agencies and the American public?
- What statutory and other legal parameters affect federal agency ombuds practice, including issues with respect to confidentiality and record-keeping and are they adequate to uphold the commitment to the ombuds professional standards?

Lastly, ACUS tasked the research group to update the 1990 Report conclusions and recommendations based on the evidence gathered for their report.

chiResolutions, LLC, a government contractor specializing in integrated conflict management systems (ICMS), recruited a team of 6 head researchers and over a dozen graduate school and legal assistants to undertake this task. The team of academic and professional legal and ombuds experts have, over the course of 14 months, done the extensive research necessary to compile this report and provide some clarity to what is a varied, sometimes confusing, yet tremendously exciting and promising landscape. It is our hope that this Report will propel this

movement toward greater maturity and adulthood as follow-up actions provide some needed clarity and support to the federal ombuds community.

The Report consists of four parts, and reflects the research that was conducted in two phases. This Executive Summary (Part 1) offers the purpose and context for the report, an overview of our research methodology as a whole, summaries of findings from the two research phases including promising best practices, overviews of the policy considerations on standards and the legal analysis, and includes at the end a draft Recommendation for ACUS.

Part 2 of the Report contains both Phase 1 and 2 of the research. Phase 1 of the research provides a definition of key terms; some historical information; context setting and a literature review; a narrative and visual display (Taxonomy, Appendix B) of our notional classification of the many varieties of federal sector ombuds offices; information on the design, distribution and collection of our quantitative and qualitative surveys; and separate summaries of the responses to the two surveys.

Phase 2 of the research includes case studies of four different ombuds offices that have provided value and innovation at the Consumer Financial Protection Bureau, the Department of Energy, the Department of Interior, and the Internal Revenue Service (the National Taxpayer Advocate). Profiles of the Long Term Care Ombuds program and the Navy Family Ombuds program are also included. These latter two profile subjects are unique in many ways, including relying heavily on volunteers, and are the face of the ombuds world to many Americans. A brief profile on the Coalition of Federal Ombudsmen (COFO) is offered since many of our interviewees commented on its importance in the development of the federal ombuds field, to date, and expressed strong support for it—or something like it—to play a continued or expanded role in the future. Part 2 concludes with a summary of insights and promising best practices,

possibilities for further research, and discussion of policy considerations regarding ombuds professional standards.

Part 3 of the Report encompasses an extensive analysis of legal issues affecting federal ombuds, and Part 4 offers the draft Recommendation, as a separate document, for ACUS' consideration.

A variety of research methods were used to gather empirical data for this report. A robust quantitative survey was sent to over 150 ombuds offices. In follow-up, the research team obtained comprehensive answers to 9 open-ended, qualitative questions via phone interviews or written responses from more than 50 ombuds offices. Dozens of face-to-face interviews with ombuds and their key stakeholders supplemented published information in the case studies. Federal ombuds who have led ombuds associations or working groups, or are otherwise widely known among their peers as being highly influential in the field, were consulted many times throughout the study.

The following are some overall observations that have emerged as most important:

1. Federal ombuds offices have proliferated over the roughly forty-five years of their existence. Their missions and functions are very diverse and have broadened and deepened far beyond the traditional, classical ombudsman model (which itself is not present in the U.S. federal government).
2. Many federal ombuds offices appear to contribute an extraordinary array of benefits to the government and their constituents, in the context of dispute resolution and conflict management. These include fostering critical systemic changes that enhance the missions of their departments and agencies.
3. There is no definitive typology of federal ombuds that works in a precise way for all ombuds. Attempts to differentiate ombuds offices—by origin (legislative or executive),

by constituents (external or internal), by standards of practice and definitional characteristics, or generalist vs. specialist focus—all lead to finding many ombuds offices of mixed characteristics which defy easy categorization. A number of major ombuds offices are unique. We have found it useful to do some analyses differentiating between externally-facing ombuds and internally-facing ombuds and also offer a taxonomy, with illustrative examples, as a way to think about the complex array of ombuds offices, roles and functions.

4. Most federal ombuds share three *core standards of practice* in some form—independence, confidentiality and impartiality—which are considered essential to the ombuds profession. Many if not most also share common *definitional characteristics*—informality (does not make decisions binding on the agency or provide formal rights-based processes for redress), a commitment to credible practices and procedures, and a commitment to fairness. These attributes, taken together, define a unique profession.
5. Office and agency practice consistent with the three core standards of practice, as articulated in at least one of the three generally recognized sets of professional standards (set forth, respectively, by the International Ombudsman Association, the American Bar Association and the United States Ombudsman Association), is essential in order to obtain the unique benefits offered by federal ombuds, and in order to defend ombuds confidentiality should it be subject to legal challenge.
6. All of the offices surveyed report important accomplishments. These vary according to the type of ombudsman under consideration. Taken together, these accomplishments appear to add great value to government service—both internally and externally—and make a strong case for further development and expansion of the use of ombuds in the federal government.

7. The federal ombuds in our case studies and profiles appear to be extraordinarily creative and successful in employing their personal skill-sets and talents to develop support from agency leaders. They work hard to earn credibility and respect from their constituents, and advance the mission of their agencies while positively advancing and influencing the continuous improvement culture of their organizations. In this way, they play a powerful role in promoting excellence in government.

Due to the length and complexity of this Report, what follows are overviews of different sections. However, as the recommendations flow from all the information contained in the Report, critical readers may wish to read the entire Report.

Summary and Highlights from Phase 1[1]– the Survey of Federal Ombuds Offices

Remarkably little was known about ombuds serving in the federal government. Previous studies have painstakingly and very helpfully illuminated some aspects and goals of federal ombuds practice. However, there appears to have been little comprehensive understanding of the universe of federal ombuds practice in this century. Federal ombuds themselves are among the first to note that the ombuds profession is little known and often misunderstood. Information gathered for this Report may help to explain why federal ombuds—and their accomplishments—

[1] Phase 1 of the Report contains an introduction; key terms and definitions; context and review of the literature; details on the survey design, distribution and collection; and separate summaries of the findings from the quantitative and qualitative survey responses. However, this executive summary consists only of an overall analysis and discussion of the most significant findings from the collected data.

have been less well understood than some other alternative dispute resolution and conflict management practitioners.

There Are Now Many Different Types of Federal Ombuds

In its Standards for the Establishment and Operation of Ombuds Offices (2004) the American Bar Association described four broad categories of ombuds: legislative, executive, organizational and advocate. On its website, the American Bar Association Ombuds Committee of the Section of Dispute Resolution refers to "Classical/Traditional, Organizational, Advocate, and others." We cannot easily fit the instant survey results into either typology. In fact, there is no one typology that makes the multiplicity of federal ombuds offices easy to understand. Some ombuds offices appear to be unique. In addition, each of the terms is used differently by different observers. This point becomes clear in reviewing the history of federal ombuds, and is still true today. Here are four examples:

- Observers often divide U.S. ombuds by how they are authorized—as with "legislative or executive," or "legislative or agency" origins. We report that some 20 percent of the ombuds offices in the survey had a complex history, beginning in one way and thereafter reconfigured by a different authority or authorities.
- Another customary way of differentiating ombuds is by whether their constituent base is primarily external to the organization or primarily internal to the organization. We also use this differentiation and find it useful. However, about 25 percent of the offices reported that they serve both sets of constituents at least some of the time. Most ombuds that responded have a "predominant" set of constituents, but this differentiation lacks precision.

- In the category of "advocate" ombudsmen, many, perhaps almost all offices, are unique with distinctive differences from each other.
- There is no firm differentiation between "generalist" ombuds and "specialist" ombuds. "Generalist" ombuds report that they sometimes deal with issues that are usually associated with the "specialty" offices, and the reverse may occasionally be true.

This report attempts to illuminate a "map" in order to better understand the complex spectrum and practices of federal ombuds.[2] First, unlike many other countries, at the federal level the United States does not have a traditional classical ombudsman, appointed by the legislature, to be independent of the offices over which it has oversight. However, there are federal ombuds who resemble classical ombuds in various ways. These ombuds, who are within agencies, receive concerns and complaints from those outside the agency, and work to investigate and resolve complaints. Some "externals" are designated as advocates. Some but not all are mandated by Congress. "External" ombuds typically safeguard confidentiality and privacy. They may, however, need to identify the constituents they serve in order to provide appropriate remedies for constituent concerns; such identification typically is done with notice or permission when it occurs but is usually at the discretion of the ombuds.

"Internal" ombuds have many informal functions and refer to formal avenues for redress, but typically do not do formal, written investigations. Those that are organizational ombudsmen mostly were established by agency action and typically receive most concerns from inside their agencies. They characteristically commit to a high degree of confidentiality to safeguard constituents who otherwise might not come forward.

[2] See the Taxonomy Chart in **Appendix B** of Part 2 for different, cross-cutting characteristics of various ombuds office types (reproduced at the end of this executive summary).

There are, in addition, other types of ombuds who also assist with concerns from inside their agencies, including analytic ombuds and whistleblower ombuds mandated by Congress. They also offer a high degree of confidentiality, articulated in different ways, by relevant statutes and agency directives.

There are distinctive types of advocate ombudsmen, most but not all established by Congress. They have different sets of functions and standards of practice depending on their specific professional focus or the specific constituency. Most, but not all, typically receive concerns from outside their agency.

There Are Many Commonalities Among Most Federal Ombuds

Although the context is still one of great complexity, the self-reports from the surveys show that most ombuds hold much in common in their views of purpose, standards of practice, functions, and accomplishments.

As noted elsewhere in this Report, there were not enough surveys returned from each particular kind of ombuds to report in detail on each different type of ombuds, respectively. Looking first at the surveys, the researchers then analyzed much of the data in terms of constituent base—which kind of ombuds predominantly serve which sets of constituents. Analyzing some survey information by constituent base permitted analysis that would respect the general concern for confidentiality of individual ombuds offices. It also is a division that has practical significance in terms of some functions and standards of practice. (In addition, and quite coincidentally, it produced two equal groups of ombuds offices.) COFO also uses the shorthand of "externals" and "internals."

Differences and commonalities reported by federal ombuds

Use of the title

One issue is the very use of the title "ombudsman." For the most part, this survey is limited to ombuds offices that use the title ombudsman, including several whose principal activities are in the nature of ombuds services, such as the Office of the Taxpayer Advocate. Some also designate their type of professional practice in their titles (as for example, Analytic Ombudsman, Long Term Care Ombudsman, or Wounded Warrior Ombudsman.)

The researchers also heard from some with the "ombudsmen" title that they are somewhat uncomfortable with it. Some said that they are not in fact "ombudsmen." That is, some professionals—who have the title—are performing important functions, and are justifiably proud of their accomplishments, but believe they should have different titles. Several mentioned that they are constantly misunderstood because of this fact.

In addition, the title of "ombudsman" is sometimes *not* authorized for some professionals who think they really are ombudsmen because of their standards of practice and functions. In the course of the researchers' attempts to identify ombudsmen for the survey, several professionals of this kind mentioned that they would like to be accorded this title.

Job classification

Ombuds offices differ in job classification. There is no Office of Personnel Management (OPM) classification for an ombudsman. Across the federal government there are at least six classification series used by ombuds. Only about 80 percent of senior ombuds reported that they are at GS-15 or above. Many ombuds told the researchers that an OPM classification at a high level, GS-15 or above, is needed for credibility and effectiveness in working for systems improvements.[3] Some emphasized that there should be a number of professionals at GS-15 and even above in large offices.

[3] Elevated rank is a standard of practice for classical ombudsmen, as part of "credible review," and a best practice for International Ombudsman Association (IOA) members.

Staffing and workload

The various offices differ in their level of staffing. Many federal ombuds are part-time; only 60 percent of the offices reported a full-time ombuds. Most ombuds work with little administrative support. Some noted difficulties, for example, in being able to respond timely to calls, to do as many reviews as they think appropriate, or to keep the data they would like to keep. Anecdotally, the researchers heard a number of stories of offices that had been taxed beyond their resources.

Origin of the ombuds office

There were few clear patterns as to how the various ombuds offices in the survey began. The authorizations for the ombuds offices responding to the survey are varied, with under 40 percent started by legislation, and over 60 percent by agency action. However, about a fifth of all offices also reported complex, nearly unique origins and developments, including various combinations of legislative, executive and/or judicial action.

Standards of practice

There were many sources cited for the contents of ombuds office charters (or other enabling documents), including guidelines from the American Bar Association (ABA), the International Ombudsman Association (IOA), the United States Ombudsman Association (USOA), COFO, the Federal Acquisition Regulation (FAR), Intelligence Community Directive 203 and Analytic Ombudsmen Guide, and the Whistleblower Protection Enhancement Act of 2012. Some ombuds told researchers that they would like to see clear standards of practice relevant to their specific professional type.

In the future, providing coherent standards of practice for many different types of federal ombuds would appear at first glance to be quite complex. However, over the years many federal ombuds have found common value in one or more of the sets of generally recognized

professional standards adopted by, respectively, the ABA, the IOA or the USOA. In this regard, most ombuds reported one or more of the following as standards of practice: confidentiality, credible review process, fairness, impartiality, independence, and informality.

Were an effort made to promulgate a common set of standards for the full spectrum of federal ombuds, *independence,* and *impartiality* would likely have reasonably similar definitions across the spectrum. Where there are differences it would be relatively easy for each type to make their definitions clear, as for example, the USOA does in its "Standards."

The issue of "*independence*" is tied to the reporting structure for the ombuds office. The USOA standards make explicit a list of ways that independence should be ensured. For organizational ombuds it is a best practice to report to the head of the agency and it is contrary to standards of practice to report to a compliance officer. The point is to be—and to be perceived as—a senior official, and "independent" from most managers in the agency. Many ombuds offices say they do report to the head of the agency or other very senior leadership but many also asked for review of this issue as it is notably inconsistently applied and subject to changes in agency leadership.

Given that the definitions of confidentiality in the three generally recognized sets of professional standards differ, *confidentiality* would be described differently for different types of ombuds. Again, the distinctions would be relatively easy to make clear for each type of professional practice.

The issue of *confidentiality* for federal ombuds includes the question of the mandatory disclosure to agency and other officials of certain types of information required generally of federal employees. (There is no similar mandatory reporting for the traditional classical ombudsman.) Some 40 percent of the ombuds responding to the survey described mandatory reporting of certain topics. Some described effective methods and guidelines for dealing with

this issue—for making sure that information about the most serious concerns gets to relevant managers—without breaching confidentiality. Some ombuds mentioned that these matters would benefit from detailed reviews and guidelines. They wish to preserve the ombuds office as near as possible as "zero barrier" offices, presenting no tangible or intangible cost to the person who wishes to call upon the ombuds.

The term "*credible review*" (a USOA standard) is not used by all ombuds. However, the concept of needing a high degree of expertise, training, access, appropriate independence, authorization, credible processes and resources—for reviewing and dealing with conflicts and disputes—is one to which most or all ombuds would likely be sympathetic. Likewise, the term "*informality*" (an IOA standard) does not have a well-defined meaning among all ombuds, even though many ombuds of all types speak of their work as "informal." However, "informality" could easily have a common definition, in the sense that almost no ombuds in our survey is authorized to make binding agency decisions, mandate policies, or formally adjudicate issues for the agency. Beyond that agreement, there could be some specific differences, in a definition for "informality," for each major type of ombuds.

Reports

About 75 percent of the ombuds report that they make some kind of report of their activities. Reporting methods vary, by office and by professional type. About half of those who responded to the survey say that they report privately within their agencies.

The keeping of case records and approved record retention schedule practices were reported as varied; all questions of case records appear specific to the type of ombuds professional practice. For organizational ombuds who belong to IOA, it is against standards of practice to keep permanent case records for the employer. Some ombuds reported they have records schedules approved by the National Archives and Records Administration (NARA) that

enable them to protect case record confidentiality. For many externals, case records are part and parcel of the job, and many reported a record retention schedule approved by NARA. As with standards of practice and mandatory reporting guidelines, this is a topic some ombuds suggested be reviewed to create guidelines relevant to each professional type.

Access to Independent Legal Counsel

About half of the ombuds have some access to independent counsel. For organizational ombuds who belong to IOA, access to independent legal counsel is a best practice. Externals and internals reported similar professional experience, and similar points of view, on this subject. In particular, 20 percent of all ombuds in the survey reported they do not have access to independent legal counsel; half of these were externals and half were internals.

Issues and functions

Ombuds deal with many different sets of issues depending on their professional type. On the other hand, there were many commonalities particularly among ombuds of the same type. Additionally, many "generalist" ombuds reported dealing with "specialist issues" like whistleblowing, procurement, and analytic rigor.

As a general matter, almost all the ombuds in this survey report working—in many different ways—to be seen as fair and credible. Almost all report that they do *not* make decisions binding on the agency or provide formal rights-based processes for redress, and none reported they issue decisions on appeals or make decisions on grievances. None report that they act as a witness, accompany a party in a formal process, or act as arbitrator or judge.

Almost all ombuds report helping their constituents to collect, organize and understand their own information. Most ombuds report working to develop responsible, ethical and effective options for their constituents and to provide relevant referrals. Most ombuds reported—throughout the survey—a wide variety of systems work, that is, working for

improvements in the functioning of their agencies. Eighty percent of ombuds report informal fact-finding, 75 percent report providing education and briefings, and 60 percent report reviewing data files and studies to make systems recommendations. Some ombuds report that they focus almost solely on education, training, and providing information on resources and rules and how they work.

Advocacy

The question of advocacy by ombuds is broad and complex and deserves much more research. Each of the advocate offices is unlike the others in origins, mission, standards of practice, training of ombuds, and functions.

Several advocates mentioned explicitly that they begin their work and often remain as impartial conflict managers and dispute resolvers. Some are explicitly charged to be impartial, at least in the sense of having no conflicts of interest.

Some of the best known and longest lasting ombuds offices are designated advocates. The Taxpayer Advocate is a well-known example. Other advocates have recruited and trained many volunteer ombuds and have done so for decades; the Long Term Care ombuds and family ombuds in the Navy and Coast Guard are some of the best-known examples.

Some Accomplishments of Federal Ombuds

The survey collected numerous reports and a wide range of ombuds achievements to many different stakeholders. The following highlights, and percentages, are derived from survey responses submitted by many kinds of offices with the ombuds title:

Highlights include:

- About half of all ombuds report supporting significant systems changes.
- About 80 percent report having helped individuals in a significant way to resolve the issues they have brought to the ombuds.

- About half of all ombuds report having contributed to significant cost savings by dealing with complaints, reducing litigation, and settling serious disputes.
- More than half report identifying "new issues" for their agency and helping with "early warning."
- About 40 percent report significant contributions in effective handling of "very serious problems."
- About 60 percent reported identifying significant patterns of concerns that were not well known or being ignored.
- About 70 percent reported preventing problems through trainings and briefings.
- About 75 percent reported serving as an important liaison between or among colleagues, units or agencies.
- About 90 percent reported their work resulted in a constituent receiving a fair process who previously did not.

Requests to ACUS from a Substantial Number of Participants

Many ombuds professionals asked for standardization of: the use of the title; standards of practice, and terms of reference; reporting arrangements; resources to maintain a statistical data base and for facilitated self-assessments, mentoring and continuous education; agreement about retention and appropriate destruction of case records for different types of ombuds; and availability of outside counsel. Ombuds emphasized that government-wide information and outreach about ombuds and their value are badly needed. Many ombuds mentioned being grateful to COFO, and would like it (or a newly formed strong central office) considerably strengthened to standardize and support the ombuds profession in the federal government. Ombuds would also like to make recommendations to OPM about an OPM classification for the profession and a standard role for senior ombuds at the GS-15 and SES levels.

Some Thoughts on Further Research

The survey results simply sketch an outline of the federal ombuds "map," based on self-reports. Those who filled out the long survey may comprise a quarter or more of all federal ombuds offices. More substantiation of promising best practices might be gleaned from additional case studies on specific offices or types of ombuds. To the extent possible, further verification of the full spectrum of ombuds could be accomplished by sustained individual outreach to offices that did not participate in this study by survey or otherwise. These would be helpful though not necessary predicates to standardization of the profession within different ombuds types.

Although the researchers had the gracious help, and extensive expertise, of some five dozen federal ombuds, it was not possible to make an independent examination of the offices' self-reports. (Self-reports may of course have a point of view and may not be complete.) Moreover, ombuds—by standards of practice and ethical norms—are generally scrupulous about confidentiality. A significant number of ombuds graciously spoke with us, and at length, but off the record—declining to be on any list. In the future, COFO and other informal working groups may, in continuation of their present work, be able to help the whole profession, in a systematic fashion, with facilitated self-assessment and peer review, and to gather more data from more offices. Groups might, for example, be able to foster case studies and more data gathering and the writing of discreet, informative reports of their own work by individual ombuds offices.

Summary and Highlights of Phase 2 – Showcasing Ombuds Programs and Practices

While Phase 1 provided aggregate information about the range, variations, commonalities and practices among federal ombuds offices, Phase 2 offers a more detailed and nuanced analysis

of effective ombuds' offices, procedures and activities. Phase 2 consists of six complementary sections: 1) introduction, 2) case studies, 3) profiles, 4) summary of insights and promising best practices, 5) possibilities for further research, and 6) policy considerations concerning ombuds standards of practice. Below is a description of each major section.

Case Studies of Current Ombuds Offices

The case studies in Phase 2 of the research carry the report beyond the limited self-reports of ombudsmen that characterized Phase 1. Phase 2 provides a more thorough analysis of effective ombuds' practices with inquiry into the complex conditions and a variety of factors that shape ombuds offices, and how they operate. We include perspectives of the various functions of each of the subject ombuds offices from multiple stakeholders (e.g., key leadership, human resources, counsel's office, equal employment or civil rights office, and ombuds' constituents). The case studies offer a variety of perspectives on criteria and benchmarks for measuring ombuds' effectiveness and impact. They also offer powerful examples and stories of success. These may serve as useful models for agency leaders, federal ombudsmen, and others interested in developing, re-designing or expanding ombuds offices.

The four offices were selected for the case studies based on the following criteria: 1) specific ombuds programs or practices identified by peers in Part 1 as positive 'models'; 2) ombuds identified in Part 1 by researchers as utilizing innovative or effective practices (e.g. based on findings from Part 1 analyses or as described in relevant literature); 3) ombuds offices that demonstrate differences and illustrate important variations in practice; and 4) the ombuds' willingness to participate as a case study. Those offices are the Consumer Financial Protection Bureau's Office of the Ombudsman, the Department of Energy's Office of the Ombudsman, the Department of the Interior's Organizational Ombudsman within the Office of Collaborative

Action and Dispute Resolution, and the Internal Revenue Service' Office of the Taxpayer Advocate. A team of three, including Head Researcher Dr. Neil Katz, Project Manager Lauren Marx, and Research Assistant Kathleen Watkins-Richardson, conducted dozens of 30-45 minute interviews with ombuds and key stakeholders from the four agencies on site the week of July 18-22, 2016, and additional telephone interviews in August.

Profiles

In addition to the case studies, the chiResolutions team offers 3 important "profiles." A major finding from many months of research is the discovery of the extraordinary complexity of federal ombuds office configurations and achievements. Included, therefore, are substantial profiles of the Long Term Care Ombuds Program and the Navy Family Ombuds Program originally assembled for the chiResolutions team by students from the Harvard Law School Negotiation and Mediation Clinical Program, supervised by their Clinical Fellow and Associate. An additional profile of the professional organization for federal ombuds—the Coalition of Federal Ombudsmen (COFO)—consists of interviews with the present chair, descriptions of some notable "promising best practices," and comments from two previous chairs and other ombuds surveyed as part of this study.

The Long Term Care Ombuds Program and the Navy Family Ombuds Program have very broad reach throughout American society and are configured in complex and unusual ways. Together with the Office of the National Taxpayer Advocate (one of our case studies), they are the face of federal ombudsmen for many Americans. The Long Term Care and Navy Family Ombuds are also notable:

- For adding strong elements of advocacy to the traditional understanding of the "impartial" model;
- They are very large "sets" of ombuds in North America; they touch the lives of a great many people and—almost by definition—many citizens who are underserved;
- They appear to be much appreciated by most of their stakeholders including the Congress, their sponsors and constituents;
- They appear to be sustainable and long-lived. These advocate ombuds appear to be among the most sustainable group of 'neutrals' in the U.S.;
- Like other ombuds, they do significant training of ombuds, which is a "promising best practice;"
- They have a high level of diversity;
- Their origins, and mandates or original directives, missions, structures, training, and standards of practice are very different from each other; and
- The Long Term Care and Navy Family Programs appear remarkably cost-effective, in part because many are volunteers and many are part-time. More exploration of their roles, functions, and the value they contribute, may be helpful in determining whether models with volunteers and distributed, trained, part-time, "adjuncts" could become a "promising best practice" in some other domains.

Summary of Most Significant Insights from the Case Studies and Profiles

Leaders of the agencies selected for our case studies cited tangible and intangible benefits of ombuds services including reduction of legal costs, respect for diversity, enhancement of employee morale, increase in employee engagement, and improved products and/or services that ultimately advance the agency mission. They have found that ombuds reinforce a positive

organizational culture demonstrating that the agency cares about its employees and its external stakeholders, and wants to help them with challenges they face. The ombuds become important ambassadors for the organization while also cultivating staff and leaders to become ambassadors for the ombuds program, as follows:

1. The most effective ombuds portray a passion for helping people in need, a non-judgmental and welcoming attitude, and a willingness to both give and receive feedback. Ombuds work is challenging and stressful; it is not for everybody. High levels of emotional intelligence, communication and problem-solving skills, diplomatic competencies, and a "tool-box" of conflict resolution methods are all necessary. Further, ombuds must be able to work as a close-knit team.
2. Ombuds and ombuds offices have been successful with on-going efforts to improve the organizational culture. The role and services of ombuds demonstrates a clear commitment to a culture of continuous improvement at all levels of the organization, a conflict culture of proactively managing or resolving differences, and one in which all constituents are treated with respect and support. The ombuds office is an important symbolic and actual representation of this culture; modern methods of communication are extending the effectiveness of ombuds.
3. Ombuds offices are a powerful way to foster government as accessible and responsive to the needs and concerns of both external and internal stakeholders. They serve as a "voice" to and within government institutions. They humanize government (especially important in today's political climate); helping people navigate with and within the agency. Many ombuds are involved in continuous system and policy reviews; this may be the function that gives the greatest return on investment.

4. There are successful ombuds programs that rely heavily on volunteer assistance, thereby increasing their apparent cost effectiveness. The largely volunteer programs and those with collateral duty adjuncts, and local "workplace advisors," offer interesting models that could be further investigated. However, these ombudsmen are unique in many ways and the use of volunteer or collateral duty ombuds would not be practical or consistent with professional standards, including independence, in many other contexts.
5. The case study advocacy programs combine advocacy along with traditional ombuds standards and characteristics. Each does this in quite different ways. Each warrants in depth studies by scholars and the ADR community.
6. The Coalition of Federal Ombudsmen (COFO) has provided a wide variety of service in professionalizing the role and status of ombuds in the federal government.

Highlights of the Value Provided by Federal Ombuds

The research queried repeatedly the value that federal ombuds provide to the populations they serve. Thus, the case studies, along with the quantitative and qualitative survey responses, revealed a wide range of tangible benefits of ombuds services including reduction of legal costs, enhancement of employee morale and customer satisfaction, increased employee and customer engagement, improved products and/or services that ultimately advance the agency mission, and significant contributions to systemic changes in agency policy or procedure through effective handling of an "early warning" issue or serious dispute.[4]

Internally facing ombuds and their agency stakeholders offered numerous examples of how ombuds assist employees by modeling an organizational culture of respect, caring, fair

[4] See Part 2, Research Report, p. 317

process, problem-solving, and a strong desire for continuous improvement. The ombuds role is seen as a critical point of initial contact and "sounding board" for many employee issues and conflicts, providing a place for employees "to be heard, an opportunity to vent and/or learn about their rights, and gain a reality check."[5]

Furthermore, through their coaching and training efforts, ombuds have enhanced the "conflict competency" of employees and "helped to evolve the agency culture so that the norm is now for disgruntled employees to sit down and try to work through conflicts first instead of filing grievances."[6] Ombuds often assist the agency in ways beyond widely accepted dispute resolution practices for resolving disputes such as mediation or arbitration. High levels of emotional intelligence, communication and problem-solving skills, diplomatic competencies, and a "tool-box" of conflict resolution methods are all necessary to help prevent conflict in the present and future. The following is a representational statement:

> [T]here are conflict resolution gaps unmet by mediation. Specifically, mediation is often used just prior to, or as a preliminary stage of, formal adjudicative processes such as discrimination or grievance complaints. It [mediation] appropriately focuses on issues between parties at the lowest possible level. Mediation does not address larger systemic issues that gave rise to the issues in the first place.[7]

Internally facing ombuds contribute significantly in creating a positive work environment by "increasing morale and helping employees and managers to refocus, reframe, and address conflict…in a healthy and productive manner" by improving conflict resolution processes, promoting interest-based problem-solving, and being proactive and creative (coming up with "cutting edge solutions") in addressing problems before the issues "infect the workplace."[8]

[5] See Part 2, Research Report, p. 136
[6] See Part 2, Research Report, p. 136
[7] See Part 2, Research Report, p. 336
[8] See Part 2, Research Report, p. 77

Externally facing ombuds spoke passionately about their commitment to "humanize government" to constituents by providing a "bridge between concerns of individuals and government offices and allowing voice, understanding, affirmation, strategies, and resolution for a population that would otherwise be ignored or have limited options." In addition, they operate as a "switchboard operator" to channel constituents to the most appropriate resources."[9] Ombuds offices assist people in "navigating through the agency, fellow employees, industry, and the public," and being involved in continuous system and policy reviews.[10] Comments received by the research team included:

> [The agency] Ombudsman's Office is active in the field and community because it brings renewed energy and great access for the public. The Ombudsman's role "encourages another line of input…Constructive criticisms come out."[11]
>
> The Office "holds up a mirror to our [agency]…and elevates our visibility into certain issues …The Office is a safety-valve, giving one more place for consumers to go."[12]
>
> "[The] Ombudsman's Office helps to reinforce or verify a problem—and from a totally independent source…shining a light on certain issues."[13]
>
> The impeccable manner in which these ombudsmen exercised independence, impartiality, and confidentiality truly represented a role model for the federal ombudsman community and the entire organization.[14]

As previously referenced, a critical and unique contribution of all observed ombuds is their role and function in working with systemic issues. By developing rapport, trust, and credibility with clients, employees, managers, and top agency officials, ombuds are a conduit to change through their ability to bring repetitive and/or significant topics to management's attention in a safe, confidential way—particularly with controversial issues that might not come

[9] See Part 2, Research Report, p. 114
[10] See Part 2, Research Report, p. 242
[11] See Part 2, Research Report, p. 96
[12] See Part 2, Research Report, p. 97
[13] See Part 2, Research Report, p. 98
[14] See Part 2, Research Report, p. 104

forward without confidentiality"—and "raising issues others cannot or will not discuss . . . such as barriers in governance structures."[15]

The systemic nature of many of these benefits was apparent in the numerous interviews conducted with case study stakeholders, as reflected in the following statements from senior level administrators:

> "They give me a more accurate and holistic picture of what is happening than I have myself, since I am in the midst of the crisis/issue…they can prevent problems so I don't have to clean them up."[16]
>
> "The ombuds is an option for those who are fearful of bringing concerns to management because of the perceived threat of retaliation."[17]
>
> The ombuds have been touted for their emphasis on the importance of developing organizational "conflict competencies" as a priority within the Department, and for installing conflict management competency as part of performance evaluations for managers."[18]
>
> There are usually several cases a year that have saved the Department some embarrassment, proving the "case for the ombuds."[19]
>
> The Ombudsman's Office is an "early warning mechanism for potentially negative or highly impactful problems"— a critical risk management perspective.[20]
>
> Significant contributions can be supported by the innumerable legislative changes influenced by [agency] since its inception, represented by the 78 percent relief rate in cases in 2015, and symbolized by the fact that the [agency] does not have a queue of unresolved cases. The [agency] also has an 88 percent customer satisfaction rate in which "[clients] indicated they were very satisfied or somewhat satisfied with the service provided", even when they did not find relief of their case.[21]

These are just a few of the many comments by ombuds and critical stakeholders regarding positive benefits and impacts of federal ombuds. Overall, they seem to be significant

[15] See Part 2, Research Report, p. 349
[16] See Part 2, Research Report, p. 114
[17] See Part 2, Research Report, p. 136
[18] See Part 2, Research Report, p. 136
[19] See Part 2, Research Report, p. 137
[20] See Part 2, Research Report, p. 97
[21] See Part 2, Research Report, p. 156

actors in attempts to restore faith, trust, and a sense of fairness and decency to constituents, whether they be internal or external to the organization. One agency Chief of Staff summed up his high regard for the work and value of the ombuds in his own agency by stating "the ombuds and their contributions are one of the best ideas in government."[22]

Ombuds Professional Standards

Many major professions—for example, physicians, lawyers, engineers, scientists, and accountants—have standards of practice, defining characteristics, codes of ethics and guidelines. These structures define the very concept of the profession, establish a consistency in practice, and allow for the professional development and growth of the field. This research affirms what ACUS recommended in 90-2, and what the ombuds community in both the private and public sectors, both domestically and abroad, has understood for many years: the value of the ombuds is predicated on appropriate professional standards of practice and definitional characteristics.

If one looks across all types of federal ombuds, three core standards define the professional practice of nearly all of them: *independence*, *neutrality* or *impartiality*, and *confidentiality*. These core standards have reasonably similar definitions across the different types of ombuds. Where there are some differences, for example with the type of confidentiality offered to constituents, they are mostly consistent with at least one of the three sets of professional standards (IOA, ABA, and USOA),[23] and it would be relatively easy for each type of ombuds to make their distinctions clear. In addition, most ombuds share three common characteristics: adherence to the concept of providing *credible review* of the issues that come to

[22] See Part 2, Research Report, p. 114
[23] See discussion of standards in Report Part 2 Section 1.3.3 and 1.3.4

the office, a commitment to *fairness*, and assistance in the resolution of issues without making *binding agency decisions*.

The core standards and common characteristics encourage all parties to a dispute or problem to work with the ombuds office, especially those who are reluctant to approach the government with an issue or may be afraid of management,[24] or those within the agency who are wary of complainants. They encourage constituents to explore effective options. By creating a safe space, ombuds receive unvarnished feedback about an agency's programs and processes. This feedback informs the recommendations ombuds make to the agency as to how to better serve their internal and external constituents—a benefit to all taxpayers.[25]

As the value of the federal ombuds continues to be recognized, we expect the profession to grow. If the nation is to fully benefit from federal ombuds, the unique and complementary combination of professional standards and characteristics that define the ombuds role and differentiate it from other agency functions, should be recognized. The standards and characteristics discussed herein provide essential guidance for the structure and operation of federal ombuds offices necessary to serve the federal government and all constituents.

Promising Best Practices for Federal Ombuds Offices
Identified from Research, Surveys, Interviews, Case Studies and Profiles

Starting a new office

- *Immediate priorities.* Work with relevant senior managers and ombuds colleagues to establish an office consonant with standards of practice for the particular type of practice. At the same time, listen to and build relationships with all stakeholders.

[24] For example, researchers heard from two Department of Energy employees who were hesitant to bring concerns to their collective bargaining representative or the labor relations and human resources offices because of the potential negative impact it might have on their reputation. See Report Part 2 Section 2.2.2 for more information.
[25] Office of the Attorney General, 2007; See also Report Part 2 Sections 1.6, 1.7, and 2.2 for specific examples.

- Consult with professional groups, other federal ombuds, and with all relevant managers.
- Consult with the Inspector General with jurisdiction over the agency, agency counsel, and other senior managers when drafting the charter, and spell out the safeguards for confidentiality for the office.
- Consult with top leaders and support them in setting the tone and preparing the agency for an ombuds function. Ensure that the ombuds reports to the top-most level of the agency.
- Seek support from leaders to get a records schedule approval by the National Archives and Records Administration (NARA), which provides that confidential ombuds records may be destroyed soon after an issue is resolved.
- Craft an "ombuds elevator speech," for use wherever appropriate, and use the organizational chart as a road map, to begin meeting with all stakeholders.

Developing intra-agency support

- *Build trust throughout the agency.* Ombuds must be seen as safe, accessible, and credible to all stakeholders to earn sustainable and public support from top leaders in the organization.
  - Help stakeholders to understand how the ombuds' work in surfacing and helping to resolve issues serves their needs. This is an important element of developing support.
  - Communicate with all stakeholders, constituents, and agency employees, an absolute commitment to uphold the core professional standards of independence, confidentiality and impartiality/neutrality as the anchor of ombuds practice.

  - It is critical from the outset that the ombuds office handles its mandate, independence, and confidentiality in ways that build the trust of agency leadership, management, and other stakeholders. Ongoing discreet communication, as appropriate, early and often about problems as they surface, and strong, collaborative relationships perceived by stakeholders as objective (but sensitive to their concerns) and supportive will avoid creating any perception that the ombuds is creating discontent or stimulating complaints rather than enabling existing issues to surface and providing impartial assistance in the interests of all concerned.

- *Collaborate with other offices.* Utilize every opportunity to reach out to offices that might be concerned about territorial issues.
  - Recognize that this may well be the first time that individuals are working with an ombuds; many may not even know what one is. Explain the ombuds role, figure out how the offices can collaborate, and discuss referrals from and to the ombuds office. Prepare to do this over and over as personnel changes occur.
  - Adopt a permanent and consistent, "we can't do this without you" constructive approach with all line and staff managers with conflict management responsibilities. Establish an on-going dialogue with each and schedule regular check-in meetings with the divisions, offices, and others with whom the ombuds office works closely.
  - Learn everything you can from other managers about issues facing the agency and constituents. Share knowledge generously (consistent with confidentiality commitments.)

Outreach and promotion of services

- *Communicate creatively.* Outreach demonstrates value through visibility and providing immediately useful information, and works to address misconceptions about the office.
    - Develop attractive and catchy informational "business cards," infomercials, videos, posters.
    - Make sure the ombuds office is accessible to all stakeholders (be mindful of disabilities, language groups, etc.).
    - Include specific plans for connecting with specific stakeholders, as part of the office's strategic plan. Implement annual "in-reach" and outreach plans as part of the office's strategic plan, with objectives to ensure intentionality in how the office engages with their internal/external stakeholders.
    - Make use of available technology—for example, to offer webinars, pre-taped content, and an online interface (if appropriate to the type of office) to contact or submit questions to the ombuds, and post FAQs, self-help tools, etc.
    - Make presentations at new employee or new customer orientations and provide updates during leadership meetings, all hands meetings, etc.
    - Utilize trainings and workshops as an opportunity to provide specialized information appropriate to the agency mission, the purposes of the office, and the interests of constituents—for conflict prevention, and relationship building with stakeholders.
    - Host stakeholder forums to get critical input from constituents about the challenges they face, and how the office might more effectively meet their needs. These meetings should be expertly facilitated and structured to provide for candid

discussion. Follow-up afterward with stakeholders; see if getting back to them raises more concerns.

The multi-person ombuds office: nimble by design

- *Complementary blend of skills.* If possible, seek ombuds and other office personnel with a variety of work and educational experience. This will permit the office to offer a wider understanding of different cultures and to offer a broader menu of skills.
  - Seek skills in areas such as human services, organizational development, law, public administration, multi-cultural workshop design and development, data analysis, and report writing.
- *Sustainability*. Continue to develop new talent.
  - Bring in detailees who will gain valuable experience and might become permanent staff or share the ombuds experiences when they return to their former position.
  - Provide opportunities for newer ombuds to "shadow" more experienced ombuds; create a mentoring program and informal mentoring channels.
  - Engage in explicit individual career development and succession planning.
  - When requesting additional staff, make the "business case" for more ombuds by comparing the sizes and levels of activity in similar offices, and highlighting the need for succession and career planning that would ensure long-term success, stability, and sustainability for the agency's ombuds' capability.
- *Continuity of service*. If appropriate to the type of office, all ombuds should be able to step in for one another—with appropriate means to be kept up to date about one another's cases.

  - Provide an "ombuds of the day" or other means to handle walk-ins.
- *Supportive environment.* Given the stressful and somewhat isolating nature of ombuds work, foster positive, supportive relationships that are important for effectiveness and well-being—among all members of an ombuds office, and with other ombuds colleagues.
  - Encourage colleagues to protect their health, understand and deal with compassion fatigue, and affirm the accomplishments of other ombuds (consonant with the standards of practice).
  - Implement appropriate office and working group discussions of the welfare of ombuds professionals.

Assessments and accountability

- *Encourage structured "accountability" practices* such as:
  - Hold regular, facilitated self-assessments at the individual and office levels;
  - Review data collection and data analysis methods on a yearly basis;
  - Implement and monitor appropriate time frames for acknowledging contacts to the office and starting on problem resolution;
  - Encourage intra-office and working group professional discussions of the goals of the specific ombuds office, new issues, patterns of issues, the specific functions being performed, cohorts being served, referrals to and from other offices and outside constituents;
  - Consider tracking innovative and objective metrics such as "repeat consultation requests from top managers," a decline in formal grievances after training programs, numbers of visits from bystanders regarding concerns or exemplary

practices, numbers of referrals to and from other elements in the conflict management system, or invitations to facilitate senior management meetings;

- Provide mid-year reports in addition to annual reports.

Promoting a conflict competent culture

- *Agency-Wide skill development.* Consider that one of the key functions of internally-facing ombuds office is to develop "core conflict competencies" of employees. This may be done in one-on-one coaching, group and team facilitations, workshops and trainings, brown-bag lunches, and leading by example.
- *"Complaints can be a compass."* Keep reviewing the interests of constituents. Review the breadth and depth of initiatives, (as relevant to the type of ombuds office), that are now being performed by ombuds, and consider adding to the portfolio of services provided if consistent with the skills sets in the ombuds office. Consider proactive functions such as teaching team audits, facilitated self-assessment in a given work unit, monthly forums, conducting anonymous focus groups at the request of senior managers, specialized coaching for abrasive senior professional and managers.
- *Examine who is* accessing the ombuds office, and consider reaching out to those who are thought to have concerns but are not contacting the office: bystanders, anonymous callers, and different language groups.
- *Link to performance measures.* Support making conflict competencies part of performance evaluation for managers and supervisors at the agency, and then, over time, installing these as performance measures for all employees.
- *Supporting coordination of a conflict management system*. Structure and develop the idea of the ombuds as a designated independent office that as part of its mission

fosters the effectiveness of the whole agency conflict management system (which may be called by another name).

- In some agencies the ombuds may help develop and support programs with "unit mediators," "responsible workplace advisors," collateral duty ombuds, or volunteers who are not federal employees.
- In some agencies the ombuds office may explicitly or informally help to coordinate various conflict management functions. In some agencies ombuds participate in regular meetings with the heads of other conflict management offices such as HR, EAP, security, EEO, to discuss common issues, help build constructive working relationships, prevent misunderstandings, and develop plans to address various trends, themes, and systemic issues.

Summary and Highlights of the Legal Analysis[26]

The legal analysis considers the following issues:

- To what extent and how the functions of federal ombuds are covered by the Administrative Dispute Resolution Act (ADRA) including its prohibitions and requirements, in particular those in § 574 on confidentiality;
- How case law and commentary on the law of privilege and the inherent authority of judges to manage discovery might further illuminate the scope of federal ombuds confidentiality; and

[26] Citations in the legal portions of the Report follow Bluebook rather than APA formatting.

- How adherence to ombuds professional standards and the rights and obligations under ADRA are affected by other statutes, regulations and management directives, specifically how these standards are affected by:
    - Law pertaining to the affirmative duty of federal employees to report certain information to agency or other authorities (e.g., the duty to report waste, fraud, abuse and corruption);
    - The law pertaining to actual and implied notice to federal agencies;
    - Federal sector labor and employment law;
    - The Inspector General Act;
    - The Freedom of Information Act (FOIA), the Federal Records Act (FRA) and the Privacy Act;
    - Statutes creating ombuds positions in the federal government.

Given the limited case law interpreting ADRA, in any context, or specifically addressing the legal status of federal ombuds, the broader legal context of alternative dispute resolution and analogous case law are considered. Where relevant, some developments in case law regarding ombudsmen in the private sector will be discussed.

The legal analysis presents the spectrum of law in the respective areas of inquiry from settled to uncertain, and addresses key legal questions raised by commentators. Recommendations are made as to how federal ombuds might best position themselves, practically and legally, to protect the commitments they make to constituents about office standards, given the current legal environment.

Ombuds privilege, inherent judicial authority to manage discovery, the Administrative Dispute Resolution Act of 1996 (ADRA)

Requests for testimony or confidential documents may come to the federal ombuds in the course of litigation. ADRA[27] § 574(b)(5) sets forth the balancing test a court must use to weigh the need for testimony or disclosure against the confidentiality provided for in § 574. However, inasmuch as the extent of ADRA's coverage of ombuds is not yet clearly established, precedent on privilege and inherent judicial authority to manage discovery may be useful to safeguard confidentiality offered by a federal ombuds office.

The law on privilege and confidentiality as it pertains to ombuds generally and federal ombuds specifically is not clear and still evolving if in an uncertain direction. It is clear, however, that it does matter how the ombuds and his/her agency respond to any request (in whatever form) in the course of litigation for documents or testimony concerning confidential ombuds information. Specifically, how well the purposes, structure, function and need for confidentiality on the part of that ombuds office as well as ombuds generally is both explained and documented for the tribunal may be determinative. Further, if the ombuds and his/her counsel seek to quash a subpoena or obtain a protective order, any court that might consider a qualified privilege or that might be inclined to exercise its inherent authority to manage discovery will look to what the ombuds and the ombuds' agency have done to create an expectation of confidentiality as well as evidence that the core ombuds professional standards are actually adhered to in that office and agency.

With the 1996 reauthorization of ADRA and the addition of "use of ombuds" to the Act's list of means of alternative dispute resolution (ADR), Congress clearly expressed its intent to

[27] Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–584 (2012) [cited herein by section number only].

include "use of ombuds" under the Act's requirements and protections.[28] Apart from its recognition that the use of ombuds is a form of alternative dispute resolution, the chief practical impact of the inclusion of ombuds in the definition of "means of alternative dispute resolution"[29] is in the application of § 574 on confidentiality. Significantly, § 574 imposes obligations on the neutral and the parties with respect to confidentiality. It is not articulated as a privilege but rather as a proscription describing what neutrals and parties may and may not do and the specific exceptions to confidentiality that apply respectively. ADRA § 574 "does not provide a mere privilege or general endorsement of 'confidentiality.' It prohibits disclosure . . . ."[30] Further, § 574's reach exceeds that of a privilege in that it is not limited to adjudicatory applications.

The addition of "use of ombuds" would seem to resolve the issue of the Act's coverage of ombuds, at least to the extent ombuds are engaged in dispute resolution. However, the meaning of the text becomes less clear as the wide range of functions of federal ombuds are held up to the other definitions in that section and the language in § 574 itself. Congress could reinforce and fully realize its intent in adding "use of ombuds" to ADRA by expressly aligning the Act's provisions to embrace those ombuds functions that require confidentiality in order to provide the safe place for raising issues that is the ombuds' special purpose.

Failing such an amendment and in the absence of case law applying ADRA to ombuds, some basic principles of statutory interpretation must be considered. As the plain meaning of the text is not clear and there appears to be no legislative history[31] that definitively resolves the

[28] *See* 5 U.S.C. § 571(3) ("'[A]lternative means of dispute resolution' means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and *use of ombuds*, or any combination thereof . . . .") (emphasis added).
[29] *See* 5 U.S.C. § 571(3).
[30] AM. BAR ASS'N, AD HOC COMM. ON FED. ADR CONFIDENTIALITY, GUIDE TO CONFIDENTIALITY UNDER THE FEDERAL DISPUTE RESOLUTION ACT 17 (2005) (*ABA Guide to Confidentiality*).
[31] See in this regard S. Rep. No. 104-245, at 8 (1996): "To increase the effectiveness of the work of ombuds, the bill would extend the protections of the ADR Act's confidentiality provisions to disputes in which they serve as neutral parties." This statement underlines the intention of Congress to include ombuds under the umbrella of ADRA § 574

questions that have been raised concerning which ombuds functions are covered by the amendment of ADRA to include "use of ombuds" as a form of alternative dispute resolution, the underlying presumption of statutory construction which requires the body construing the statute to do so in a manner ensuring that the statute is internally consistent may be employed. "A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[32] Likewise, with respect to statutory amendments, there is "a general presumption" that "when Congress alters the words of a statute, it must intend to change the statute's meaning."[33]

Bearing these principles in mind and turning to the problematical ADRA terminology, the definition of "issue in controversy" in the statute is very broad, requiring only that the issue be "*concerning* an administrative program" about which there is disagreement.[34] Workplace mediations and internal ombuds existed when the definition was formulated. Therefore, one can assume that those who drafted and those who passed the 1996 ADRA reauthorization intended to include both direct, explicit disputes about a government program and those that *concern* a government program less directly by virtue of their impact on federal budgets, contracts, processes or employees administering or executing federal government programs.[35]

On the question of whether or not ADRA's use of "parties" in the plural precludes most ombuds activities from ADRA coverage, it must be said that the visible assistance offered to the constituent seeking help in resolving an issue may be limited to the ombuds' interaction with that visitor. Significantly, however, an "issue in controversy" by definition denotes a conflict between two or more parties and accordingly the use of "parties" in the plural should not be an

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but does not clarify which ombuds functions are covered or what might have been meant by the somewhat contradictory term "neutral parties."

[32] Hibbs v. Winn, 542 U.S. 88, 101 (2004).

[33] *See* United States v. Wilson, 503 U.S. 333, 336 (1992); Stone v. INS, 514 U.S. 386, 397 (1995).

[34] *See* 5 U.S.C. § 571(8).

[35] *See also ABA Guide to Confidentiality*, *supra* note 4, at 60.

obstacle to coverage of this sort of assistance with dispute resolution. Further, one could conclude that the agency is always, in effect, *de facto* a party when the ombuds is, under the general terms of his/her appointment by the agency, assisting in the resolution of an issue concerning an agency program.[36]

Finally, there is the question of whether or not federal ombuds are "neutrals" within the meaning of ADRA. Under the Act, a neutral need only be someone who is acceptable to the parties and who assists in the resolution of issues in controversy. As the ABA Ad Hoc Committee noted, under ADRA "a neutral need not even be 'neutral'" as long as the parties agree.[37] Inasmuch as the constituent voluntarily chooses to seek assistance from the federal ombuds, and the agency as another party employs (or contracts with) the ombuds for purposes, *inter alia*, of resolving agency issues, both parties can be deemed thereby to have indicated consent. Hence, the ombuds practicing to professional ombuds core standards is a neutral under the Act's limited requirements.

The policy concerns surrounding ombuds and confidentiality tend to be distinct from that of other ADR professionals in one key aspect. For most ADR processes, the dispute has already surfaced and confidentiality is critical primarily to protect the process, to encourage frank discussion without fear that what is said during the ADR process will later be used against the party offering the communication in question. With an ombuds, however, confidentiality is also of paramount importance as an incentive to get the constituent "in the door" and the issue raised in the first place, thereby affording the ombuds the opportunity to assist the constituent and the agency in resolving it before it escalates or festers with negative consequences for all concerned. Moreover, ombuds often are able, without breaching confidentiality, to ensure that the agency is

[36] *Id*. at 61.
[37] *Id*. at 60.

apprised of serious issues brought by constituents for whom anonymity is a necessary inducement and this would not be possible were ombuds unable to make credible pledges of confidentiality.

Questions have been raised about whether all of the techniques deployed by the ombuds in the interests of resolving disputes are covered by ADRA. The typical ombuds approach includes a variety of techniques and practices for providing assistance that may range from merely discussing and referring the visitor to other informal or formal channels all the way to looking into the matter, shuttle diplomacy or mediation or beyond. Moreover, the ombuds' dispute resolution process is a fluid one. There is no set sequence of practices and, in fact, an ombuds may go back and forth among them. As a practical matter, it is difficult to envision how the purposes of ombuds confidentiality under ADRA § 574 could be served were confidentiality to attach, detach and then reattach at uncertain intervals during a dynamic dispute resolution process depending on what dispute resolution practice is being deployed at a given time.

Further, there is consensus in federal guidance that the confidentiality provisions of ADRA begin to apply when the individual seeking assistance first approaches the dispute resolution office and raises their concern.[38] Inasmuch as many issues that are raised with ADR intake personnel never reach a dispute resolution session during which the neutral facilitates a discussion among the parties, whether because the constituent accepts a referral to a different process or decides not to pursue the matter, it must be presumed that ADRA's confidentiality provisions apply even when there is no later dispute resolution session among the parties that might be recognized as mediation, conciliation or adjudication. Absent that presumption, confidentiality would only attach after the fact once it is known whether or not a party raising an

[38] *See, e.g.*, Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085, 83,090 (Dep't of Justice December 29, 2000) (concluding that ADRA confidentiality applies to the intake and convening stages of ADR).

issue goes forward with a specific ADR session procedure like mediation. Such an approach would increase the uncertainty of potential users of ADR and diminish their willingness to approach the ADR office.

There are some ombuds functions that cannot easily be placed within the requirements and protections of § 574 on confidentiality because they are not associated with resolution of particular issues. These might include, for example, general conflict management training that is not part of an intervention or facilitation of agency conversations that are proactive (e.g. strategic planning) and not part of resolving existing conflicts. Some, though not all, of the systems work that a subset of federal ombuds engage in would also likely be excluded from coverage depending on the extent to which it might be deemed part of a resolution process. However, a host of other ombuds functions that are integral elements of the uniquely fluid and flexible approach to resolving issues that is the hallmark of ombuds practice must be covered by ADRA.

In light of all of the above, a practical and reasonable interpretation of the addition of "use of ombuds" to ADRA entails a reading that would look at the ombuds dispute resolution process as a whole, having the coverage of § 574's protection and requirements beginning when the visitor first approaches the ombuds with a concern and ending when the ombuds has either ceased to be involved or breaches confidentiality with the visitor's consent or under a § 574 exception. Moreover, this would be so without regard to which techniques are used in the interests of resolving the issue. As noted, ombuds functions that are not associated with resolving issues would likely not come within ADRA's requirements.

In sum, each ombuds office should consider for itself the office's standards, the full gamut of roles it plays and functions it performs in light of ADRA's definitional requirements and § 574's limitations. Some, and in most cases many, but not all functions of offices practicing to professional standards will likely be covered by ADRA. It is important to

understand what these are, what this means for constituents, the agency and the ombuds and what options the ombuds has given the legal environment in its entirety. For those functions covered by ADRA, § 574 imposes obligations and requirements pertaining to confidentiality with specified exceptions. For those offices created by statute, any specifications in that statute addressing independence, impartiality, and most particularly confidentiality would prevail over ADRA's requirements.

Possible modification of ADRA

Ombuds practicing to core professional standards and indeed the ADR community at large would benefit from certain targeted amendments to ADRA. These would add needed clarity and remove much of the ambiguity as to whom the Act covers and the scope of that coverage. These changes might include:

- **§ 571. Definitions**
  - (8) "issue in controversy" — broaden this definition to *expressly* include internal conflicts of the kind handled by workplace mediators, conflict management coaches and internal ombuds and to include issues for which the neutral directly engages with only one party in the course of providing assistance in resolution. The latter would also require modification of § 571(6) to the effect that both parties need not actively participate in a "dispute resolution proceeding."
  - (9) "neutral" — to align with current thinking, clarify that this term denotes any individual acceptable to the parties who functions specifically to aid the parties in resolving an issue in controversy. This would align the definition in § 571 with the descriptive language in § 573(a).

- (10) "party" — clarify that this includes both named parties and any person or entity significantly affected by a potential resolution of the issue in controversy *and* specify additionally that when a federal neutral aids parties to resolve an issue in controversy the agency is always, *de facto*, a party. In either case, the Congress or the agency has determined that the cost of establishing ADR programs is outweighed by the benefits to the government precisely because the government is significantly affected directly or indirectly by the conflicts these programs are designed to address. (This amendment to include the government as a party might not be necessary should the amendments recommended above for § 571(6) and (8) be enacted.)

- **§ 574. Confidentiality —** Note that if this provision is modified to more definitively embrace federal sector ombuds, allowance should be made for those ombuds offices: 1) that practice according to USOA standards which provide for confidentiality only at the discretion of the ombuds which is at variance with confidentiality as defined in the current § 574 and/or 2) that were created by statutes specifying the scope of confidentiality applicable to that office.

  - § 574(3) — the exception for communications "required by statute to be made public" should be modified to comport with its presently generally understood meaning as applying to communications required *by statute* to be made public *or* reported to agency officials or other authorities.

  - § 574(j) — consideration should be given to harmonizing the Privacy Act and the Federal Records Act with the confidentiality provisions in § 574 as has already been done with FOIA.

- An additional provision precluding access by Inspectors General to confidential ombuds communications should be considered. Barring that, a provision clarifying the relationship between ombuds and Inspector Generals might be added, providing a test for access similar to that for courts found in § 574(a)(3).
- § 574 should also be modified to articulate what is now generally understood, i.e., that confidentiality begins to attach at the time of ADR intake. Further, it should be made clear that ADRA's confidentiality persists until the dispute resolution process concludes, regardless of the techniques employed throughout or whether or not there is a resolution. If the government determines that offering alternative means of resolving issues is in its interest, it is also in the government's interest to encourage use of these options by protecting users from their first approach to the office offering the service. If formal settlement is reached, it should be disclosed if required by law.

Independent Counsel

It cannot be sufficiently emphasized that when there is a legal challenge to ombuds confidentiality, the ombuds should have access to independent rather than agency counsel. If an ombuds does not have independent counsel, the ombuds should be cautious about what dispute resolution communications are revealed to the agency's counsel should that counsel be called upon to defend ombuds confidentiality. Although attorney client privilege may apply, there may be times when the interests of agency counsel and that of the ombuds may not be congruent, for example when a threat to confidentiality emanates from or involves another office within the

agency that agency counsel also represents.[39] Likewise, counsel may be required to balance a variety of agency interests in deciding during case negotiations which of an opposing litigant's demands to accept. Agency counsel may also lack experience or expertise in addressing requests for disclosure of confidential ombuds communications.

For these reasons, and in the interests of reinforcing ombuds independence, every effort should be made to obtain independent counsel for federal ombuds when and as issues arise or when the ombuds wants to manage legal questions proactively. Recognizing that few agencies routinely use outside counsel, thought might be given by ACUS[40] and/or COFO to engaging the Department of Justice in identifying a niche in government where a cadre of lawyers might be educated on legal issues pertaining to ombuds and available for advice and/or litigation support should the need arise. Alternatively, COFO might identify those within their ranks who are lawyers and willing to serve in, at least, an advisory capacity. The "Shared Neutrals" program administered by the Department of Health and Human Services might serve as a model for such sharing of expertise and services among agencies.[41]

Practicing to standards

Those legislative and agency officials who would create offices that assist designated constituents to raise and resolve issues should only attach the "ombuds" title to the office if the office adheres to the three core principles of confidentiality, independence and impartiality/neutrality as represented in at least one of the three sets of professional standards

[39] *See* Charles L. Howard, THE ORGANIZATIONAL OMBUDSMAN, ORIGINS, ROLES, AND OPERATIONS—A LEGAL GUIDE 305–07 (2010).
[40] *See* Administrative Conference Recommendation 87-3, Agency Hiring of Private Attorneys, 52 Fed. Reg. 23,632 (June 24, 1987).
[41] *See Sharing Neutrals*, HHS, http://www.hhs.gov/dab/divisions/adr/sharingneutrals/sn.html.

(IOA, ABA and USOA).[42] Existing offices that do not reflect these principles should be modified to adhere to them, or renamed.

The evident lack of a clear definition of federal ombuds based on core principles makes a common set of expectations for federal ombuds more difficult to achieve and these principles, for those federal offices that have adopted them, more difficult to legally defend.[43] Of equal importance, failure to establish and operate an ombuds office consistent with all three applicable ombuds core standards will undermine that ombuds' ability to defend a challenge to any one of them. From a legal perspective, while ADRA has since 1996 included "use of ombuds" in its definition of the means of alternative dispute resolution, as we have discussed its embrace of those with the ombuds title and their various practices is still not definitively resolved.[44] A common understanding, at least, of the meaning of the ombuds title would render interpretation of this addition to the Act far less daunting.

Articulating and maintaining standards for ombuds would not inhibit legislative or executive efforts to create "complaint handling" offices that provide a combination of, for example, some of the following services to internal or external constituents: inquiry, dispute resolution, facilitation, coaching, communication, outreach, and training. However, if the architects of such offices want to claim the name and obtain the particular benefits of ombuds practice, those creating such offices must fully commit to the standards that have been shown to make those benefits possible. This means at a minimum placing the ombuds office where it is,

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[42] *See* IOA STANDARDS OF PRACTICE (2009); ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004) [hereinafter *2004 ABA Standards*]; UNITED STATES OMBUDSMAN ASSOCIATION (USOA), MODEL SHIELD LAW FOR OMBUDSMAN (1997).

[43] Moreover, the inconsistent and unpredictable definitions and standards for ombuds in the federal sector may well confuse the general perception of what an ombuds is and undermine attempts to build and secure the profession nationwide in both the public and private sectors.

[44] Nor is it at all clear that the Act would apply to any offices in the federal government that might be acting as ombuds offices consistent with ombuds professional standards but without the ombuds title except when they are performing one of the functions specifically named as a means of alternative dispute resolution in ADRA § 571(3).

and is perceived to be, independent and permitting it to operate as independently as is possible consistent with law and accountability. Similarly, it means that ombuds confidentiality and impartiality under the standards must be broadly communicated, respected and supported from the top down.

Some agency leadership, particularly those in the public eye who are accountable for what transpires within their area of responsibility, may be uncomfortable with the notion of a largely independent office within the agency offering confidentiality in one of the forms recognized by ombuds standards. Accordingly, one best practice that characterizes some of the most effective ombuds offices is their ongoing efforts to forge strong relationships characterized by mutual understanding with agency leadership and management, legal offices, Inspector General offices, officials responsible for FOIA requests, records management and, if relevant, equal employment opportunity (EEO), and employee and labor relations. Such efforts build the trust necessary to inspire confidence in the confidentiality, independence and impartiality that are the lifeblood of ombuds effectiveness.

Affirmative duty to report

To the extent that ombuds communications are covered under ADRA, where a *statutory* duty to report information conflicts with confidentiality, the duty to report prevails under § 574(a)(3) even if it conflicts with professional standards on confidentiality and whether or not there is an imminent risk of serious harm.[45] The same would be true for many of the reporting

[45] There are few statutes that clearly fall within ADRA § 574(a)(3)'s exception for information that "is required by statute *to be made public*." At one point, the "made public" language in ADRA seemed to be interpreted literally, often in connection with the Clean Air Act, which requires that "[a]ny records, reports or information obtained under . . . this section shall be made available to the public." The evolving consensus appears to be that the exception relates more to the use of the word "statute" in § 574(a)(3) than to the "to be made public" language. The two statutes, other than possibly the Inspector General Act, most commonly assumed to fall within ADRA's exception are 18 U.S.C. § 4, which makes it unlawful for any person — including federal employees — to fail to report knowledge of a felony to appropriate authorities, and 28 U.S.C. § 535(b), which requires executive branch employees to report the crimes of other government officers and employees. In addition, some statutes creating

obligations found in non-statutory sources that merely echo the statutory duties to disclose criminal or potentially criminal behavior. However, where the duty to report is not contained in a statute, the prohibitions in ADRA *against* disclosure arguably would prevail. In this regard, some regulations and management policies with reporting requirements are not reflected in statutory requirements as such. For example, while fraud and abuse may be potentially criminal, "waste" may not be and the federal employee duty to report fraud, waste and abuse is not "required by statute."[46]

Congress signaled the notably high value it placed on confidentiality in dispute resolution processes by, *inter alia*, restricting the exception at issue to statutory conflicts and therefore agencies should not attempt to impose additional agency specific obligations on ombuds to report information obtained during communications that would otherwise be confidential. However, given that some non-statutory obligations to report are of general application across the government and not insignificant, it is important to consider how these obligations might be harmonized with prohibitions against disclosure under ADRA. Ombuds should consider with counsel and agency leadership what non-statutory legal and ethical reporting obligations must be applicable in light of the standards and exigencies of the office and other pertinent factors. Any discussion should for most ombuds include the caveats that where possible at the outset all efforts will be made to encourage the visitor to report the information him or herself through appropriate channels, anonymously if necessary, or to permit the ombuds to get information where it needs to go while protecting the identity of the visitor. Additionally, the ombuds should advise that if the visitor declines and the ombuds affirmatively is obligated to report, it will be

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ombuds offices may have specific provisions pertaining to the duty to disclose. These would come within the exception in § 574(a)(3).

[46] *See, e.g.*, 5 C.F.R. § 2635.101(b)(11) (requiring that all federal executive branch employees "shall disclose waste, fraud, abuse, and corruption to appropriate authorities.").

done by the ombuds in a manner that protects confidentiality to the fullest extent possible. In the end, if there is a clear mutual understanding with the agency on the parameters of confidentiality and this understanding is shared in a timely fashion with constituents and visitors, an argument can be made that the parties have implicitly agreed to "alternative confidential procedures for disclosure" under ADRA § 574(d)(1)[47] rendering a subsequent consistent disclosure by the ombuds permissible under § 574. Since most ombuds in this study reported that they sometimes learn of very serious concerns, effective mutual understandings between ombuds and agencies are essential to build sufficient trust so that ombuds offices can continue to serve the government as a safe, accessible and credible point of access.

The question of notice to the agency

Under the Restatement (Second) of the Law of Agency and generally recognized black letter law on agency, there may be few, if any, situations in which federal ombuds are clearly authorized by statute or charter to receive notice on behalf of the employing agency. Therefore, most federal ombuds created and practicing to core standards specifying independence will not be agents of their employer for purposes of legal notice or authorized conduits of information, and accordingly only the specter of implied agency would be a concern. The ombuds' knowledge of pertinent information might be imputed to the employer should appropriate measures not be taken by agency officials and the ombuds him or herself to clearly confirm the ombuds' independence and disavow any authority on the ombuds' part to receive notice or act as a conduit of information. Most importantly, the ombuds should not be assigned to a position or given collateral responsibilities that would be inconsistent with such disavowals of agency. It

[47] 5 U.S.C. § 574(d)(1) ("The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding . . . .").

goes almost without saying that in order to make this assertion the ombuds should in fact be independent, unencumbered with management responsibilities outside the ombuds office itself and with the requisite independent operational authority.

Concerning notice and agency, federal ombuds should be very specific and cautious when they articulate to constituents and at large about their standards, mission and functions. Communications about most ombuds offices stress that they are safe, confidential places to raise issues of concern. Indeed, this study shows that ombuds are sometimes called by visitors with very serious concerns and by potential whistleblowers. In touting these beneficial and sometimes unique attributes, it is imperative that communications avoid any implication that the ombuds has authority to receive complaints for the agency, or otherwise serve as an official conduit of information (assuming that to be the case). Likewise, when communicating about the scope and benefits of the confidentiality offered by the ombuds office, it is important that constituents understand the trade-offs of this practice including with respect to notice. It follows that ombuds must be informed themselves and inform their constituents about what other options there might be for reporting a concern and seeking formal investigation and/or redress if the ombuds cannot provide these services.

Federal ombuds differ widely in purpose and structure and these differences may have particular significance with respect to agency. While most federal ombuds will be able to make the case that they are not agents, it is possible that some offices bearing the ombuds title, particularly among those that serve external constituents, are situated, structured and promoted as a conduit of information to their respective agencies or may reasonably be perceived as such absent effective communications articulating facts that would negate agency status.

Additional legal issues relevant to federal ombudsmen

As discussed at length in the legal analysis section of this Report, there are several federal statutes that federal agencies and ombudsmen should take into account in order to establish an effective ombuds office that both adheres to core ombuds professional standards and is compliant with the law. These include: federal sector labor law, in particular Federal Service Labor-Management Relations Statute (FSLMRS)[48] § 7114; the Inspector General Act of 1978[49] and the impact of the Federal Records Act (FRA),[50] Freedom of Information Act (FOIA)[51] and the Privacy Act[52] on ombuds records and confidentiality.

Proposed ACUS Recommendation

The following draft constitutes the proposed recommendation of the Administrative Conference's Committee on Rulemaking, for consideration by the full Conference membership. It is based on the authors' suggested recommendations submitted to the Conference on September 19, 2016. The original draft was modified by the committee, with the assistance of the authors and the Conference staff, through a series of public committee meetings held on September 24, October 19 and November 3, 2016, as well as by consideration and review of comments received via the ACUS website. The authors have worked collaboratively with all concerned to understand the concerns raised and are in general agreement with this proposed recommendation as put forth by the Committee on Rulemaking.

The Use of Ombudsmen in Federal Agencies

Committee on Rulemaking

Proposed Recommendation for Council | November 17, 2016

This recommendation updates and expands on the Administrative Conference's earlier Recommendation 90-2, *The Ombudsman in Federal Agencies,* adopted on June 7, 1990. That

[48] 5 U.S.C. §§ 7101–7135 (2012).
[49] Pub. L. No. 95-452 (Oct. 12, 1978) (codified as amended at 5 U.S.C. app (2015)) ("IG Act").
[50] 44 U.S.C. §§ 3101–3107 (2016) (current through Pub. L. No. 114-185).
[51] See also 5 U.S.C. § 552 (2016) (current through Pub. L. No. 114-185).
[52] 5 U.S.C. § 552a (2012).

document concentrated on "external ombudsmen," those who primarily receive and address inquiries and complaints from the public, and was formulated before "use of ombuds" was added to the definition of "means of alternative dispute resolution" in the Administrative Dispute Resolution Act (ADRA)[1] in 1996. In 90-2, the Conference urged "the President and Congress to support federal agency initiatives to create and fund an effective ombudsman in those agencies with significant interaction with the public," believing that those agencies would benefit from establishing either agency-wide or program-specific ombudsman offices.

The present recommendation is based on a study of the far broader array of federal ombuds[2] that have been established since the Conference's earlier recommendation on this subject. Federal ombuds now include multiple variations of both primarily externally-focused and primarily internally-focused ombuds (i.e., those who receive inquiries and complaints from persons within the agency). These individuals and offices can and do make a distinct and beneficial contribution to government effectiveness. While all forms of alternative dispute resolution expressly embraced by the ADRA have the capacity to reduce litigation costs and foster better relationships, the ombuds alone affords the constituent and the agency the opportunity to learn about and address issues before, in effect, they have been joined. Constituents and the agency are served by the ombuds' skilled, impartial assistance in resolution, and the agency is served by the opportunity for critical early warning of specific and systemic issues.

[1] 5 U.S.C. §§ 571-84; *see* § 571(3).

[2] The term *ombudsman* is Scandinavian and means representative or proxy. Variations on the term exist in the field (ombudsmen, ombudsperson, ombuds, etc.) In this recommendation, the term "ombuds" will be used as the predominant term to be as inclusive as possible. For historical background on the use of ombudsmen in other countries and their potential value in the United States, *see* Walter Gellhorn, OMBUDSMEN AND OTHERS: CITIZEN PROTECTORS IN NINE COUNTRIES (1966), and Walter Gellhorn, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES (1966).

The research conducted to support this recommendation, including quantitative and qualitative surveys, interviews, case studies and profiles, revealed that federal ombuds can add value to their agencies in a variety of ways.[3] Ombuds (1) identify significant new issues and patterns of concerns that are not well known or being ignored; (2) support significant procedural changes; (3) contribute to significant cost savings by dealing with identified issues, often at the earliest or pre-complaint stages, thereby reducing litigation and settling serious disputes; (4) prevent problems through training and briefings; (5) serve as an important liaison between colleagues, units, or agencies; and (6) provide a fair process for constituents.

Externally-facing ombuds were more likely to report supporting the agency with specific mission-related initiatives; helping the agency to improve specific policies, procedures, or structures; making administrative decisions to resolve specific issues; helping within the agency to keep its organizational processes coordinated; and advocating on behalf of individuals. Internally-facing ombuds were more likely to report helping constituents by providing a safe way to discuss perceptions of unsafe or illegal behavior; promoting the use of fair and helpful options; helping to prevent problems by coaching one-on-one; and providing group training and briefings to constituents. Whistleblower ombuds and procurement ombuds—consonant with their particular focus on more narrowly defined responsibilities—described their accomplishments as providing specific information and education, and guidance about very specific matters of concern to their constituents.

Since the Conference last considered ombuds in the federal government, the milieu in which government operates has, by all accounts, become more polarized, with government itself often the target of suspicion and hostility. In a challenging environment in which many federal

[3] Houk et al., A Reappraisal — The Nature and Value of Ombudsmen in Federal Agencies, *available at* www.acus.gov/research-projects/ombudsman-federal-agencies-0

agencies struggle to maintain the trust of the public they serve and even of their own employees, the ombuds is uniquely situated to provide both pertinent information and assistance in resolving issues to constituents and the agency alike. The ability of the ombuds to provide a place perceived as safe — which can offer a ready, responsive, and respectful hearing and credible options — in itself builds trust. And trust is a commodity without which government in a democratic society cannot function effectively.

Accordingly, the Conference continues to urge Congress and the President to create, fund, and otherwise support ombuds offices across the government consistent with the recommendation articulated below. Further, the Conference urges those agencies that already have ombuds, and those that are contemplating creating ombuds offices, to align their office standards and practices with those included in this recommendation. In general, the Conference recommends these practices to the extent applicable in particular situations, regardless of whether an ombuds office or program is created by Congress or by an agency.

Although functionally the federal ombuds landscape is quite diverse, most federal ombuds share three *core standards of practice* — independence, confidentiality, and impartiality — and share common characteristics. The core standards are set forth in the standards adopted by the American Bar Association (ABA),[4] the International Ombudsman Association (IOA),[5] and the United States Ombudsman Association (USOA),[6] though with some variations, particularly with respect to confidentiality. These organizations' standards are generally followed, as applicable, and considered essential by the ombuds profession, both within and outside government. The further an ombuds office and the agency in which it resides deviate

[4] ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004), *available at:* https://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf.
[5] IOA STANDARDS OF PRACTICE (2009), *available at:* https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf.
[6] USOA GOVERNMENTAL OMBUDSMAN STANDARDS (2003), *available at:* https://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf.

from the three core standards in practice, the more difficult it will be to defend whatever confidentiality the office does offer should it be subjected to legal challenge.

Most federal ombuds also share the following common characteristics: (1) Ombuds do not make decisions binding on the agency or provide formal rights-based processes for redress; (2) they have a commitment to fairness; and (3) they provide credible processes for receiving, reviewing, and assisting in the resolution of issues. The three core standards and these common characteristics, taken together, are central to the ombuds profession.

Agencies have the authority to establish ombuds offices or programs. Although legislation establishing a generally applicable template and standards for federal ombudsmen has not been enacted, the 1996 addition of the words "use of ombuds" to the definition of "means of alternative dispute resolution" in ADRA clarifies that, when the ombuds office is assisting in the resolution of issues that are raised to it under its mandate, it is covered by the Act's provisions.[7] The Act's coverage attaches to communications that take place when the constituent first approaches the ombuds office with an issue and continues to cover communications that occur until the case is, in effect, closed.[8] While ADRA's definition of "alternative means of dispute resolution" includes use of ombuds, federal agency ombuds programs would benefit from certain targeted amendments to ADRA to clarify certain definitions (e.g., "issue in controversy,"

[7] Further, ombuds are 'neutrals' within the meaning of the Act including those ombuds who, after impartial review, advocate for specific processes or outcomes. *See* ABA STANDARDS, *supra* note 4, at 14.

[8] The Act's coverage is generally understood to begin at intake in alternative dispute resolution offices and continue until closure even when the constituent's interaction with the office ends without a session process involving both parties. For example, guidance concerning ADRA confidentiality issued by the Federal Alternative Dispute Resolution Council in 2000 concluded that ADRA confidentiality applies to the intake and convening stages of ADR. *See* Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085, 83,090 (Dep't of Justice Dec. 29, 2000). Further, the Interagency ADR Working Group Steering Committee in its Guide states that ADR program administrators are "neutrals when they are helping the parties resolve their controversy by, for example, discussing ADR options with the parties, coaching, and preparing them to negotiate . . . ." *See* Interagency ADR Working Group Steering Comm., Protecting the Confidentiality of Dispute Resolution Proceedings 8 (2006). While ADRA covers dispute resolution communications occurring through the duration of the case, the neutral's obligation to maintain this confidentiality does not end with the closure of the case.

"neutral," "party") and other provisions as they apply to the work of ombuds, to expressly align them with current practice.

The research for this recommendation also identified three areas of potential conflict between (a) the requirements of ADRA § 574 and the scope of confidentiality that ombuds offer to constituents and (b) other legal requirements that may be applicable in certain situations. Federal ombuds should be aware of these matters and how they may affect particular ombuds programs:

(1) The relationships among their statutory duties to report information, the requirements of ADRA § 574(a)(3) on confidentiality, their agency's mission, and the professional standards to which they adhere. Any latitude they may have under ADRA § 574(d)(1) should be considered in reaching an understanding within the agency and with constituents of the breadth and limits of confidentiality consistent with statutory requirements.

(2) The requirements and interrelationship of the Federal Records Act,[9] the Freedom of Information Act,[10] and the Privacy Act,[11] with regard to agency records and other documentation.

(3) The effect on confidentiality of the Federal Service Labor-Management Relations Statute,[12] pursuant to which the union may be entitled to notice and an opportunity to be present at meetings with bargaining unit employees (for those ombuds that have employees with a collective bargaining representative among their constituents, or who may have cause, in the course of resolving issues that have been brought to them, to engage with represented

[9] 44 U.S.C. Chaps. 21, 22, 29, 31, and 33.
[10] 5 U.S.C. § 552.
[11] 5 U.S.C. § 552a.
[12] 5 U.S.C. §§ 7101-35; *see* § 7114.

employees as well as management on issues affecting the terms and conditions of bargaining unit employees).

In addition, this recommendation addresses standards applicable to federal agency ombuds offices and related issues involved in creating such offices. The practices included in this recommendation are intended to highlight some overarching beneficial practices observed among federal ombuds and to supplement the recommended practices and guidance available from various ombuds professional organizations.

To foster continual improvement and accountability of individual ombuds offices, the recommendation advises that each ombuds office arrange for periodic evaluation of its management and program effectiveness. Evaluation of ombuds by colleagues within the office can be useful if the office is of sufficient size to make this feasible. Otherwise, any external evaluation should be conducted by individuals knowledgeable about the roles, functions, and standards of practice of federal ombuds. For example, peer evaluation using the expertise of similar types of ombuds in other offices or agencies, or by outside ombuds professionals, may be suitable.

Finally, the recommendation urges the creation of an entity within the Executive Branch to serve as a government-wide resource to address certain issues of common concern among agency ombuds that transcend organizational boundaries. Such an office, perhaps modeled on the Council of the Inspectors General on Integrity and Efficiency (CIGIE), could develop, over time, a credible professional system for credentialing federal ombuds programs.

RECOMMENDATION

1. *Establishment and Standards.*

(a) Agencies should consider creating additional ombuds offices to provide places perceived as safe for designated constituents to raise issues confidentially and receive assistance in resolving them without fear of retribution. They should ensure that the office is able to, and does, adhere to the three core standards of independence, confidentiality, and impartiality, as these standards are described in generally recognized sets of professional standards, which include those adopted by the American Bar Association, the International Ombudsman Association, and the United States Ombudsman Association, and they should follow, to the extent applicable, the procedural recommendations below. Existing offices with the ombuds title that do not adhere to these standards should consider modifying their title, where permitted, to avoid any confusion.

(b) Ombuds offices created by executive action should be established or governed by a charter or other agency-wide directive specifying the office's mandate, standards, and operational requirements, so that others in the agency and the public are aware of the office's responsibilities.

2. Legislative Considerations.

(a) Congress should consider creating additional ombuds offices. When Congress creates a new ombuds program, it should observe the procedural principles contained in this recommendation, to the extent applicable.

(b) Any action by Congress creating or affecting the operations of agency ombuds offices, whether through amendment of the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. §§ 571-84, or other legislative action, should reinforce the core standards of independence, confidentiality, and impartiality. Any such actions should maintain clarity and uniformity of definitions and purpose for federal agency ombuds, while allowing for differences in constituencies (whether primarily internal or external), type of office (advocate, analytic, organizational, etc.), and agency missions.

3. *Leadership Support.*

(a) Agency leadership should provide visible support, renewed as leadership changes, for the role of ombuds offices in the agency and their standards, including independence, confidentiality, and impartiality.

(b) Agency leadership should consider carefully any specific recommendations for improved agency performance that are provided by agency ombuds.

4. *Independence.*

(a) To promote the effectiveness and independence of ombuds offices, agencies should consider structuring ombuds offices so that they are perceived to have the necessary independence and are separate from other units of the agency. To ensure adequate support from agency leadership, ombuds offices should report to an agency official at the highest level of senior leadership. Ombuds offices should not have duties within the agency that might create a conflict with their responsibilities as a neutral, and their budgets should be publicly disclosed.

(b) The agency should ensure that the ombuds has direct access to the agency head and to other senior agency officials, as appropriate. Whether by statute, regulation, or charter, ombuds should expressly be given access to agency information and records pertinent to the ombuds' responsibilities as permitted by law.

(c) Ombuds and the agencies in which they are located should clearly articulate in all communications about the ombuds that the ombuds office is independent and specifically not a conduit for notice to the agency.

(d) Federal ombuds should not be subject to retaliation, up to and including removal from the ombuds office, based on their looking into and assisting with the resolution of any issues within the ombuds' area of jurisdiction.

5. *Confidentiality.*

(a) Consistent with the generally accepted interpretation of ADRA § 574, as applied to alternative dispute resolution offices, agencies should understand and support that the Act's requirements for confidentiality attach to communications that occur at intake and continue until the issue has been resolved or is otherwise no longer being handled by the ombuds, whether or not the constituent ever engages in mediation facilitated by the ombuds office. Restrictions on disclosure of such communications, however, should not cease with issue resolution or other indicia of closure within the ombuds office.

(b) Agencies (or other authorizers) should articulate the scope and limits of the confidentiality offered by ombuds offices in their enabling documents (whether statute, regulation, charter or other memoranda) as well as on the agency website, in brochures and any other descriptions or public communications about the office utilized by the office or the agency.

(c) Agency leadership and management should not ask for information falling within the scope of confidentiality offered by the ombuds office.

(d) If information is requested from an ombuds during discovery in litigation, or in the context of an internal administrative proceeding in connection with a grievance or complaint, then the ombuds should seek to protect confidentiality to the fullest extent possible under the

provisions of ADRA § 574, unless otherwise provided by law. Agencies should vigorously defend the confidentiality offered by ombuds offices.

6. *Impartiality.* Ombuds should conduct inquiries and investigations in an impartial manner, free from conflicts of interest. After impartial review, ombuds may appropriately advocate with regard to process. An ombuds established with advocacy responsibilities may also advocate for specific outcomes.

7. *Legal Issues.* Federal ombuds should consider potential conflicts in the following areas:

(a) The relationships among their statutory duties to report information, the requirements of ADRA § 574(a)(3) on confidentiality, their agency's mission, and the professional standards to which they adhere.

(b) The requirements and interrelationship of the Federal Records Act, the Freedom of Information Act, and the Privacy Act, with regard to agency records and other documentation.

(c) The effect on confidentiality of the provision in the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114, where applicable, pursuant to which the union may be entitled to notice and an opportunity to be present at meetings with bargaining unit employees.

8. *Staffing.*

(a) Agencies should reinforce the credibility of federal ombuds by appointment of ombuds with sufficient professional stature, who also possess the requisite knowledge, skills, and abilities. This should include, at a minimum, knowledge of informal dispute resolution practices as well as, depending on the office mandate, familiarity with process design, training, data analysis, and facilitation and group work with diverse populations. Agency ombuds offices

should also seek to achieve the necessary diversity of ombuds skills and backgrounds on their staffs to credibly handle all matters presented to the office.

(b) While the spectrum of federal ombudsmen is too diverse to recommend a single federal position classification, job grade, and set of qualifications, agencies and the Office of Personnel Management should consider working collaboratively, in consultation with the relevant ombuds professional associations, to craft and propose appropriate job descriptions, classifications, and qualifications, as set forth in the preceding subsection, covering the major categories of federal ombuds.

9. *Training and Skills.*

(a) To promote accountability and professionalism, agencies should provide training to ombuds with regard to standards and practice, whether offered by one of the ombuds professional organizations or working groups, or from within the government.

(b) Ombuds should identify steps to build general competency and confidence within the office and to provide specific support to ombuds when cases become highly emotional or complex. More generally, as a regular practice to support and improve their skills, federal ombuds should participate in relevant professional working groups or ombuds association training programs.

(c) Ombuds offices should consider the use of developmental assignments via details to other agencies or offices, as appropriate, supplemented by mentoring, which can be helpful as part of their training program.

10. *Access to Counsel*. To protect the independence and confidentiality of federal ombuds, agencies should ensure, consistent with available resources, that ombuds have access to legal counsel for matters within the purview of the ombuds, whether provided within the agency with appropriate safeguards for confidentiality, by direct hiring of attorneys by the ombuds

office, or under an arrangement enabling the sharing across agencies of counsel for this purpose. Such counsel should be free of conflicts of interest.

11. *Physical Facilities.* To reinforce confidentiality and the perception of independence, to the fullest extent possible and consistent with agency resources, the agency should ensure that the physical ombuds office and telephonic and online communications systems and documentation enable discreet meetings and conversations.

12. *Evaluation.* Each ombuds office should, as a regular professional practice, ensure the periodic evaluation of both office management and program effectiveness for the purposes of continual improvement and accountability.

13. *Providing Information.*

(a) Ombuds offices should provide information about relevant options to visitors to the ombuds office, including formal processes for resolving issues, and their requirements, so that visitors do not unintentionally waive these options by virtue of seeking assistance in the ombuds office. Correspondingly, ombuds offices should not engage in behavior that could mislead employees or other visitors about the respective roles of the ombuds and those entities that provide formal complaint processes.

(b) Agencies should disclose publicly on their websites the identity, contact information, statutory or other basis, and scope of responsibility for their ombuds offices, to the extent permitted by law.

(c) Agency ombuds offices should explore ways to document for agency senior leadership, without breaching confidentiality, the value of the use of ombuds, including identification of systemic problems within the agency and, where available, relevant data on cost savings and avoidance of litigation.

14. *Records Management.* Federal ombuds offices should work with agency records officials to ensure appropriate confidentiality protections for the records created in the course of the office's work and to ensure that ombuds records are included in appropriate records schedules.

15. *Agency-wide Considerations.*

(a) Ombuds offices should undertake outreach and education to build effective relationships with those affected by their work. Outreach efforts should foster awareness of the services that ombuds offer, to promote understanding of ombuds (and agency) processes and to ensure that constituents understand the role of the ombuds and applicable standards.

(b) To ensure that there is a mutual understanding of respective roles and responsibilities within the agency, ombuds offices should work proactively with other offices and stakeholders within their agencies to establish protocols for referrals and overlap, to build cooperative relationships and partnerships that will enable resolutions, and to develop internal champions. Such initiatives also help the ombuds to identify issues new to the agency, as well as patterns and systemic issues, and to understand how the ombuds can use the resources available to add the most value. Outreach should be ongoing to keep up with the turnover of agency officials and constituents and should utilize as many communications media as appropriate and feasible.

16. *Presidential Action.* The President should create an entity within the Executive Branch to serve as a central resource for agency ombuds to address matters of common concern and to support federal ombuds integrity, effectiveness, and professionalism by developing policies, technical standards, and standards for evaluation.

Suggestions to ACUS for Evaluation of Proposed Recommendation

Federal agency use of ombuds offices is broad and varied, and many different types of ombuds offices offer private or confidential services. Confidentiality poses challenges, but not barriers to evaluating how this report's recommendations will achieve policy objectives. We can, for example, easily measure the number of offices configured in accordance with the recommendations in this report.

An institutional-level, *quantitative* measure is the number of federal agency ombuds offices in operation at a given point. A related *qualitative* measure would be the number of offices operating with a charter reflecting the three core standards of practice: independence, impartiality and confidentiality, and the three common characteristics of ombuds offices: ombuds do not make decisions binding on the agency or offer formal rights-based processes for redress; ombuds have a commitment to fairness; and ombuds provide credible processes for receiving, reviewing, and assisting in the resolution of issues.

Assessment at the office level should be grounded in each office's functional role. The typology of federal ombuds offices distinguishes among six main categories—organizational, whistleblower, analytic, programmatic external, subject matter agency-wide, and advocate. Available evaluation measures and methods flow from the nature of each office's work, and relate to the office's impact on governmental and/or taxpayers' interests.

Methods appropriate to these contexts include surveying, assessing costs or time through records review, and documentation of organizational or operational changes. In the chart below, *surveying constituents* encapsulates online or paper-based questionnaires, telephone or in-person interviews, an occasional focus group or town meeting. *Assessing timeliness and cost* involves

records review of records maintained by offices other than the ombuds. *Documentation of changes* represents reports of revisions to operations or processes.

Organizational Ombuds offices

Purposes:

- Managing conflict constructively and informally; providing information to constituents about all formal and informal options
- Building constituent and organizational capacity to manage conflict
- Providing upward feedback to support earlier identification and engagement with problems/concerns
- Recommending and supporting systems improvements

Evaluation measures:

- Constituent perceptions of climate/culture/integrity
- Diminution of costs attributable to poorly managed conflict, poor communications, and unethical behavior
- Demonstrable, measurable benefits from mitigation/remediation of several, specific, complex and challenging issues
- Description of "new" problems identified for the agency; number of improvements to systems or operations supported by the ombuds office

Evaluation methods:

- Surveying constituents
- Assessing costs and changes in costs; describing improvements achieved in part from ombuds office initiatives
- Documentation of office operations including cases and cohorts served

Impacts:

- Informal confidential support for compliance with Federal rules and regulations
- Transparency
- Improved public understanding of Federal rules or regulations
- Improved communication with constituents
- Reduction in government and/or taxpayer costs

Whistleblower Ombuds offices

Purposes:

- Ensuring constituent knowledge of WPEA
- Monitoring complaint handling

Evaluation measures:

- Constituent knowledge of WPEA
- Lowered costs in terms of timeliness and fewer complaints

Evaluation methods:

- Surveying constituents, where possible
- Assessing timeliness and cost of conflict handling through review of complaints records

Impacts:

- Informal confidential support for compliance with Federal rules and regulations
- Transparency
- Public understandings of rules and regulations
- Improved communication with constituents
- Reduction in government and/or taxpayer costs

Analytic Ombuds offices

Purposes:

- Dealing safely and credibly with analysts' concerns about intelligence reports with respect to analytic rigor, excellence and integrity

Evaluation measures:

- Constituent (analysts) perceptions of appropriate handling of concerns
- Lowered costs in terms of timeliness and fewer complaints

Evaluation methods:

- Surveying constituents
- Assessing timeliness and costs of concern handling

Impacts:

- Informal confidential support for compliance with Federal rules and regulations
- Improved communication with constituents
- Reduction in government and/or taxpayer costs

Programmatic External Ombuds offices

Purposes:

- Facilitating informal resolution of external constituent concerns about agency actions or inactions

Evaluation measures:

- Constituent perceptions of appropriate handling of concerns
- Lowered costs in terms of timeliness and fewer complaints

Evaluation methods:

- Surveying constituents
- Assessing costs of conflict handling through review of complaints

Impacts:

- Support for compliance with Federal rules and regulations
- Greater transparency
- Public understanding of federal rules or regulations
- Reduction in constituent, government, and taxpayer costs

Subject Matter Agency-Wide External Ombuds offices

Purposes:

- Responding to external constituents' concerns about tasks/delivery orders/procurement

Evaluation measures:

- Constituent perceptions of appropriate handling of concerns

Evaluation methods:

- Surveying constituents
- Assessing timeliness and cost of resolving concerns

Impacts:

- Support for compliance with existing laws and regulations
- Greater transparency
- Public understanding of federal rules or regulations
- Reduction in constituents, taxpayer and government costs

Advocate Ombuds offices

Purposes:

- Evaluating claims of, and advocating on behalf of designated populations

Evaluation measures:

- Constituent perceptions of appropriate handling of concerns
- Diminution of costs attributable to poorly managed conflict and unethical behavior
- Demonstrable, measurable benefits from mitigation/remediation of several, specific complex and challenging issues or cases
- Tracking of systems changes

Evaluation methods:

- Surveying constituents
- Assessing timeliness and cost of resolving concerns
- Documentation of operational changes

Impacts:

- Better compliance with existing laws and regulations
- Better communication
- Reduction in constituents, taxpayer and government costs

Taxonomy of Federal Ombudsman

INTERNALS Ombuds who serve internal, or primarily internal constituents, including agency employees, contractors and subcontractors						
Type	**Definition**	**Authorizing Action**	**Constituent Groups**	**Standards of Practice**	**Purpose/Mission**	**Examples**
Organizational Ombuds	A designated neutral who provides confidential, informal, independent and impartial assistance to individuals through dispute resolution and problem-solving methods such as conflict coaching, mediation, facilitation, and shuttle diplomacy. The Organizational Ombudsman responds to concerns and disputes brought by visitors to the office and may report new issues, trends, systemic problems, and organizational issues to senior leaders, and work collaboratively to foster systems change.	Varies by agency to fit diverse cultures and missions though they are typically created by one of the following: agency directive, head of agency, agency or congressional mandate, and sometimes explicitly as part of a conflict management system.	Primarily agency employees, with some agencies including contractors, grantees, subcontractors, and external visitors	• Independence • Neutrality • Confidentiality • Informality	Provide constituents with safe, informal opportunities to be heard; assistance in identifying and pursuing options for managing or resolving concerns; facilitation of communication between or among conflicting parties; conflict resolution skills training; and upward feedback and recommendations and collaborative support to management about patterns of conflicts, hot-button issues or other matters of import to organizational leaders. Help organizations reduce costs related to conflict by resolving disputes informally, reducing the need for resources, time and energy spent by disputants in formal grievance processes and litigation. He or she does not advocate for individuals, groups or entities, but rather for the principles of fairness and equity. The Organizational Ombudsman does not play a formal role in conflict management, formally investigate problems brought to the office's attention, or represent any side in a dispute. When appropriate, he or she will refer individuals toward appropriate informal resources and formal processes within the organization.	NIH, Office of the Ombudsman, Center for Cooperative Resolution, NSA, NGA, DOJ BOP, Dept of State, Defense Intelligence Agency (DIA), Navy's Naval Criminal Investigative Service, Dept of Energy, US Secret Service, Dept of Interior
Whistleblower Ombuds	A designated individual or office whose role is to educate employees, contractors and grantees about prohibitions on retaliation for protected disclosures and their rights and remedies if they have been retaliated against for making protected disclosures. The law does not permit the Whistleblower Protection Ombudsman to act as a legal representative, agent, or advocate for employees, contractors and grantees.	Pursuant to the Whistleblower Protection Enhancement Act of 2012 (WPEA), each Inspector General (IG) shall, in accordance with applicable laws and regulations governing the civil service - designate a "Whistleblower Protection Ombudsman." 5 U.S.C.A. App. 3; Inspector General Act	Agency employees, as well as contractors, grantees, and subcontractors	Whistleblower Protection Ombuds follow the same standards as the IG or OIG. • Independence • Confidentiality • Objectivity/Impartiality • Professional Judgment	Education, particularly about rights under the Whistleblower Protection Enhancement Act, relevant protections, working to see that complaints are being handled appropriately, with Quality Control, and Liaison functions. WB Ombuds do not get involved in the resolution of complaints, but they do provide information to employees who are making or contemplating making protected disclosures.	Whistleblower Protection Ombuds can be found in all IG offices.
Analytic Ombuds	An individual or office responsible for responding to concerns raised by Intelligence Community analysts about adherence to analytic standards (including tradecraft standards) in analytic products.	The National Security Act of 1947, as amended; the Intelligence Reform and Terrorism Prevention Act of 2004; Executive Order 12333, as amended; Presidential Policy Directive/PPD-28; and other applicable provisions of law. Paragraph E3b of Intelligence Community Directive (ICD) 203, "Analytic Standards," directs the head of each IC element to designate an analytic ombuds.	Intelligence Community Analysts	• Neutrality • Confidentiality • Informality • Independence	Available to all analysts who wish to raise concerns regarding whether intelligence products are timely, objective, independent of political considerations, based upon all sources of available intelligence, account for dissenting views, distort intelligence analysis, or employ proper analytic tradecraft. Expected to address concerns regarding objectivity or politicization, as well as perceptions of breaches of the other analytic standards. Additionally, the Analytic Ombuds 1) report concerns directly to the director of the IC element or the head of analysis when circumstances warrant; 2) use broad and flexible resolution techniques, conduct informal inquiries, issue reports, and provide recommendations for positive organizational change in a manner free from interference by any organization employee or official; and 3) provide independent, impartial, informal, and confidential mechanisms to informally facilitate resolution of individual and systemic problems.	Defense Intelligence Agency (DIA), National Security Agency (NSA), Office of the Director of National Intelligence (ODNI)

EXTERNALS Ombuds who serve external or primarily external constituents such as citizens, vendors, or others outside of the Federal government.							
Type	Specialty	Definition	Authorizing Action	Constituent Groups	Standards of Practice	Purpose/Mission	Examples
Programmatic External Ombuds		An independent, impartial federal employee, usually only found at one agency or department, who is appointed or employed by that organization to facilitate the informal resolution of concerns about specific program areas, constituents, and/or issues and addresses actions and failures to act of a government agency, official, public employee, or contractor.	Either authorized by 1) the legislative body or by the executive with confirmation by the legislative body; 2) executive action; or 3) agency mandate	Specific subsets of external or predominantly external constituents: citizens, vendors, or others, outside the Federal government, including regulated entities	• Independence • Impartiality • Confidentiality • Credible Review Process	Each Department/Agency External Ombuds Office has a unique mission, depending on the language in the authorizing action and the population that the offices serve.	FDA's Center for Devices and Radiological Health; Dept of Education Student Loan Ombuds; EPA's Office of Pesticide Programs' Ombudsman; FAA's Aviation Noise Ombudsman, Medicare Beneficiary Ombudsman, USDA's Animal Welfare Ombuds, DOJ's Victims' Rights Ombudsman, and FCC's Open Internet Ombudsperson
Subject Matter Agency Wide External Ombuds		An independent, impartial federal employee with authority and responsibility to receive, investigate or informally address complaints about their agency, official, public employee, or contractor, and, when appropriate, make findings and recommendations, and publish reports. Can be agency wide or throughout government at multiple agencies.	Either authorized by 1) the legislative body or by the executive with confirmation by the legislative body; 2) executive action; or 3) agency mandate	External or predominantly external constituents: citizens, vendors, or others, outside the Federal government, including regulated entities	• Independence • Impartiality • Confidentiality • Credible Review Process	Agency External Ombuds Office hear and respond to concerns and inquiries from the public about their agency, government officials, employees, or contractors.	CFPB, SBA, FDIC, Federal Maritime Commission Ombudsman, US Patent and Trademark Office Patents Ombudsman Program, United States Citizenship and Immigration Services CIS Ombudsman, Federal Housing Finance Agency
	Task and Delivery Order Ombuds	Task and Delivery Order ombudsmen review complaints from contractors on specific types of Multiple Award Task and Delivery Order contracts (IDIQ) and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. IDIQ ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency's competition advocate.	10 USC Sec 2304c(f); Federal Acquisition Regulation (FAR), Section 16.505(b)(8), Ordering under IDIQ regulations requires that the head of the agency shall designate a task-order and delivery-order ombudsman for Indefinite Delivery Indefinite Quantity (IDIQ) Contracts. The IDIQ ombuds functions are frequently considered collateral duties.	Contractors and bidders	• Independent of the Contracting Officer • Fair • The ability to offer confidentiality • Credible Review Process	Ombuds for use in connection with multiple award indefinite quantity/indefinite delivery type acquisitions in order to 1) address contractor concerns regarding compliance with task/delivery order award procedures; 2) review contractor complaints on task/delivery order contracts; 3)ensure all contractors are afforded a fair opportunity to be considered for each task/delivery order, consistent with FAR 16.505(b); and 4) when requested, maintain strict confidentiality of the contractor requesting assistance. The ombudsman does not have the authority to overturn award decisions or adjudicate formal contract disputes.	National Nuclear Security Agency's Task Order and Delivery Order Ombudsman/Procurement Analyst, DHS Task Order and Delivery Order Ombudsman, US Coast Guard's Ombudsman Program for Agency Protests, General Services Administration Task Order and Delivery Order Ombudsman
	Procurement Ombuds	Procurement ombuds offices typically receive inquiries and resolve concerns from the vendor community about an agency's procurement program. They also conduct outreach with vendors and industry associations to understand trends in the marketplace, to identify barriers to doing business with the agency, and to promote meaningful communications between government and industry.	Either authorized by 1) the legislative body or by the executive with confirmation by the legislative body; 2) executive action; or 3) agency mandate	Contractors, bidders, and potential bidders	• Neutral • Fair • Confidentiality • Credible Review Process	The primary purpose of the Procurement Ombudsman is to ensure equitable treatment of all parties participating in the agency's acquisition and assistance pre-award, post-award and administration functions. The Procurement Ombudsman facilitates the resolution of differences through an informal, impartial administrative review of the action in question. The review requires obtaining factual information about the specific matter and researching and applying pertinent regulations/policies and, where appropriate, consulting with Senior Agency Management or other federal-wide subject matter experts.	HHS/CMS has a Competitive Acquisition Ombuds created by Sec. 154 of Medicare Improvements for Patients and Providers Act of 2008 to respond to suppliers' and individuals' complaints about the Competitive Bidding Program for Durable Medical Equipment (DMEPOS) and provide an Annual Report to Congress. NASA Procurement Ombudsman, National Oceanic and Atmospheric Administration Ombudsman, DOD's Defense Procurement and Acquisition Policy, GSA, National Science Foundation's National Acquisition Ombudsman

EXTERNALS Ombuds who serve external or primarily external constituents such as citizens, vendors, or others outside of the Federal government.							
Type	**Specialty**	**Definition**	**Authorizing Action**	**Constituent Groups**	**Standards of Practice**	**Purpose/Mission**	**Examples**
Advocate Ombuds		An individual who is appointed or employed by an organization to receive concerns about or within the organization, to evaluate and investigate these concerns objectively and to attempt to resolve them informally and is authorized or required to advocate on behalf of individuals or groups found to be aggrieved or in need of support. This ombuds is thus not always a neutral party, but at the fact determination stage, the advocate ombuds must be impartial.	Frequently legislative	External constituents as designated in their specific charter	• Independence • Impartiality • Confidentiality • Credible Review Process	Each Advocate Ombuds Office has a unique mission, which includes evaluating claims objectively but is also authorized or required to advocate on behalf of individuals or groups found to be aggrieved and may issue reports to the legislature or specific agency.They typically serve designated vulnerable populations such as long term care residents, wounded servicemen, and others. The Advocate Ombuds represents the interests of a designated population with respect to policies implemented or adopted by the establishing entity and government agencies.	National Taxpayer Advocate, Small Business Administration National Ombudsman, Census Bureau's Survey Advocates, Securities and Exchange Commission's Office of the Investor Advocate.
	Wounded Warrior Ombuds - MEDCOM Medical Assistance Group	An independent, neutral and impartial mediator for Soldiers and their Family Members. Ombudsmen are selected for their demonstrated ability and passion to help Soldiers. They are located but not assigned to Medical Treatment Facilities (MTF) and serve as a liaison between the MEDCOM, the Soldier/Family member and the MTF Commander, acting as a communicator, facilitator and problem solver.	Established in 2007 by U.S. Army Medical Command (MEDCOM) as an outgrowth of the Army Medical Action Plan. Following the airing of complaints about conditions at Walter Reed Army Medical Center and elsewhere in the media, the Army was quick to engage problem solving solutions to insure all Soldiers and Family Members that they could expect the very best healthcare. Simultaneously, steps were taken to improve infrastructure and streamline administrative actions associated with the Physical Disability System. The final pillar in the strategy was the creation of a vehicle Soldiers and Family Members can use to air grievances and obtain assistance resolving problems.	Soldiers and their Family Members assigned to Warrior Transition Units, as well as other Service members and their families.	• Independence • Neutrality • Confidentiality • Informality	The mission of Ombudsman is to act as an independent, neutral, and impartial mediator for the Warriors in Transition and their families in the Warrior Transition Brigade. The Ombudsmen were selected for their demonstrated ability and passion to help Soldiers. They are not assigned to the Medical Treatment Facility (MTF) or the Warrior Transition Brigade but serve as a liaison. The Ombudsmen have a collaborative relationship with a variety of resources to assist with the resolution of issues that come through the Soldiers in Transition (ST) among others.	Currently the program includes 52 Ombudsmen at 30 sites, mostly in locations with an Army Medical Treatment Facility. The Air Force has a similar Advocacy Program that is not identified as an Ombuds Program. The Navy adopted the Healthcare Resolution Program for its Medical Treatment Facilities, BUMED Inst 6010.28 (May 23, 2011).
	Long-Term Care Ombuds	A State Ombudsman and representatives of the Office who identify, investigate and resolve complaints made by or on behalf of long-term care facility residents, and who perform other related duties as required by the Older Americans Act (OAA). While is it mandated by the OAA, it is decentralized, and the implementation at the state level is the responsibility of the OAA grantees (i.e. the designated state unit on aging).	1972 Health Services and Mental Health Administration funded nursing home ombudsman projects to "respond in a responsible and constructive way to complaints made by or on behalf of individual nursing home patients." 1981 Older Americans Act Amendments expanded ombudsman program coverage to include board and care homes. The name was changed from Nursing Home Ombudsman to Long-Term Care Ombudsman 1992 Older Americans Act Amendments strengthened the ombudsman program. Requirements for the establishment of an Office of Long-Term Care Ombudsman Programs, headed by an Associate Commissioner (later changed to Director), and funding of a National Long-Term Care Ombudsman Resource Center were added to Title II of the Act. 2016 Older Americans Act amendments made a number of revisions, including significantly strengthened conflict of interest provisions.	Residents of long-term care facilities (which includes nursing facilities, assisted living, board and care homes, and similiar residential care communities).	• Independence • Confidentiality • Advocacy	Title VII of the OAA outlines the responsibilities of the LTCOP. Section 712(a)(3) provides a list of functions, including: identifying, investigating and resolving complaints made by or on behalf of residents; providing services to assist the residents in protecting the health, safety, welfare, and rights of the residents; ensuring that the residents have regular and timely access to the services provided through the LTCOP; representing the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents; and analyzing, commenting on, and monitoring the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions.	53 State Long-Term Care Ombudsman Programs (all states, DC, PR, and Guam)
	Navy and Coast Guard Family Ombuds	An ombudsman is a volunteer who is, most often, the spouse of an active duty or reserve member, with an option to appoint a reservist or an Auxiliary member as an ombudsman. They assist the commanding officers/officers-in charge (COs/OICs) by providing a better understanding of the welfare of the command/unit's families and helping the units to better prepare families to meet emergency situations. Additionally, an ombudsman allows their members to better achieve mission readiness by helping to ensure their family members have access to available resources when issues or emergent situations arise.	For the Navy: In 1970, Admiral E.R. Zumwalt, Jr., then Chief of Naval Operations (CNO), created the Navy Family Ombudsman Program to improve communication between commands and the families of Sailors who served in them. In 2006, Admiral Michael G. Mullen, CNO, re-emphasized the importance of the program and signed an updated instruction, highlighting the requirement that all Navy families have access to a Navy Family Ombudsman. OPNAVINST 1750.1G Sept 2, 2014. For the Coast Guard COMMANDANT INSTRUCTION 1750.4E 14 January 2013.	Service members' families	Per the Ombudsman Code of Conduct, each ombudsman shall • Support the command's mission • Respect the command and family members • Maintain confidentiality • Avoid conflicts of interest and • Maintain the highest standards of professionalism	The primary purpose of the ombudsman program is to act as a source of information, both to Navy families on resources and services available, and to commanders regarding issues facing Navy families. Similarly, the Coast Guard Ombudsman Program is a Coast Guard-wide program established to serve as a link between commands and families, to help ensure their members' families have the information necessary to meet the challenges of a military lifestyle. The Ombudsman Program assists commanding officers/officers-in charge (COs/OICs) by providing a better understanding of the welfare of the command/unit's families and helping the units to better prepare families to meet emergency situations. Additionally, an ombudsman allows their members to better achieve mission readiness by helping to ensure their family members have access to available resources when issues or emergent situations arise.	Navy Family Ombudsman, The Coast Guard Ombudsman Program; other Services may have similar programs with or without the title of "ombudsman."

Administrative Conference of the United States

A REAPPRAISAL – THE NATURE AND VALUE OF OMBUDSMEN IN FEDERAL AGENCIES

PART 2: RESEARCH REPORT

Final Report: November 14, 2016

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1.0 Research Phase 1

1.1 Introduction

Twenty-six years ago, Recommendation 90-2 of the Administrative Conference of the United States (ACUS) played a pivotal role in encouraging support for the use of ombuds in the federal government and providing guidance for the establishment and operations of federal ombuds offices. In recent years, ombuds offices[1] in federal agencies have grown in number, prominence, and diversity of practice (Ginsberg & Kaiser, 2009). This is reflected in the creation and growth of a professional association and several networks, with standards and guidelines for practice, and related legal provisions and requirements. The concurrent development of the field of conflict management, including alternative dispute resolution (ADR), has also impacted ombuds practice as well as the growth of ombuds offices in the federal government.

Federal ombuds are generally highly placed agency employees or offices that operate independently of line and staff management structures to provide objective, impartial, and confidential assistance resolving complaints and conflicts involving that federal entity. More specifically, ombuds serve as complaint-handlers, dispute resolvers, information resources, communication channels, and as resources who help improve the functioning of their agencies by identifying patterns and trends, surfacing new problems and issues, and recommending changes (Rowe, 2010; American Bar Association [ABA], 2004; Meltzer, 1998).

Professionals and scholars have noted that the rapid growth of, and increasing reliance on, federal ombuds has resulted in a wide a range of ombuds programs and practices in federal

[1] This report uses the term *ombuds office* interchangeably with *ombuds program*, *ombuds, ombudsmen, ombudsperson,* and *ombudsman* to include individuals and offices that serve an ombuds function within a federal entity. If we are quoting someone, we will employ the term they used.

agencies (Ginsberg & Kaiser, 2009; Pou, 2011). Among them are Gadlin and Levine (2008), who stated:

> Federal ombudsmen are as variable as the agencies they serve… Adapting ombuds programs to the diverse cultures and organizational missions of different federal agencies has resulted in tremendous inconsistencies in how agencies define and structure the role of ombudsman, how ombudsman officers interpret their role, and how the ombudsman function is viewed and treated by agency leadership. (p.20)

Differences in ombuds' offices and activities may also reflect the unique set of circumstances associated with their establishment, their jurisdictions, the types of constituents and issues they address, the scope of their activities, their caseloads, resources available to them, educational background and training, and approaches to complaint and conflict management (Ginsberg & Kaiser, 2009).

However, federal ombuds also share common ground. Many adhere to similar standards of practice such as independence, impartiality or neutrality, and confidentiality established by professional associations such as the American Bar Association (ABA), the International Ombudsman Association (IOA), and the United States Ombudsman Association (USOA). Most also have the ability to bring systemic issues to management's attention and work with other agency offices in providing assistance to the constituents they serve (U.S. Government Accountability Office [GAO], 2001). In addition, many share common goals and values of supporting administrative fairness, accountability and equity (Rowe & Gottehrer, 1997).

Despite the recent proliferation of federal ombuds, little comprehensive information is available about their placement, role, and activities throughout the federal government. Comparative analyses of ombuds practice across federal ombuds offices are even sparser.

Fundamental questions remain about the current shape and functions of federal ombuds practice, including:

- Which federal agencies currently make use of ombudsmen?
- How do ombuds define their role and function?
- What is the scope of their activities?
- What value do they add to their agencies and how do they assess effectiveness and impact?
- What are promising best practices for the establishment, organization, and operation of federal ombuds offices?
- Under what circumstances may the establishment or expanded use of ombuds benefit agencies?
- What statutory and other legal parameters affect federal agency ombuds practice, including issues with respect to confidentiality and recordkeeping? (Administrative Conference of the United States [ACUS], "Request for Proposals," 2015)

Responding to this confusion, inconsistency and hastily expanding ombuds landscape in the federal sector and the lack of basic knowledge of who they are, what they do and why they do it, ACUS issued a *Request for Proposals (RFP)* in April, 2015, seeking "consultant (s) to undertake a research project to study procedures and best practices related to the use of ombudsmen in federal agencies" (p.1). ACUS believed that the 25th anniversary of Recommendation 90-2 provided a valuable opportunity to reevaluate the recommendation and examine the effectiveness and value of agency ombuds. More specifically, the RFP called for the study to begin answering the fundamental questions listed above.

1.1.1 The Research Team

chiResolutions, LLC (CHI) convened a uniquely qualified team[2] to conduct this research project. The team is comprised of leading conflict management professionals who have decades of experience in the design, implementation and evaluation of federal and private-sector ombuds offices; expertise in the legal and policy contexts of federal conflict management programs; content knowledge and academic scholarship in ombuds and conflict management fields; and experience with comparative assessments and applied research methodology in conflict management.

The CHI Research Team (the Team) has a complementary blend of academic credentials and hands-on, professional experience; is a mix of insider and outsider perspectives on federal ombuds work; and offers an interdisciplinary approach that includes legal, social psychological, economic, conflict management, political science, and business perspectives. Critically, the team has a long professional involvement with both federal and private sector ombuds, and is familiar with the challenges and economic constraints now faced by federal agencies, programs, and employees, including ombuds.

Additionally, the Research Team has been supported by a group of twenty law school, masters, and doctoral students from Harvard Law School, Nova Southeastern University, William and Mary Law School, Hamline University School of Law, American University Washington College of Law, New York University School of Law, University of Richmond School of Law, University of Baltimore and Kennesaw State University.

[2] See CHI Research Team bios in **Appendix A**.

1.1.2 The Report

This Report outlines a mixed method research project to examine the aforementioned questions and provides a comparative analysis of federal ombuds offices. The study utilizes a multi-stage approach, which includes four distinct and complementary elements: 1) a literature review and survey methodology (online surveys, interviews, and collection of program materials) across all federal ombuds offices; 2) a case study methodology to highlight promising practices; 3) a standards of practice policy discussion and a legal analysis relevant to the creation and operation of federal ombuds offices, and 4) recommendations offered both by surveyed participants and by the Research Team. The study is designed to help differentiate existing federal ombuds programs and practice, identify consistencies across ombuds offices, develop a framework for comparative evaluation, and identify promising practices. The results will provide an empirical basis for examining the shape and development of federal ombudsmen since ACUS' Recommendation 90-2, and will inform the development of a new recommendation contained herein.

The comparative analysis framework of this research examines similarities and differences across federal ombuds offices. Differentiating program approaches and mapping the variations in current ombuds' practice can provide federal agencies and ombuds a better understanding of the range and options of ombuds practice. This can enhance the appropriate use of existing ombuds offices and encourage the development of more informed efforts. Identifying competing or contradictory assumptions and practices is also useful in testing the relative effectiveness of different approaches or in exploring the conditions under which each may be most useful. Recognizing differences (and learning of possible innovations) can encourage reflective practice among ombuds as well, which can result in more thoughtful and deliberate approaches.

At the same time, identifying consistency and common ground among ombuds' programs is essential for providing clearer definitions and boundaries of practice, establishing core competencies, and identifying criteria for comparative evaluation across programs. Consistencies in practice can promote better accountability, more effective practice, and greater legitimacy and credibility of ombuds offices (Brubaker, Noble, Fincher, Park, & Press, 2014), and thereby strengthen and support professionalism of the field.

This research builds upon, expands, and updates previous research on federal ombudsmen. For example, Leah Meltzer's (1998) research on Federal Workplace Ombuds and the GAO's (2001) report on Human Capital both used case study methodology to examine workplace ombuds offices that focus on assisting employees within their federal agency to resolve work-related concerns. Anderson and Stockton's (1990) study of *The Ombudsman in Federal Agencies*, which served as the research basis for ACUS Recommendation 90-2, as well as Ginsberg and Kaiser's (2009) broader study of *Complaint Handling, Ombudsmen, and Advocacy Offices* for the Congressional Research Service both focused on the work of ombuds offices that handle complaints and concerns about their federal agency from the public or other constituents outside the agency. Jeffrey Lubbers' (2003) Report on *Independent Advocacy Agencies within Agencies* highlighted an innovative category of "advocate" ombuds that have "some degree of independence from the agency that houses them" (p. iii). Our report expands the scope of research to include a full range of current practice by persons with the title of ombudsman—including the well-recognized distinctions of ombuds who focus internally or externally—as well as new permutations of ombuds that were created to meet the unique needs of the federal government. It also expands the research design to include both survey methodology that provides a descriptive overview of current programs, and a complementary

case study and profile approach that adds detail and evaluative dimensions. Finally, this report offers updated information on the growing and changing role of ombuds in federal agencies.

The final result will be a review of ombuds practices within the federal government along with detailed portraits of several agencies, followed by conclusions and recommendations—all with the intent to sketch the landscape of the federal ombuds and provide an evidence-based platform to help improve practice, inform policy, build theory, and suggest future research on ombuds programs.

1.2 Key Terms and Definitions

Ombuds, Ombudsperson, Ombudsman, Ombudsmen – These terms are used interchangeably. Federal ombuds are agency employees (or occasionally contractors) who provide assistance in managing complaints and conflicts involving that federal entity. More specifically, ombuds serve, *inter alia*, as complaint-handlers, dispute resolvers, information resources, communication channels, and as resources who help improve the functioning of their agencies by identifying patterns and trends, surfacing new problems and issues, and recommending changes.

Constituents – Those people who reasonably might contact the ombudsman office in a given year; the broader universe of those whom ombuds are expected to serve on a regular basis.

Visitor/Complainant – For the purposes of this study, a visitor is an individual, group of individuals, or organization that contacts the ombuds office with an issue. In some practices, a visitor might be called an inquirer or complainant.

Responder – A person whose behavior is the subject of an issue or complaint.

Case – For the purposes of this study, a case occurs when a visitor presents a new problem, issue or set of issues, to the ombuds that results in a discussion or action where the ombuds helps to develop, discuss, offer options or otherwise acts on the concern. A case may or may not require multiple appointments with the visitor and/ or other parties, and may or may not involve more than one issue.

Agency – The department, agency, bureau, or other subdivision, that defines the unit of government covered by the office's ombudsman practice.

1.2.1 List of Acronyms and Abbreviations

ABA	American Bar Association
ACUS	Administrative Conference of the United States (also called "the Conference")
ADR	Alternative Dispute Resolution
ADRA	Administrative Dispute Resolution Act
CHI	Carole Houk International
COFO	Coalition of Federal Ombudsman
CRS	Congressional Research Service
DOD	Department of Defense
EEO	Equal Employment Opportunity
FAR	Federal Acquisition Regulation
FOIA	Freedom of Information Act
GAO	Government Accountability Office
IADRWG	Interagency Alternative Dispute Resolution Working Group
ICD	Intelligence Community Directive
ICMS	Integrated Conflict Management System
IOA	International Ombudsman Association
IRS	Internal Revenue Service
ODNI	Office of the Director of National Intelligence
OIG	Office of Inspector General
OPM	Office of Personnel Management
RFP	Request for Proposals
TOA	The Ombudsman Association
UCOA	University and College Ombuds Association
USOA	United States Ombudsman Association

1.3 Report Context and Review of the Literature

If there is merit in the Senger (2000) statement that "the emergence of alternative dispute resolution (ADR) was one of the most significant movements in United States law during the latter half of the 20th century, and has had a profound effect on the way the federal government handles conflict" (as cited in Nabatchi, 2007, p. 646), then it may also be true that the role of the ombuds in the federal sector has been, and will continue to be, an important factor in this development. Though there are many distinctions among ADR practitioners, there is no doubt that the ombuds movement was "swept along by the wave" of the increased attention and credibility earned by ADR since the late 20th century (Rowe & Gadlin, 2014, p.10).[3]

1.3.1 Federal Ombuds: Formation and Evolution

The word *ombuds* or *ombudsman* can be traced back to 11th century Scandinavia, when the term appeared—meaning proxy, attorney, or representative (Clark, 2007; Friedery, 2008). Centuries later, in 1806, the Swedish legislature created the role of this high level officeholder to assist the King in applying the laws of administration and dealing with citizen complaints—in effect, creating the first modern day ombuds. Following Sweden's lead, Finland (1919), Denmark (1955), Norway (1962), and New Zealand (1962) appointed ombuds at the executive level. The concept and role of ombuds then progressed to other countries such as Canada, Australia, Israel, and England. While the jurisdiction to investigate complaints against

[3] Many ombuds in the federal government serve roles and provide functions beyond what may commonly be thought of as ADR processes (for example, negotiation, conciliation, facilitation, mediation, and arbitration). Ombuds do use ADR processes — and are also concerned with prevention and management of concerns, inequities, and inefficiency. Many assist visitors by exploring all relevant channels for fairness, accountability and equity. Many ombuds are also involved in suggesting systems changes to make agencies more efficient, effective, and fair in handling issues and concerns from their visitors, be they from the general public or their own employees (Rowe & Gadlin, 2014).

government agencies was common among these different offices, significant variations existed in the ombuds' focus, roles, reporting structures, and services rendered.

Prior to the second half of the 20th century, the United States had paid scarce attention to the role and function of ombuds. However, this began to change during the civil rights movement and anti-Vietnam War era, which brought with it a renewed emphasis on justice, equality, dissent, citizen rights, and "alternatives to formal, authoritative, and bureaucratic processes" (Gadlin & Levine, 2008, p. 18; Rowe & Gadlin, 2014, p. 9).

Specifically, there were several developments in the 1960s that are believed to have accelerated interest in the ombuds concept. The first, in 1964, was the establishment of the Administrative Conference of the United States, an independent agency with the "purpose to promote improvements in the functioning of a bureaucratic government by promoting improvements in efficiency, adequacy, and fairness of procedures in performing government functions" (Anderson & Hill, 1991, p. 106). Three years later, the Administrative Law Section of the American Bar Association formed a committee to consider the ombuds role and function, and in 1969 influenced its House of Delegates to pass a resolution urging adoption of ombuds at all levels of the government (Anderson & Stockton, 1990). Furthermore, it proposed that ACUS spearhead this effort and "sponsor research and experiments in specific agencies" (Anderson & Stockton, 1990, p. 117; Gadlin & Levine, 2008, p. 18).

Professor Walter Gellhorn's two seminal works on ombudsmen were also influential—one a study of ombuds and other citizen protectors in nine countries, and the other a volume based on lectures at the Harvard Law School with a recommendation that the ombudsman be utilized as an "external critic" of "various American Institutions" (Verkuil, 1975). The ombudsperson was viewed as a way "to help the public solve problems encountered in dealing with the government" and at the same time, give "a voice to ordinary people" by allowing them

to "achieve fairness by means of independence, unfettered access to records and persons, careful investigation, impartiality, and prestige of the office" (Anderson & Stockton, 1990, p. 111; Stieber, 2000, p. 49).

From 1969-1974, several congressmen attempted to keep the momentum by introducing legislation to create ombuds in the federal sector. Bills proposed by Senators Edward Long (D-Mo.), Jacob Javits (R-N.Y.), Charles Percy (R-Ill.) Gaylord Nelson (D-Wisc.), Representatives William Keating (R-Ohio) and John Melcher (D-Mont.) all failed to become law for various reasons. There was general reluctance to add an additional layer to the government, as well as turf battles from congressmen believing that, they, after all, are the "ombuds of first resort" for constituent problems (Anderson & Stockton, 1990, p. 120). Nevertheless, the ombuds concept for organizations gained traction in the United States when a few academic and corporate entities began to adopt the idea and established the functions of an ombuds under various titles, including that of ombudsman.

In 1971, the Department of Commerce established one of the first ombudsmen in the federal government, to investigate and assist in citizen disputes against the agency. The Federal Aviation Administration (FAA) also began a notable, internal pilot program, called "the Organization Ombudsman," in its Western Region. The Social Security Administration (SSA) soon followed by appointing its own ombuds. Later in the decade, the Internal Revenue Service (IRS) created an advocacy ombudsman office to function as an impartial investigator to handle complaints against the IRS and identify systemic problems. In 1977, the Smithsonian Institution established another early workplace ombudsman program at the federal level as an "alternative to formal litigious processes considered more time consuming, costly, inefficient and adversarial as it pitted employees against employees or employees against management in ways that

negatively affected the culture of the institution" (Anderson & Stockton, 1990, p. 120; Meltzer, 1998, p. 556).

Throughout the 1980s, ACUS focused substantial research and staff implementation activities on the use of ADR processes in the federal government (Pou, 2011). It logically followed that in 1990 when Congress was interested in promoting consensus-building processes in the federal government it looked to ACUS for expertise. The Conference commissioned a major study of *Ombudsmen in Federal Agencies: The Theory and the Practice* by David Anderson and Diane Stockton to help determine whether it should recommend more systemic use of ombuds as a means of improving the administration of government programs by the executive branch. This historic report included a rich history of the ombuds concept, legislative attempts to establish ombuds in the United States, issues to consider in developing an ombuds office, and some detailed case studies of ombuds in the Internal Revenue Service, the Army Materiel Command of the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, the Interstate Commerce Commission and the Department of Commerce. Anderson and Stockton (1990) concluded their report with a strong endorsement of the ombuds role:

> The experiences of several federal agencies show that an effective ombudsman can materially improve citizen satisfaction with the workings of the government and, in the process, increase the disposition toward voluntary compliance and cooperation with the government, reduce the occasions for litigation, and provide agency decision makers with the information needed to identify and treat problem areas….The Conference urges the President and Congress to support the creation of an effective ombudsman in those federal departments and agencies with significant interaction with the public (p. 189).

The Anderson and Stockton report led to *Recommendation 90-2*, adopted by ACUS on June 7, 1990, that encouraged and offered some rudimentary standards for establishing ombuds offices in federal agencies that administer significant programs involving interactions with members of the general public (Pou, 2011). Specifically, the Recommendation stated, "the Conference believes that agencies would benefit from the establishment of an Office of Ombudsman either on an agency-wide basis or to assist in the administration of particular programs" (Anderson & Stockton, 1990, p. 189). Furthermore, the recommendation provided guidelines concerning powers, duties, qualifications, terms, confidentiality, limitations on liability and judicial review, access to agency officials and records, and outreach…and "set forth procedures and criteria for utilizing a variety of alternative dispute resolution techniques and approaches for eliminating excessive litigation costs and long delays in federal agency programs" (Lubbers, 1998, p. 29).

These endeavors, complemented by ACUS-sponsored roundtable discussions on federal ombuds possibilities chaired by Conference Council member Walter Gellhorn, influenced the passage of the *Administrative Dispute Resolution Act*[4] (ADRA). Signed into law November 15, 1990 by President George H.W. Bush, "ADRA required each federal agency to adopt a policy to address the use of alternative means of dispute resolution and to designate a senior official to be a dispute resolution specialist to implement provisions of the [A]ct and agency policy" (Pou, 2011, p. 1; Administrative Dispute Resolution Act). In addition, ADRA required each agency to provide training for the dispute resolution specialist and other employees involved in implementing agency policies and declared that such training should encompass the theory and practice of negotiation, mediation, arbitration or related techniques. Very soon afterward, the

[4] Administrative Dispute Resolution Act, P.L. 101-552, 5 U.S.C. §§ 571-593 (1990).

Negotiated Rulemaking Act of 1990,[5] was passed, largely upon research and recommendations of ACUS and the early efforts of a small number of agencies to apply consensual processes to rulemaking. To implement these statutes, "ACUS provided extensive assistance to agencies throughout the federal government including training programs, interagency working groups to address specific issues through the study and sharing of information about best practices, and publication of two voluminous sourcebooks for agency reference" (Pou, 2011, pp. 1-2).

Although the passage of ADRA in 1990 created momentum for the establishment of the ombuds position in more federal agencies and encouraged greater utilization of ADR practices, the law failed to address several important issues. Chief among them were the absence of ombuds as a defined ADR process, the lack of funding for training and hiring, the absence of an exemption from the disclosure requirements of the *Freedom of Information Act*[6] (FOIA), which could compromise the confidentiality of ombuds records and actions, and lack of enforcement of arbitration decisions. In addition, Congress expressed some hesitancy behind their endorsement of ADRA by setting the Act to expire after five years.

When Congress reenacted ADRA in 1996[7], it acknowledged the growing number of federal ombuds and the constituents they served[8] by explicitly listing ombuds in its definition of 'alternative means of dispute resolution' to include "any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and use of ombuds, or any combination thereof" (Administrative Dispute Resolution Act of 1996). The newly strengthened ADRA gave ombuds and other ADR

[5] Negotiated Rulemaking Act of 1990, P. L. 101-648, 5 U.S.C. §§ 561-570 (1990).
[6] Freedom of Information Act, P. L.107-306 5 U.S. Code § 552 (2002).
[7] Administrative Dispute Resolution Act 1996 P.L 104-320, 5 U.S.C. §§ 571-584 (1996).
[8] People who come to federal ombuds for assistance are often referred to as "visitors" to "suggest a mode of operation which stresses informal problem solving, offers opportunity to ventilate concerns, emphasizing counseling, conciliation, and mediation, protects whistleblowers, and guides others to work out harassment issues" (Stieber, 2000, p. 54).

practitioners more credibility and opportunity to be successful by making confidential communication between the neutral and the parties exempt from FOIA; allowing arbitration to be binding on the parties; and by removing the expiration date that was in the original 1990 Act, thereby making ADR a fixed feature of the federal administrative landscape (Senger, 2000).

Additional developments in the 1990s complemented congressional initiatives to promote the growth of ombuds and other conflict resolution professionals and gave greater attention to federal ADR efforts. For example, President George H. W. Bush in 1991 issued *Executive Order 12778* calling on government counsel to be trained in dispute resolution techniques, noting that ADR can "contribute to the prompt, fair, and efficient resolution of claims" (Senger, 2000, p. 82). In 1993, President Clinton issued *Executive Order 12871* requiring the establishment of Partnership Councils between unions and management in federal agencies and promoted the use of ADR processes in day-to-day problem solving among the entities as part of his National Performance Review initiatives to create a government that works better and cost less.

In addition, Attorney General Janet Reno was a strong proponent of the use of ADR practices. She authorized significant financial resources to train more than 1600 Department of Justice lawyers in ADR (which she referred to as *appropriate* dispute resolution). When President Clinton issued a Presidential Memorandum on May 1, 1998, requiring each federal agency to develop a policy to promote greater use of ADR in administrative disputes, he appointed Ms. Reno to chair the Interagency ADR Working Group (IADRWG). The IADRWG was set up to be the "central forum and resource for information of the government's use of ADR and would advance the use of ADR by coordinating multi-agency initiatives; promoting best practices and programs; and disseminating policy information and guidelines" to assist federal agencies in developing and operating ADR programs (Senger, 2000, pp. 83-84; Office of the Attorney General [IADRWG], 2007.).

At the turn of the century, there were an estimated 100 ombuds at the federal agency level (Krent, 2000). As in the private sector, several beneficial consequences of their placement soon became evident. Federal ombuds provided an outlet for alienated agency employees and public members of communities regulated by agencies. Litigation was reduced, and relationships were strengthened between individuals and agencies. According to the Coalition of Federal Ombudsmen (COFO), "ombuds protect legitimate interests and individual rights against the excesses of public and private bureaucracies—those who are affected by, and those who work within, these organizations" (Coalition of Federal Ombudsman [COFO] & IADRWG, 2006, p. 3).

What had become manifest, as a result of employing ombudsmen, was a type of monitoring mechanism. Krent (2000) stated, "…federal ombuds through their interaction with members of the regulated public may help lend legitimacy (as well as transparency) to the affairs of government" (p. 22). Furthermore, given considerations of time and money, an ombuds can address problems at an early stage, before positions harden, working relationships deteriorate, morale is undermined, conflicts escalate, and matters end in a formal, costly process (Krent, 2000; GAO, 2001). For all of these reasons, ombuds continued to play an increasingly important role in agency life.

Under Presidents George W. Bush and Barack Obama, support continued for ADR and federal ombuds. Congress reauthorized ACUS in 2004 and 2008.[9] Funding was approved in 2009 that led to the official re-establishment of ACUS in March of 2010 when the Senate confirmed President Obama's nomination of Paul Verkuil as chairman of the Administrative

[9] Although ACUS lost its funding in 1995, Congress never repealed the Administrative Conference Act of 1964. In 2004, in response to continued widespread support for the prior work of the agency, Congress reauthorized ACUS, and it extended that reauthorization in 2008. For more information, visit www.acus.gov

Conference ("ACUS History", n.d.). Over the last six years, the Conference has resumed one of its major interests and focus on alternative dispute resolution and the role and practice of federal ombuds.

1.3.2 Federal Ombuds: Functions, Issues, and Value

The champions for federal ombuds had the foresight to envision the many benefits that would follow from an office founded on integrity and functioning as a confidential outlet to field complaints, enable freedom to voice concerns or frustrations, and diminish the fear of reprisal (Krent, 2000). In many ways, ombuds can be considered "agents of change" (Adcock, 2013, p. 21). Ombuds listen and guide people to their own resolutions, which is empowering, while at the same time showing care toward populations that have been unfairly treated or under-represented. Handling matters in this way improves relationships and the public or private programs involved, because the systems feedback the ombuds passes along to the organization can ultimately improve it, as well as enhance its image, legitimacy, and commitment to accountability for, and transparency of, its operations (Adcock, 2013; Krent, 2000; Office of the Attorney General, 2007).

There are some common issues, activities, and approaches in the work of ombuds. Issues may include employee and/or public dissatisfaction with an agency policy or program; allegations of discrimination or prohibited personnel practices and safety issues; or specific topics initiated by a member of one of the communities regulated by a federal agency. General activities include marketing their accessibility, so as to be available to hear concerns, answer questions, and identify patterns and trends that may signal systemic problems. Ombuds conduct trainings and facilitate workshops. Ombuds' approaches are designed to support correction of organization-wide problems, and develop strategies for preventing future conflict (GAO, 2001).

Ombuds engage participants in dialogue— counseling about alternatives; coaching for improved communication; shuttling among employees, managers and supervisors as needed, or initiating group mediation—all fostering a dispute resolution strategy that is coherent for the agency, informal, and flexible (GAO, 2001).

The value of the ombuds in any organization can be summarized in terms of what can be achieved through attention to *responsiveness*:

- Information dissemination or central clearinghouse-type activity that gathers information on trends or weaknesses in an agency's relationship with the public (Office of the Attorney General, 2007)
- Information to continuously improve programs and processes and expand ADR options for the evolving needs of the users (Office of the Attorney General, 2007)
- Improvement of relationships (Office of the Attorney General, 2007)
- Cost-effective and efficient use of government resources (Office of the Attorney General, 2007)
- Achievement of agency goals – frees an agency to make programmatic decisions based on needs rather than personal antagonisms or workplace disputes (Office of the Attorney General, 2007)
- Results of productivity, lower turnover, higher decision quality (Office of the Attorney General, 2007)
- Decreases in the amount of resources spent on employment litigation (Thacker, 2009)

1.3.3 Emergence of Professional Organizations – Development of Standards and Practices

Development of the conflict resolution field evolved in parallel with the employment of ombuds in federal agencies. Standards, practice guidance, and professional development for ombuds also evolved. Three principal professional associations for ombudsmen, with multiple working groups—including the COFO and the IADRWG—have all influenced the development of the federal ombuds. These organizations range in purpose and member services, but their overall objective is to provide professional development via courses, certifications, conferences

and publications on industry trends, and to provide guiding principles of practice or establishment.

The **United States Ombudsman Association** (USOA) was founded in 1977, "to foster the establishment and professional development of public sector ombudsman offices throughout the United States and the World and is the oldest ombudsman organization in North America" ("USOA Home", n.d.). According to the association's bylaws, USOA exclusively operates for education, scientific, and charitable purposes by assisting existing ombudsman and ombuds associations with the improvement of operations. A sample of member agencies include the Alaska State Ombudsman, the Arizona Office of the Ombudsman, Office of the Ombudsman for the Department of National Defense and the Canadian Forces, the Equal Opportunities Program (CO), and District of Columbia State Board of Education (DC). The USOA adheres to and promotes seven *Principles of Effective Ombudsman Legislation* and has established its own Standards of Practice, discussed *infra,* for public sector ombudsmen.

Officially formed in July 2005, the **International Ombudsman Association** (IOA) is the largest international association of professional organizational ombudsmen practitioners in the world. Its predecessors were the Corporate Ombudsman Association, which became The Ombudsman Association (TOA), which merged with the University and College Ombudsman Association (UCOA) to form the IOA. The stated mission of IOA is "to advance the profession of organizational ombudsman and ensure that practitioners are able to work to the highest professional standards" (IOA, "About Us", n.d.). The IOA is comprised of approximately 900 members from the U.S. and other countries supporting work in corporations, universities, non-profit organizations, government entities and non-governmental organizations. The IOA also offers a certification acquired through examination, the Certified Organizational Ombudsman Practitioner CO-OP credential. This association chartered the IOA Standards of Practice that are

derived in part from the ethical principles stated in the IOA Code of Ethics. According to the IOA, "[e]ach Ombudsman office should have an organizational Charter or Terms of Reference, approved by senior management, articulating the principles of the Ombudsman function in that organization and their consistency with the IOA Standards of Practice" ("IOA Standards", 2009). The Standards of Practice are translated into ten languages, illustrating IOA's diverse membership. Its membership includes representatives from the United Nations, the World Health Organization, Yale Medical School, Chevron Corporation, the National Institutes of Health, and the Coca-Cola Company (IOA, 2014).

Although it is not an association specifically for ombudsmen, the **American Bar Association** (ABA) has a Dispute Resolution Section that includes an ombuds committee. The stated mission of the committee is to "promote a better understanding and increased utilization of appropriately designed, supported, and implemented ombuds programs in organizations of all types" (ABA, "Ombuds Committee", n.d.). The committee educates law firms and organizations about ombuds programs, advocates for new ombuds programs, has its own publications, and was the impetus behind the ABA's adoption of a resolution encouraging the use of ombuds programs. The committee was reestablished in 2013 in the interest of promoting effective resolution of disputes. The ABA has contributed to the field through adoption of resolutions, the first in 1969 and the most recent in 2004, helping to create standards for the establishment and operation of ombuds offices (ABA, "Ombuds Committee", n.d.).

The **Coalition of Federal Ombudsmen** (COFO), formed in July 1996, is an interagency forum that provides collaboration, advice, and guidance on professional ombuds standards, skills development, program development, and effectiveness of federal ombuds ("COFO History", 2012.). The association established the first Coalition of Federal Ombudsman Charter in 2005 through a member vote and holds an annual conference in the fall. Member agencies include the

U.S. Department of Agriculture, U.S. Secret Service, U.S. Capitol Police, U.S. Department of Defense, U.S. Food & Drug Administration, U.S. Patent and Trademark Office, and U.S. Department of Veterans Affairs, among many others. The coalition serves as a platform for the exchange of experiences, ideas, policies, standards, best practices, and innovative approaches to providing world-class ombudsman services.

1.3.4 Comparison of the Primary Sets of Professional Ombudsman Standards

The three non-federal professional associations—USOA, IOA, and the ABA—have created similar yet distinct standards for the creation and operation of ombudsmen's offices in the United States: IOA's [10] *Standards of Practice*, the ABA's[11] *Standards for the Establishment and Operation of Ombuds Offices*, revised 2004, and the USOA[12] *Governmental Ombudsman Standards.* In addition, COFO has issued guidance which can be found in *A Guide for Federal Employee Ombuds: A Supplement to and Annotation of the Standards for the Establishment and Operations of Ombuds Offices Issued by the American Bar Association (the guide)* (COFO & IADRWG, 2006). The *Guide*, developed by COFO and the IADRWG Steering Committee in 2006, builds upon the ABA Standards and is intended only for use by federal employee ombuds in connection with their functions for the federal government.[13]

All three sets of standards include independence, neutrality, and confidentiality as core standards for ombudsman offices although there are some variations in how these terms are

[10] To be a member of the IOA with full voting rights on all matters including ethics and standards, an individual must be a practicing Organizational Ombudsman who: 1) adheres to the Standards of Practice and Code of Ethics; 2) in instances where the Ombudsman has other job functions for the organization, fulfillment of those duties must not compromise the independence, neutrality, confidentiality or informality of the Ombudsman role; and 3) has no job function which would make him or her an agent of the organization for the purposes of notice. The IOA's focus is primarily on organizational ombudsmen.

[11] Although membership in the ABA is largely limited to lawyers and law students, individuals interested in the legal profession but not U.S. licensed attorneys or students may become associate members.

[12] Voting membership in the USOA is restricted to incumbent public sector ombudsmen, staff members of a public sector ombudsman office or a public official who performs the ombudsman function.

[13] At the time of this report, COFO Leadership was in the process of drafting its own Standards of Practice.

defined. The IOA adds 'informality' as a fourth core standard (IOA, 2009) while the USOA adds 'a credible review process' as the fourth (USOA, 2003). These terms as well as other key similarities and differences will be discussed in general terms below.[14]

Independence.

With respect to independence, the IOA and ABA standards are largely parallel. Both stress that it is essential that an ombudsman be free, both in fact and perception, of interference in the performance of his/her duties, including interference by others in the organization in which the ombudsman office may reside. From the perspective primarily of the organizational ombudsman, the IOA notes that the ombudsman should hold no other position that would compromise independence, should have sole discretion about if, when and how to act, have access to all individuals and information within the organization and should have authority to select staff and manage the office budget. In this regard, the IOA strongly recommends that the organizational ombudsman report to the highest office possible of the organization that the ombudsman serves (IOA, 2009).

From its more general perspective, the ABA adds that no person or entity that is part of the appointing entity or may be the subject of a complaint or inquiry should be able, for retaliatory purposes, to remove the ombudsman from office, eliminate the office, or reduce budget and resources.

As the USOA is specifically focused on public sector ombudsmen, its indicia for independence differ in a few respects (IOA, 2009). It looks *additionally* to whether an ombuds office has been established by law (sustainability), whether the ombudsman is appointed by an entity not within the purview of the ombudsman's jurisdiction, whether the ombuds office has

[14] The standards and related commentary produced by these three respective professional organizations are far more detailed than can be duplicated here. This report focuses on key points of agreement and differences among them.

sufficient resources, and whether the ombuds is immune from discovery and prosecution for claims arising out of the lawful performance of ombuds duties (USOA, 2003).

Confidentiality.

Confidentiality is one area where there are substantial and significant differences among the three sets of standards. In essence, both the ABA and IOA agree that information brought to an ombudsman by someone seeking assistance is confidential with the rare exception, exercised at the ombudsman's discretion, of information about an imminent risk of serious harm.

The ABA and IOA differ noticeably concerning under what circumstances communication by the ombudsman with an entity constitutes legal notice to the entity. In the ABA's view, if the ombudsman communicates with the entity about an allegation and reveals both the specific allegation and the identity of the complainant *or* inappropriate or wrongful conduct alleged by multiple unnamed complainants, the ombuds' communication to the entity can be considered legal notice if it is determined to be so based on the facts surrounding the communication to the entity (ABA, 2004).

In the IOA's view, such communication between an organizational ombuds and the entity in which it resides only constitutes legal notice when the ombuds gives notice intentionally and the individual revealing the information to the ombuds is unwilling or unable to put the organization on notice him/herself (IOA, 2006). Further, the ombuds can be required to testify only as to the specific communication between the ombuds and the organization and not to the circumstances or substance under which it was initially communicated to the ombuds. The IOA contends that the ambiguity in the ABA's qualification that notice should be determined by "the facts of the communication…offers an imprecise catch-all provision" that might inadvertently invite challenges to the ombuds confidentiality privilege (IOA, 2006, p. 12).

Inasmuch as many of the public sector ombuds that USOA represents have authority and responsibility to investigate, engage in fact-finding and report and/or make recommendations on claims, the USOA has a markedly different standard for confidentiality. For the USOA, confidentiality attaches to a communication *only* when offered by the ombuds and at the ombuds' discretion. In exercising his/her discretion, the ombuds must balance the need to protect information so that people will come forward with the need to disclose information as part of an investigation or report. The ombuds may offer confidentiality in order to elicit information and must honor such a promise. The ombuds should not release information if unnecessary harm would result and the ombuds should not be required to testify or release confidential records.

The *COFO Guide* would add to the exception for imminent risk of serious harm a duty of government employees, including ombuds, to report fraud, waste and abuse (COFO & IADRWG, 2006). Additionally, the *Guide* notes that federal recordkeeping laws[15] have provisions that arguably implicate ombuds confidentiality, although the confidentiality of case specific information received or maintained by ombuds offices is generally consistent with these statutes. Importantly, the *Guide* specifies that ombuds should have access to independent or properly insulated counsel in order to obtain competent advice on the extent and any limitations on federal ombuds confidentiality.

Neutrality/Impartiality.

The three sets of standards diverge in the area of neutrality and impartiality as well, based in large part on IOA's primary focus on organizational ombuds as opposed to the USOA's focus

[15] The Freedom of Information Act 5 U.S.C. § 552 (1966); The Privacy Act 5 U.S.C. § 552a (1974); and the Federal Records Act 44 U.S.C. Chapter 31.

on external ombuds, and the ABA's efforts to embrace both. The IOA, in essence, emphasizes neutrality, while the USOA and ABA emphasize impartiality.

For the IOA, an ombuds is a designated neutral, impartial and unaligned. The IOA emphasizes both structural and functional neutrality. The ombuds should report to the highest possible level of the organization independent of ordinary line and staff structures, not have any additional role in the organization and not be affiliated with any compliance function. Without any personal stake in the outcome, the ombuds must consider the interests of anyone affected. While the ombuds may advocate for fair and equitably administered processes, the ombuds does not advocate on behalf of any individual (IOA, 2009).

The USOA's membership is more representative of ombuds who deal with concerns of the public *about* government. Thus for the USOA, while the ombuds is neither predisposed to be an advocate for the complainant nor an apologist for the government, the ombuds may come out in support of specific government action or advocate for recommended changes. In this regard, the USOA standards emphasize that ombuds must have no vested interest in the outcome, must avoid conflicts of interest and refrain from partisan or political activities or employment/business relationships that might compromise the perception of impartiality, and not allow their personal views to affect decisions (USOA, 2003).

The ABA standards also require that the ombuds act in an impartial manner free from initial bias and conflicts of interest. However, the ABA states that impartiality does not preclude the ombuds from developing an interest in securing changes deemed necessary as a result of the ombuds' process nor from otherwise being an advocate on behalf of a designated constituency. The ABA concurs in the various indicia of impartiality articulated in the other two sets of standards (ABA, 2004).

Fourth standard—Informality or Credible Review Process.

Informality.

The fourth standard for the IOA refers to what the ombuds does and how the ombuds does it. The organizational ombuds is an informal resource. When a concern is brought to the ombuds, he/she listens, provides and receives information, identifies and helps to reframe issues, develops a range of options and, with permission of the visitor, if the ombuds agrees, may engage in third party intervention. The ombuds seeks resolution of concerns and looks into procedural irregularities and systemic problems for the purposes of identifying new problems, and patterns of concerns, and recommending solutions. The ombuds cannot make, change or set aside a policy or management decision. The ombuds does not make binding decisions, mandate policies, adjudicate or take part in any adjudicative process. Use of the ombuds office is completely voluntary and does not constitute a step in any grievance or other process (IOA, 2009).

Credible review process.

Given the investigative authority and responsibility of many, if not most of USOA members, this USOA standard concerns the proper and competent 'review' of issues raised to the ombuds. It addresses the ombuds' authority and responsibilities toward the complainant, the subject of the complaint, the appointing entity and the public. Summarized briefly, the ombuds must be qualified to make reviews in a manner that engenders respect and confidence, and be accessible to all potential complainants, and have sufficient status and authority to analyze the issues that are likely to come before him or her. The ombuds must have discretion to act informally to resolve a complaint, provide sufficient free access to those wishing to make a complaint to the ombuds and have defined transparent processes for the scope and manner of investigations. The ombuds should have clearly defined jurisdiction and not act outside of it.

The grounds for ombuds review should be stated broadly and the ombuds should have sufficient power to conduct thorough investigations, and publish findings, recommendations and reports. The subjects of ombuds reports should be consulted and given an opportunity to respond prior to publication and the complainant as well as the subject should be apprised of the status of the investigation. The ombuds should give the complainant a reason if a complaint is not accepted for investigation. The ombuds must complete investigations in a timely manner and, at least annually, report generally on the activities of the office (USOA, 2003).

Establishment and operation of ombuds offices.

All three sets of standards provide some guidance on how ombuds offices should be established and maintained. Again, differences can largely be traced to differences in the different constituencies and missions of the respective professional organizations.

The ABA states that ombuds offices should be established pursuant to statute *or* publically available policy (charter) (ABA, 2004). In its commentary on the ABA standards, the IOA concurs to the extent that it believes that every organizational ombudsman should have a charter (also known as terms of reference) that affirms the essential characteristics of the office and governs its role (IOA, 2006). IOA states that the charter should also define the scope of practice, the ombuds' authority including limitations, office structure and procedures and any critical cautionary provisos, e.g., that the ombuds does not accept notice on behalf of the organization.

The USOA states that "an ombuds office should be established by law. Ombuds should be appointed by an entity not subject to the ombuds' jurisdiction and which does not have operational or administrative authority over the program(s) or agency(ies) that are subject to the ombuds' jurisdiction" (USOA, 2003, p.5).

Both the ABA and IOA list what an ombuds can do. Although the ABA does so in somewhat more detail, the lists are consistent *except* the ABA includes advocating on behalf of affected individuals or groups when specifically authorized and the IOA does not.

Limitations on ombuds authority.

In this regard, the chief area of disagreement is among the IOA, the ABA and the COFO guidance to federal ombuds. It concerns the role of the organizational ombuds with respect to labor and employment issues, and labor organizations' rights with respect to organizational ombuds processes.

The ABA states that the ombuds should not address any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state or local labor or employment law, rule or regulation unless there is no collective bargaining representative and the employer specifically authorizes the ombuds to do so (ABA, 2004). The ABA's concern is that the ombuds not be perceived as substituting for other procedures or remedies which protect employee legal rights and that employees not forfeit any rights by, for example, missing a filing deadline while consulting the ombuds (ABA, 2004).

The IOA and the COFO vigorously disagree. COFO notes that many federal ombuds are in fact chartered to specifically deal with employment concerns and can do so consistent with collective bargaining obligations and agreements (COFO & IADRWG, 2006). Where the ombuds has been given such authority, COFO asserts that this limitation in the ABA standards does not apply. The COFO commentary notes that any collective bargaining agreement should address the ombuds' role (COFO & IADRWG, 2006).

The IOA in its commentary on the ABA standards states that unless specifically excluded from involvement in labor an employment issues, the organizational ombuds may address them (IOA, 2006). The charter and collective bargaining agreement should define the ombuds'

involvement with collective bargaining and the ombuds should defer to union processes with respect to any issue covered by the collective bargaining agreement unless otherwise agreed. Importantly, the ombuds should adopt safeguards to preserve legal rights including a requirement that those seeking help from the ombuds be advised of legal rights and time limits although expressly not given legal advice.

The COFO & IADRWG introduces an additional cautionary note on bargaining representatives and ombuds processes. The *Guide* advises ombuds to be aware of regulatory provisions and case law bearing on a bargaining representative's right to be present at 'formal discussions' between one or more representatives of an agency and one or more employees in the bargaining unit (COFO & IADRWG, 2006). The *Guide* cites some case law concerning union rights with respect to mediation of cases in equal employment disputes.[16]

Classification of ombuds.

Our literature review also revealed efforts of the professional associations to attempt various classification systems of ombuds—yet, here too, the differences in functions and standards, as well as differences in how they office was created and where they are located—posed challenges to consistency and clarity since there is a great deal of overlap. Two generally agreed upon categories are *classical* or *legislative*, and *organizational* ombudsman (ABA, 2002; Fowlie, 2003; Rowe & Gottehrer, 1997; Smith & Howard, 2016). Additional category names have varied and sometimes have changed with the times. Fowlie (2003) identified a third category of ombuds as *executive* following earlier work by Larry Hill. The ABA identified a third category of ombuds as *advocate*, and since 2004, has included the legislative and executive ombuds under the classical category (ABA, 2002; ABA, 2004). COFO identified four distinct

[16] See the Legal Analysis in Part 3 for a complete discussion of laws affecting federal ombuds.

categories of ombudsman as classical, organizational, executive, and advocate (COFO, 2012). For the purposes of the literature review, we examined the federal ombudsman program across this four-category framework that shares some commonality among COFO, ABA, and IOA.

Classical ombudsmen.

Classical ombudsmen are created by law or appointed by a national, state, or other legislative body to ensure the fair treatment of the population in regard to actions by government agencies or officials (COFO, 2012; Fowlie, 2003; Rowe & Gottehrer, 1997; Smith & Howard, 2016). Classical ombudsmen have formal authority to investigate complaints, issue reports and make recommendations to the appropriate authority for resolution of a matter (Fowlie, 2003; COFO, 2012). They may focus more on official policy or administrative practice in their role of holding agencies accountable to the public and assisting in legislative oversight (Wagner, 2000; Smith & Howard, 2016).

The classical ombudsman historically does not investigate elected officials since the electorate has the power to remove or refuse to reelect at the polls and so the ombudsman is not a substitute for recall or rejection at the polls, or judges, who are either subject to re-election or removal, and the ombudsman does not substitute for those processes. The ombudsman has the power to report to the agency being complained about, and issue investigative reports to the highest elected officials, the legislative body, other agencies and the public and media (Rowe & Gottehrer, 1997).

Duties of classical ombudsmen

Classical ombuds operate in the public sector and receive complaints from the general public or internal sources. They address actions, including failures to act, by government agencies, officials, or public employees (ABA, 2002; Lubbers, 2003; Rowe & Gottehrer, 1997).

A classical ombuds may have jurisdiction over all agencies of local or state government, or only over a particular agency (ABA, 2002). In addition, a classical ombuds may have:

- Authorization to conduct formal independent and impartial investigations into matters within the prescribed jurisdiction of the office (ABA, 2002; ABA, 2004; Gadlin & Pino, 1997; Rowe & Gottehrer, 1997)
- Authorization to issue subpoenas for testimony and evidence with respect to investigating allegations within the jurisdiction of the office (ABA, 2002; ABA, 2004; Gadlin & Pino, 1997; Rowe & Gottehrer, 1997)
- Authorization to issue public reports and/or findings (ABA, 2002; ABA, 2004; Gadlin & Pino, 1997; Rowe & Gottehrer, 1997)
- Authorization to advocate or offer recommendations for change both within the entity and publicly (ABA, 2002; ABA, 2004; Rowe & Gottehrer, 1997)

Classical ombudsmen in the federal government.

No federal agency ombuds program is currently identified as a traditionally "classical" in the literature examined. According to Rowe and Gottehrer (1997), "In the classical model, the ombudsman is appointed by a legislative body to investigate the administrative acts of the executive, legislative and judicial branches" (p. 2). The USOA's essential characteristics of a classical ombuds state that the ombudsman acts as an officer of the legislative body and is independent of the organizations the ombudsman reviews (USOA, n.d.). Verkuil (1975) pointed out that while the value of the classical ombuds is apparent, there are no federal agencies, including the executive branch of government, that utilize an ombuds program in classical ombudsman terms.

Organizational ombuds.

The organizational ombuds represents a relatively large category of ombuds in the U.S. (Rowe & Gottehrer, 1997). Within the federal government, organizational ombuds are appointed by their respective organizations or established by law or regulation (COFO, 2012) to receive

complaints, *inter alia*, about fairness issues within the organization (Wagner, 2000), and/or externally from clients of the agencies for which they work (Gadlin & Pino, 1997). The organizational ombuds is a dispute resolution and conflict management professional with many functions, including dealing with concerns and conflicts from individuals and groups. In many organizations, the ombuds office is the only office other than that of the Director or Secretary that can and will hear from every cohort, every geographic area of the organization, and about any workplace issue. The organizational ombuds may look into concerns, review institutional data, write systemic reviews and recommendations, and consult to every level of management (Rowe & Gadlin, 2010). An ombuds may take on a coaching role to encourage civility, to foster mutual respect, and to raise awareness of preferred skills for interpersonal communication—all toward aiding in the realization of the values of the organization, such as dignity, diversity, integrity, and caring (Fowlie, 2003; Rowe & Gottehrer, 1997; Wagner, 2000). They may have a particular focus on those who perceive themselves as less powerful than others in a given situation (Rowe & Gottehrer, 1997). The ombuds is a designated, confidential neutral (COFO, 2012) within an organization and usually reports at or near the top of that organization outside of the ordinary management organizational structure (Fowlie, 2003; Rowe & Gottehrer, 1997). There is value in the use of organizational ombuds in the government serving both internal and external constituents (Brubaker, et al., 2014; Gadlin & Levine, 2008) through an informal process (COFO, 2012).

Duties of organizational ombuds.

An organizational ombuds facilitates fair and equitable resolutions of concerns that arise within the entity. In addition, an organizational ombuds should have:

- Authorization to undertake inquiries and function by informal processes as specified by the charter (ABA, 2002; Barkat, 2015; Fowlie, 2003; Rowe & Gottehrer, 1997; Smith & Howard, 2015)

- Authorization to conduct independent and impartial inquiries into matters within the prescribed jurisdiction of the office and organization (ABA, 2002; Wagner, 2000); as a confidential and neutral resource (Kelly, McGreal, Lee, & Schwarz, 2015; Wagner, 2000); and ability to protect confidentiality and resist any participation in formal processes (Barkat, 2015)

- Authorization to issue reports (ABA, 2002); or make recommendations for change to prevent reoccurrence. This illustrates how some ombuds differ from other forms of ADR specialists (Barkat, 2015; Brubaker et al., 2014; Wagner, 2000)

- Authorization to advocate for change within the entity (ABA, 2002) or function as a change agent (Wagner, 2000)

- Authorization to intervene as a third party to help resolve disputes (Brubaker et al., 2014; Wagner, 2000)

- Acknowledgment that since they have no power to enforce their findings or recommendations (Rowe & Gottehrer, 1997), they should not serve on committees that recommend or write policy, nor respond administratively, but rather serve in a consulting capacity (Wagner, 2000)

It is important to note that some of the extant definitions are functional, while others are based on how the office was created, and that these definitions also may overlap. Furthermore, these definitions are now used differently by different people in the literature and in common conversation. This point is especially important with respect to the concept of an "executive" ombudsman.

Executive ombuds.

The executive ombuds receives complaints from the general public, or internally, and addresses actions (or failures to act) of the entity, its officials, employees, and contractors (ABA, 2002; ABA, 2004). Furthermore, investigations are conducted, which may produce reports and recommendations (Fowlie, 2003). Executive ombuds have also been defined as "a centralized complaint-handling officer" who is appointed to office and "who serves at the pleasure of an elected or appointed chief executive" (Wyner, 1973).

The executive ombuds is distinct from the classical ombuds in two significant areas: 1) an executive ombuds only has general jurisdiction over one agency or jurisdiction over one subject matter that involves multiple agencies, and 2) the executive ombuds is not created by or with the confirmation of a legislative body, but is appointed by the head of an entity (ABA, 2002; ABA, 2004; Howard & Smith, 2016).

Advocate ombuds.

The ABA and COFO recognize a distinct category of advocate ombudsmen (ABA, 2002; ABA, 2004). An advocate ombuds may be located in either the public or private sector and, like the other ombuds, evaluates claims impartially but is authorized, or required, to advocate on behalf of individuals or groups who have been injured. He/she may issue reports to the legislature or a specific agency. The ABA likewise defines an advocate ombuds as one who serves a designated vulnerable population and, when justified by the facts of a particular case, advocates on behalf of aggrieved individuals or groups (ABA, 2002; COFO, 2012).

The federal government has major advocate ombuds offices, including the National Taxpayer Advocate of the Internal Revenue Service and the Office of Advocacy in the Small Business Administration, as well as the Long Term Care Ombuds Program (Lubbers, 2003). The Department of Defense has numerous examples of offices of advocacy as well as designated family ombudsmen within the various military services. Adcock (2013) viewed many advocate ombuds as executive ombuds—particularly those found within the Internal Revenue Service, the Environmental Protection Agency, Health and Human Services Long Term Care, and the Department of Commerce.

Duties of an advocate ombuds.

An advocate ombuds performs as designated in its authorizing action, usually emphasizing the representation of the interests of a designated population with respect to policies

implemented or adopted by the establishing entity and/or government agency (ABA, 2002). Unlike other ombuds, the advocate ombuds is authorized, or required, to listen to individuals or groups found to be aggrieved. Due to the unique role, this ombuds must have a basic understanding of the nature and role of advocacy, and of legal statutes or regulations. The advocate ombuds, by design, "is not always a neutral party, but at the fact determination stage, must be impartial and objective" (Smith & Howard, 2016). The ABA specifically states an advocate ombuds should:

- Possess a basic understanding of the nature and role of advocacy;
- Provide information, advice, and assistance to members of the constituency;
- Evaluate the complainant's claim objectively and advocate for change relief when the facts support the claim;
- Have authorization to represent the interests of the designated population with respect to policies implemented or adopted by the establishing entity, government agencies, or other organizations as defined by the charter; and
- Have authorization to initiate action in an administrative, judicial, or legislative forum when the facts warrant (ABA, 2002).

1.3.5 Informed Rationale for the Current Research

Having illustrated some of the recognized diversity of federal ombuds classifications, functions and standards since Recommendation 90-2, we now detail what some of the major authors in our literature search see as the advantages and disadvantages of this diversity.

Several observers have noted the great variety of those who served as ombuds, whom they served, how they served, and the standards of practice they followed. Borrowing from the success of the branding slogan of the H.J. Heinz company with its "57 Varieties" of food products, Carolyn Stieber, an influential leader in the ombuds profession, published an article in the Harvard Negotiation Journal in 2000 on *"57 Varieties: Has the Ombudsman Concept Become Diluted?"* The article focused on operational and conceptual differences among various

types of ombuds in all levels of government, private industry and academe. The overall impression one gets from Stieber's illustration of the diversely populated landscape is that the "57 Varieties" is both a blessing and a curse. The downside of the "57 Varieties" is a lack of a common definition of what an ombuds is, what they do, what services they provide, and common standards or protocols. The upside of the diversity is "that the fundamental role has evolved in response to local cultures and changing times" (Stieber, 2000, p. 50). In addition, Stieber (2000) notes:

> If one looks beneath the surface, in spite of the diversity, common threads run through the conceptual fabric of every ombudsman's office—all aim to humanize administration, to support fairness, accountability, and equity. All ombudsmen can be approached in confidence. No ombudsman has enforcement or disciplinary powers. All depend on the power of persuasion, as well as the credibility of the office, which leads individuals to trust it. Although the *process* in achieving objectives of fairness and accountability may differ, the *product* is the same: a chance for ordinary people, those without power or prestige, to be heard and to get fair treatment (pp. 56-57).

Additional influential ombuds and scholars researching ombuds and ADR practices in the United States have written about this bewildering landscape and the daunting challenges in trying to make sense of who ombuds are, what they do, what standards they follow, and what value they add both to the public and the organizations they serve. Ginsberg and Kaiser, in their 2009 report: *Federal Complaint-Handling, Ombudsman, and Advocacy Offices,* note that even among the more limited universe of federal complaint offices, there is "no authoritative, comprehensive detailed survey...and the offices exhibit different forms, capacities and designation" (p.21). They attribute these wide variations to the reactionary nature of the

establishment of the ombudsman field. Ombuds were created in the moment—at different times, for different reasons, and for different purposes, duties, and functions—without any sort of long-term thinking. Consequently, there exist significant variations in the roles, capabilities, standards of practice of the federal ombuds (Ginsberg & Kaiser, 2009). While acknowledging the negative implications of this confusing terrain, the authors believe:

> This phenomenon reflects certain fundamental characteristics of the American national government: dispersed and decentralized powers, the absence of uniformity and standardization among similar institutions, and competition between the executive and legislature for control over government organizations and operations. (p. 21)

Though commentators on the federal ombuds scene such as Stieber and Ginsberg and Kaiser did find some positive features of the great diversity among different kinds of ombuds and their various operations, other scholars addressed the negative effect on development of the ombuds position and influence, as well as how the value of ombudsmen is perceived by key stakeholders and the public at large. Several scholarly publications note inconsistencies among ombuds serving in diverse settings such as the private sector, higher education, and public agencies, and how these inconsistencies and lack of commonalities on education, training, services, standards, and protection have detracted or dampened ombuds' effectiveness and impact (Nabatchi, 2007; Bingham & Wise, 1996).

Within the federal government, Howard Gadlin and Samantha Levine (2008) have noted that "adapting ombudsman programs in the diverse cultures and organizational missions of different federal agencies has resulted in tremendous inconsistency in how agencies define and structure the role of the ombudsman, how ombudsmen officers interpret their roles, and how the ombudsmen function is viewed and treated by agency leadership" (p. 20). While the authors

admit that variability can be interpreted as testimony to the vast appeal of the ombudsman concept, they note basic inconsistencies such as "differences regarding the standards by which concepts such as neutrality, impartiality, and confidentiality would be implemented" and firmly believe "the great variability in the formation, functioning, and quality of ombudsmen programs prevents the programs from attaining the highest possible level of achievement and effectiveness" (Gadlin & Levine, 2008, pp. 20-21).

Beyond the limitations to the credibility and legitimacy of the ombuds role and functions due to the obvious inconsistencies and confusion, there is basic confusion and even ignorance of what an ombuds is and does, among the general public, government leaders, and even among the ADR community. In a recent 2014 special issue of the *Conflict Resolution Quarterly* on the *Future of Conflict Resolution in the Workplace*, one of the many noted authors concluded that "although the profession (of organizational ombuds in particular) is expanding by leaps and bounds, what an ombuds is and does is still a mystery to many. Add to that the fact that there exist different kinds of ombuds, it is no wonder that ADR practitioners may be somewhat confused about how ombuds fit into the world of ADR service providers" (Brubaker et. al., 2014, p. 69).

What is known; what is unknown.

Despite the exponential growth and government-wide use of the federal ombuds, there has been relatively little information describing the landscape of federal ombuds, including basic information regarding which agencies employ ombuds, how many there are, how they differ, what they do, whom they serve, what standards they follow, what background and training they have, and what value they contribute. As we see in the literature review, information on federal ombuds and their respective offices does exist. Several publications include descriptions of

ombuds offices and services at various federal agencies. These snapshots range from one paragraph vignettes to fuller depictions.

Relatively substantial descriptions are available on ombuds who specialize in workplace disputes. The 2001 GAO Report on *Human Capital: The Role of the Ombudsman in Dispute Resolution* describes twenty-two agencies with ombuds programs serving internal constituents, and more detailed four- to five-page profiles of the International Broadcasting Bureau (IBB)[17], the Center for Cooperative Resolution of the National Institutes of Health (NIH), and the U.S. Secret Service (USSS). In selecting ombudsman offices as case illustrations, the Report's authors considered offices that experts identified as "good examples" in terms of (1) following the standards of practice advocated by professional ombudsman associations, (2) the office's reputation within the federal ombudsman and ADR communities, and (3) the availability of information relating to the function of the office and its successes. Furthermore, the offices were selected because of their variety. For example, IBB had a large unionized and foreign-born workforce; NIH dealt with disputes involving scientific research; and the Secret Service relied on collateral-duty ombudsmen to serve its geographically dispersed workforce (GAO, 2001).

For each of these agencies and programs, the report contains information on their origins and operating characteristics, their approach to independence, neutrality and confidentiality, comments on evaluation and outcomes, and lessons learned in their attempts to address the criticism of formal administrative processes within the workplace that were seen as "adversarial, inefficient, time consuming, and costly…by including ADR processes to resolve disputes in more efficient, timely and less adversarial manner…including alerting management to systemic

[17] On April 30, 1994, President Clinton signed the International Broadcasting Act (Public Law 103-236). The legislation established the International Broadcasting Bureau (IBB) within the United States Information Agency (USIA). When USIA was disbanded in October 1999, the IBB was established as an independent federal government entity.

problems and thereby correcting organizational situations and developing strategies for preventing and managing conflict" (GAO, 2001, p.1).

Leah Meltzer's 1998 research publication, *Federal Workplace Ombudsman,* contained information on five of the thirteen federal workplace ombuds offices to provide a complementary blend of permanency, origins, and logistics. In her five-to-eight page profiles of the U.S. Secret Service, the U.S. Information Agency's International Broadcasting Bureau, the Smithsonian Institute, the Department of Energy, and the Department of State, she included an agency description, the mission and structure, the elements of confidentiality and neutrality, and some evaluative comments addressing the question, "is it working?" (Meltzer, 1998).

For profiles of ombuds offices that serve external constituents, there is information from Jeffrey S. Lubbers 2003 report on *Independent Advocacy Agencies Within Agencies: A Survey of Federal Agency External Ombudsmen* which profiled the IRS National Taxpayer Advocate Service and the Small Business Administration's Office of Advocacy, and Ginsberg and Kaiser's 2009 Report on *Federal Complaint-Handling Ombudsman and Advocacy Offices* which included appendices noting more than fifty "Ombuds-like Entities" in brief—one paragraph for each.

In recent years there has been little up-to-date information. Most of the agency and program illustrations are between 13-25 years old. None of them included details on the ombuds' professional standards of practice, functions, scope of issues, apparent impact, and the views of ombuds professionals about what is needed for effectiveness. ACUS's *The Ombudsman: A Primer for Federal Agencies* (1991) was helpful at the time and gave basic information on ombuds activities, as well as brief suggestions on qualifications, position in the agency, operational standards, and powers. The information in the *Primer* was, however, limited to ombuds investigating external grievances against the government. The *Primer* could not anticipate the variety and richness of the multitude of ombuds offices established in the last 26

years. Additional and very informative reports authorized or inspired by ACUS involvement such as the Anderson and Stockton (1990) report and the Meltzer (1998) report are now outdated given the tremendous growth of federal ombuds in the twenty-first century. Reports such as GAO's (2001) and Ginsberg and Kaiser's (2009) captured only limited sections of the federal ombuds landscape that exists today.

The variety of federal ombuds today can be bewildering to the ombuds themselves, much less the casual observer, critic, or legislator. Some ombuds are advocates, meant to assist with the government's "responsibility to protect vulnerable populations," such as military families, "wounded warriors," small business owners, and long term care residents to name a few (Van Soye, 2007). There are those who specialize in acquisition/procurement issues or protect whistleblowers. Others are analytic ombuds who, in the terms of the formal mandate, "address concerns regarding lack of objective bias, politicization, or other issues in standards (rigor, excellence and personal integrity in analytic procedures) application in analytic products" in the Intelligence Community (Office of the Director of National Intelligence [ODNI], 2015, p. 2). Certain ombuds only deal with visitors who are external to the agency, others work with internal employee issues and disputes and some do both. Many ombuds are collateral duty, some are volunteers, while others are highly placed senior professionals who report to top-level leaders of the agency. Several ombuds follow standards from the ABA, others from the IOA, some from the USOA and some follow standards issued within their respective agencies that may or may not reflect some of the generally recognized professional standards.

Clearly the ACUS 2015 RFP—calling attention to the urgency of an updated study that, while acknowledging the "recent proliferation of ombuds…with little information available about the placement, role, and activities of ombuds…and the substantial inconsistencies

regarding the definition of ombudsman" would generate a report revealing a more accurate and up-to-date picture of the federal ombuds landscape—was timely and much needed.

1.4 Federal Ombuds Taxonomy for this Project

We have noted the lack of uniformity and much confusion in the literature—even among the professional organizations (USOA, IOA, COFO, ABA)—regarding the labeling of different kinds of ombuds. Labels have been based upon: (a) whether they were created by executive or legislative action; (b) the primary population they serve (e.g., internal or external constituents); (c) the programs they cover (e.g., consumer finance, procurement, student loans); or (d) what they do (e.g., organizational, analytic, whistleblower, advocate). However, most lines cannot be neatly drawn as, for example, some organizational ombudsmen serve both internal and external constituencies, including contractors or other organizational stakeholders. Further, most ombuds can be described by more than one of these organizing principles.

While the number of federal offices created with the ombudsman title has burgeoned, the permutations of characteristics and functions have multiplied. Indeed, the very term '*ombudsman'* itself has been stretched to—and in the minds of some federal ombuds, beyond—its limit, to the extent that the term now refers to a wider range of positions than those that comply with any of the aforementioned standards.

We do not endorse any one classification system over any other. However, in the interest of including the widest range of federal offices with the ombudsman title in this report, and for purposes of clarity in this report, we use a nomenclature that refers to constituents rather than issues. We recognize that the lines are not hard and fast, and some ombudsman offices fall into more than one classification, which is why we began with two very general primary types:

Internally-Facing – Ombuds who serve internal, or predominantly internal constituents, including employees, supervisors, managers, leaders, contractors, subcontractors and grantees;

Externally-Facing – Ombuds who serve external, or predominantly external constituents, including the public, regulated entities and contractors.

1.4.1 Internally-Facing

Within the internally-facing classification, there are the three subtypes of ombuds. One subtype serves all agency employees and two specialty/subject matter ombuds who serve specific populations within the agency:

- **Organizational Ombudsmen –** designated neutrals who are appointed or employed by an organization to facilitate the informal resolution of concerns within the organization. They do not have management decision-making power; they are *informal* dispute resolution and conflict management professionals. They may be established by statute, agency regulation or management decision, perform neutral fact-finding and assist in the resolution of problems concerning the organization's actions, policies, or the application of regulations that affect internal constituents. Typical functions of the organizational ombuds are: (1) to work with individuals and groups in an organization to explore and assist them with options to help resolve conflicts, problematic issues or concerns, and (2) to bring new problems and systemic concerns and new ideas to the attention of the organization. The primary population they serve is internal to the organization such as employees and managers. However, they may also serve external clients such as contractors and grantees. Organizational ombuds operate in a manner to preserve the confidentiality of those seeking services, and are independent of formal organizational structures. Examples of organizational ombuds include the Department of Energy and the Department of the Interior.
- **Analytic Ombudsmen** – In intelligence agencies, analytic ombuds provide impartial oversight of intelligence analysis and production and are charged with enhancing

analytic integrity, excellence, and objectivity. They are appointed pursuant to legislative action. They receive concerns from analysts about adherence to analytic standards and seek to resolve them through fact-finding, problem solving, conflict resolution, counseling and recommendations. The National Security Agency (NSA) and the Defense Intelligence Agency (DIA) have analytic ombuds.

- **Whistleblower Protection Ombudsmen** - A designated individual in an Inspector General's office whose role is to educate employees, contractors, and grantees about prohibitions on retaliation for protected disclosures and their rights and remedies if they have been retaliated against for making protected disclosures. They are appointed pursuant to legislative action. The law does not permit the Whistleblower Protection Ombudsman to act as a legal representative, agent, or advocate for employees, contractors and grantees, as the statute that mandates them only provides for the education function. However, some may be empowered by the Inspector General they work for to look into whistleblower queries. Many agencies have a Whistleblower Protection Ombudsman as required by statute.

1.4.2 Externally-Facing

Within the externally-facing classification, there are three primary sub-groups:

1. **Programmatic External Ombuds** – These ombuds, usually at one agency or department, receive and attempt to resolve concerns about specific program areas, such as the Food and Drug Administration's Center for Biologics Evaluation and Research, the Federal Student Aid Ombudsman at the Department of Education or the Foreign Trade Ombudsman at the Department of Commerce. They each have distinct

mandates, functions and standards. They usually, but not always, serve primarily external constituencies.

2. **Subject Matter/Agency-wide Ombuds** – These ombuds, usually established by statute or regulation, deal with specific agency-wide functions such as the Consumer Protection Financial Bureau's Ombudsman Office, the Office of the National Ombudsman within the Small Business Administration, and the U.S. Citizenship and Immigration Services Ombudsman. They can also exist in multiple agencies throughout government and include procurement/acquisition ombuds, as well as a specialty sub-type, the Task and Delivery Order Ombuds for multiple award contracts mandated by the Federal Acquisition Regulation. They each have distinct mandates, functions and standards. They usually, but not always, serve primarily external constituencies.
3. **Advocate Ombudsmen** – These ombuds are appointed or employed by an organization to receive complaints about relevant organization(s), to evaluate and investigate them objectively and to attempt to resolve them informally. Some are appointed pursuant to legislative action; some are appointed by executive action. They are authorized or required to advocate on behalf of individuals or groups found to be aggrieved. Examples of federal advocate ombuds are the National Taxpayer Advocate, the Long Term Care Ombuds, the Wounded Warrior Ombuds of the Army's MEDCOM Medical Assistance Group, and the Department of the Navy and the U.S. Coast Guard Family Ombudsmen.

For purposes of this report, and using a shorthand often employed by many ombuds, we refer to federal ombuds as those who serve only, or predominantly, internal constituents

(internally-facing) as "internals" and those who serve only or predominantly external constituents (externally-facing) as "externals". To repeat, *internals* include organizational ombuds and those with particular areas of specialization (such as analytic ombuds), and include ombuds who serve some external constituents (e.g., contractors) in addition to internal constituents. *Externals* include those who serve a broad range of external constituents, and those who have particular areas of specialization (e.g., procurement ombuds), and may also serve some internal constituents.

Variations exist among both internals and externals as to the genesis of their offices (legislative or executive action or both), and as to what they are authorized to do. Where any of these variations within the two categories, internals and externals, are relevant to our discussion, they have been noted in our Taxonomy of federal ombuds found in **Appendix B** that presents this classification scheme in a visual format.

1.5 Introduction to Survey: Design, Distribution, and Collection

In addition to our literature review, members of the Research Team consulted with various ombuds working groups and individual experts. Based on continuing consultation, information from the literature, and our subject matter knowledge, we designed and conducted a comprehensive survey[18].

1.5.1 Survey Design

In order to address the key research areas that ACUS detailed in its RFP, our team needed a comprehensive survey that would illumine the activities of ombuds offices—and help to differentiate them. The Taxonomy clarified our own thinking and helped us to consider distinctions.

Here are some of the differences we sought to capture in our research:

- Those who serve *external* constituents and those who serve *internal* constituents;
- Those created by *statute* and those who were created otherwise;
- Those designated as *impartial or neutral* and those designated as *advocates;*
- Those who are designated as *independent;*
- Those who are designated as *having no management decision-making power, (also known as practicing informally*) and those (if any) who make management decisions;
- Those who *assure confidentiality* and those, if any, who are limited to offering as much *confidentiality or privacy protection* as possible;
- Those who *keep case records* for the agency and those *who do not keep case records;*

[18] See **Appendix C** for a copy of the full survey.

- Those who accept a *wide-range of questions* and those who *focus on one or a few issues* (like disputes under Task Order/Delivery contracts) or processes (like whistleblowing); and

- Those who focus just on a *given complaint or question* and those *who also review systems and who are expected to identify and recommend system improvements*.

In constructing the survey, we asked about the size and structure of the ombuds office; the origins of the office; which standards of practice they might follow and what assistance they might have received in establishing these standards; the scope of activities in which they engaged, and how frequently; the issues with which they deal; their reporting structure; and how performance is evaluated. We sought to understand the functions that different kinds of ombuds perform, whether any generalizations could be made about the different kinds of professional practice, and how ombuds add value.

ACUS was particularly interested in how ombuds practice with respect to legal requirements under statutes of general application, whether there are any conflicts with the requirements of other statutes, how ombuds meet federal record keeping requirements, and how organizational ombuds in agencies with represented employees handle union issues that might also be covered in a collective bargaining agreement.

The first part of our survey consisted of 46 broad, quantitative questions covering well over one hundred items, for respondents to provide answers by entering numbers or selecting among multiple-choice options. The second part of the survey included a set of nine, general, open-ended, qualitative questions that enabled respondents to comment on selected work areas of their choice. Of great importance to us was the value that ombuds perceived they provided to their constituents and to the organizations that used their services, what they considered their "best practices," their promising innovations, and contributions to their sense of personal satisfaction. Moreover, recognizing that ombuds are likely to know best what might add more

value to their work, we asked for their recommendations both to ACUS and to Congress. We wanted to encourage participants to respond thoroughly, and therefore, we offered the opportunity to expand on the open-ended questions via a telephone interview with graduate students.[19]

1.5.2 Survey Distribution

The success of this project was based largely on our ability to identify and connect with the federal ombuds community. Since no comprehensive list of individual federal ombuds or federal ombuds existed, we recognized that this endeavor would require much of its own research. Given the field's expansion over the past 26 years, mapping the current landscape proved to be far more laborious and difficult than initially envisioned. Many offices could not be identified for reasons including national security, lack of up-to-date publicly available information, and other reasons. We ultimately assembled a list of over 150 unique federal ombuds programs[20] compiled from a variety of sources, including collaborative efforts of the COFO leadership and members, the ABA Ombuds Committee, the Whistleblower Ombuds Working Group, and numerous federal ombuds, federal ADR practitioners, and other federal employees. Over a six-month period, we attempted to accrue the most comprehensive and accurate list possible. Below is an overview of the steps we took to assemble a comprehensive and accurate list.

[19] A summary of responses to the qualitative questions is captured in Section 1.6, Qualitative Survey Summary Findings: Thematic Analysis. The full Thematic Analysis may be found in **Appendix E**.

[20] Per the request of ACUS, the research team has provided this list ("Master List of Federal Ombuds Offices"), as well as a list of those offices that participated ("Participant List"), but not the names or contact information of individuals. In matters concerning national security agencies, the research team has omitted them from the list completely. Furthermore, ACUS did not have access to any individual responses or the identity of individual participants, except for those offices that have offered to participate in the case studies. Both lists may be found in the supplementary Appendix: Invitation and Participant Lists.

We began by referencing the membership lists of COFO, the ABA Ombuds Committee, and the IOA dating back to 2011, where available. Next, information was gathered from the Congressional Research Service Report *Federal Complaint-Handling, Ombudsman, and Advocacy Offices,* The United States Government Manual 2014 published by the Government Printing Office and in the Federal Yellow Book under the "Leadership Federal" category. We also examined the staff directories for individuals with the "Ombudsman, Individuals' Representative, Citizens' Complaint Investigator" job functions. Statutorily created ombudsman offices were identified via a Westlaw search. Newly established ombuds offices were added as we learned of their existence.

Based on the estimate provided in the RFP, we initially thought there might be between 60 and 80 ombuds offices within the federal government. However, our preliminary research revealed a much larger community. With the creation of the whistleblower, procurement, and analytic ombudsmen, many agencies had multiple, unique ombuds programs. In order to manage the size of the population for purposes of this research, ACUS suggested that we focus on federal ombuds offices within the 125 agencies, excluding the White House agencies, identified in the ACUS' Sourcebook of United States Executive Agencies (2012)[21].

To verify the accuracy of information and fill in any gaps, a number of procedures were employed. First, the list of ombudsmen offices was cross-referenced against publicly available information on agency websites. Each site was searched for information relating to ombuds offices, individual ombuds, and ombuds-like positions, as well as their direct email addresses and telephone numbers. Secondly, the Research Team attended multiple COFO meetings, including

[21] The ACUS sourcebook examines the agencies and other organizational entities of the federal executive establishment, including independent agencies. The results of this study are an especially valuable resource to Congress, the judiciary, individual agencies, the general public and academic researchers in government and public administration. No other up-to-date resource of its kind exists. For more information, visit https://www.acus.gov/publication/sourcebook-united-states-executive-agencies

their 2015 annual conference, the whistleblower ombuds working group's meeting, and the ABA ombuds committee meeting, where we strongly encouraged maximum participation and answered questions related to the survey. At the same time, key ombuds were identified within the various subtypes (organizational, external, whistleblower, and analytic) to serve as liaisons and help us obtain accurate information. When it was difficult to identify an ombuds program, we utilized our collective networks and contacts within the federal government and the larger ombuds community.

The next step was to verify the accuracy of the contact information we had collected. As the survey was to be sent electronically, it was critical that we possessed confirmed email addresses. Two rounds of emails were sent to all the unverified addresses: the first an introductory message and the second as a follow-up. A considerable number of emails bounced back as "undeliverable" or yielded an automatic response stating that someone would respond to our request in one to two weeks. Many others failed to elicit a response at all. Consequently, two rounds of phone calls were made by a team of seven graduate students to confirm email addresses. Other phone calls were made by multiple members of the Research Team inviting specific ombuds to join the list.

Lastly, in an effort to extend our reach, we created a blog post with information about the project, the upcoming survey, responses to frequently heard concerns, and one final request for participation that was distributed to list of over 400 alternative dispute resolution (ADR) practitioners and federal government employees and featured on the ombuds daily information hub: "The Ombuds Blog."[22]

[22] For more information, visit http://ombuds-blog.blogspot.com/

In the end, over 150 federal ombuds offices were sent an invitation to participate in our electronic survey. Additional addresses were forwarded by recipients, growing the pool of unique addresses to approximately 200. Many addresses reached individuals in the same ombuds offices, yet our protocol sought only one response per office. After noting the number of bounced emails, the unknown number of analytic and whistleblower ombuds who were forwarded the invitation, and the number offices that received multiple invitations, we are reasonably certain there were 147 separate offices in the final pool who received the electronic survey.

However, we believe the total number of offices might be higher. Due to national security and privacy concerns within the DOD, intelligence and IG communities, an anonymous link to the survey was shared within the DOD, Analytic and Whistleblower Ombuds communities. A few pdf versions of the survey were submitted anonymously to a federal point of contact. A few of the original survey invitations were bounced back as duplicates or email address unknown, or office closed, or the person had transferred, or for other reasons. In cases where the email address was unknown or the intended recipient had since left the office, we were able to correctly update the email address for all but two. However, because of the fluidity of the landscape of ombuds offices and personnel, and without knowing how many offices received the anonymous link to the survey, we could not be certain how many surveys may have been received by an appropriate office with a person functioning in the ombuds role.

1.5.3 Survey Data Collection

On January 27, 2016, the survey went "live." Reminder notices along with the survey were sent on numerous occasions over the next two months. By the end of March, we had collected 54 survey responses from distinct ombuds offices representing over one hundred individual full or part-time ombuds. Thirty respondents who had completed the closed-ended

parts of the survey requested follow-up telephone interviews to address the nine open-ended questions. These telephone calls were made during March and early April.

Furthermore, we requested documents such as charters, office brochures, statutes, reports, and other materials that speak to the structure and functions of the ombuds offices to be submitted with the survey.

1.5.4 Lessons Learned About Conducting the Survey and Survey Limitations

Though our efforts were labor intensive and very time consuming, they informed our understanding of the federal ombuds landscape and will help to inform the Research Team's recommendations to ACUS. Throughout the design, distribution, collection, and analysis of the survey, the Research Team faced unusual challenges that bear mention in reflecting on our report and should be considered when conducting future research on federal ombuds. To wit:

1) Federal ombuds offices come in many different sizes ranging from a single part-time or full-time person (with or without a discrete office) to those with deputy and associate ombuds, as well as administrative staff. In order to get both a varied and accurate picture, our team decided that the unit of analysis for our study would be the **ombuds office itself** as opposed to the individual professional. This meant that large offices would not unduly influence the survey results. This decision, also, actually had the potential advantage of including the input of more individual ombuds since offices of multiple ombuds were asked to discuss questions among the ombuds in their office before responding on a single survey.
2) A number of federal ombuds simply did not wish to join the study despite an offer of anonymity, nor would they permit their offices to be included on our list. Although we cannot know all the reasons for reluctance, several ombuds mentioned the general level of suspicion and antagonism in public discourse concerning government. We

also heard that national security and privacy concerns within the intelligence and defense communities kept some from participating. In addition, many ombuds are very protective of privacy, although some of these ombuds were happy to talk at length, privately.

3) The cyber security settings for each agency varied, which impacted whether our survey invitations were sent to inboxes, marked as spam, or not received at all. We had considered asking ACUS to distribute the invitation, but learned from ombuds that this could be perceived to undermine our confidentiality and anonymity assurances. A few offices responded to emails with a computerized reply about overload, or significant wait times, or information that an ombuds was away.
4) Designing a survey that could be comprehensive enough to resonate with the complex variety of ombuds in the federal sector required lengthy, weekly Research Team meetings focused on the survey. This effort was supplemented by many additional calls between members of the Research Team and key members of the federal ombuds community. Each discussion added new issues to consider, resulting in numerous drafts of the survey before it was presented to ACUS for final review.
5) Obtaining voluntary and timely efforts of very busy ombuds offices to complete a long and detailed survey required persistent encouragement by members of the Research Team. We sent numerous reminders to multiple mailing lists, made explicit appeals to the ombuds community at various working group meetings, enlisted key leaders in the field to issue written appeals to the ombuds community, made dozens of individual phone calls, and extended the deadline for completed surveys four times.

6) After six months of searching we could not identify all federal ombuds offices. We know there are more ombuds offices than those listed on the survey, based upon our understanding of congressional mandates and our discussions with ombuds, in and beyond the federal government. We estimate that there might be an additional one hundred federal ombuds offices that are not listed in a public way. For example, we know that many agencies are expected to have procurement and whistleblower ombuds capacity per statutory or regulatory requirements, yet we could only identify a handful of procurement ombuds and approximately twenty-five whistleblower ombuds. We note that some offices and ombuds professionals have little publicly available contact information—particularly those on collateral duty or serving as ombuds part-time.

One of the primary reasons for this study was the recent growth and constant change in the federal ombuds landscape; however, the number of federal ombuds offices is not static or even easily defined. New offices were developed and others were being re-configured even during the course of our study. A few may be changing or disappearing this year, some have already changed their email addresses, and external emails are apparently not received by some offices. Some ombuds have multiple roles, only one of which is "ombuds." Finally, there are some federal conflict managers who report that they practice to ombuds standards of practice, but have different titles—and who, therefore, could not be included. Our own best guess, from our searches and what is statutorily required, is that up to 250 federal ombuds offices may exist.

1.5.5 Survey Analysis

As we indicated in the previous section, we are reasonably certain there were 147 separate offices in the final pool that received the electronic survey. Based on our estimate, our dataset of 54 responses represents 37 percent of those offices that were actually reached via email. In May and June, the Research Team organized, coded and analyzed the results of the survey including the thirty in-person interviews, highlighting significant findings and key insights to be included in the body of this report as well as capturing additional data collected from the survey which can be found in the appendices. We discuss the quantitative and qualitative survey findings separately.

1.6 Quantitative Survey Summary Findings

The Research Team has learned a great deal from our survey of ombuds offices in the federal government—and there is much more to learn. By design, the broad nature of the survey opens the door to future, more specific studies. We consider this work to be a foundational study, a platform to begin to understand a rapidly changing, complex population. Selected charts from the quantitative survey are found in **Appendix D**. Following are narrative highlights:

1.6.1 How Did We Analyze the Data?

Since we did not know the universe of federal ombuds before we began, it was of course not possible to draw a scientific sample.[23] We reported the data based on "all who responded" to a given question. Some analyses also reported the data in terms of the constituent base served by the various offices. There was, however, significant variation among federal ombuds about their constituent bases. About a quarter of all of our respondents actually stated they serve both internal and external constituents. Using all the data available to us, we learned of no office equally serving both categories. We then felt we were able to allocate these ombuds either to the internally-facing group or the externally-facing group, as seemed most appropriate. By coincidence, half of those who responded turned out to be ombuds who serve only or primarily internal constituents, and half turned out to be ombuds who serve only, or primarily, external constituents.

[23] This brief account presents data from the 2016 survey, in many cases reflecting the answers from "all" ombuds who responded to a given question, and for all "externals" and all "internals" who responded to a given question, without breakdowns by type of ombuds practice. Such breakdowns are not statistically useful because of the nature of this study. We have rounded percentages in the written documents and in the tables to the nearest 5%, to demonstrate that the data are limited and not generalizable. We note, too, that the data here are from self-reports. The Research Team did not have the resources for independent verification.

1.6.2 Titles Used by Federal Ombuds

We compiled lists for the survey—with one exception—intending to limit the survey to offices, rather than including all known ombuds professionals. The exception is that we included Whistleblower Ombuds who do not typically have separate ombuds offices but instead work as part of the Offices of Inspectors General. As noted above, we knew from the outset that there are offices in the federal government that practice (some of them part-time and some full-time) to one or another set of ombuds standards of practice—but which are not authorized to use the title. At the beginning we also were frequently alerted to offices that have some compliance duties, for example in the agency Equal Employment Opportunity or Civil Rights office, together with ombuds duties; some of these may have split titles. Similarly, the duties of agency Task Order and Delivery Ombudsmen, mandated by the Federal Acquisition Regulation (FAR),[24] are frequently exercised by full-time contracting professionals as a collateral duty when an ombuds function is needed under a multiple-award type contract. We attempted to limit the survey list to those who use the title "ombudsman."

We did, however, ask all who responded about the title for their office. As expected, many used the title Ombudsman or Director of the Office of the Ombudsman or a variation. Some used the name of their type of ombuds in their title—including, for example, Analytic Ombudsman and Whistleblower Ombudsman, or the Office of the Taxpayer Advocate. Some ombuds who responded did use or include an alternative title.

1.6.3 Staffing

The ombuds offices that responded illustrate very wide variation in how ombuds work is done. About 60 percent have at least one full-time ombuds; a few offices have multiple ombuds.

[24] Federal Acquisition Regulation, 48 C.F.R. § 3.502-1 (2014).

Fifteen percent have one or more part-time ombuds, some of whom have another role, while 30 percent have one or more collateral duty ombuds. Only about 20 percent have full-time administrative staff.

We cannot know if the offices that responded to the survey are typical of all federal ombuds offices, nor were we able to correlate staffing with numbers of constituents. Nonetheless, these findings are consistent with the responses of some ombuds to the effect that they do not have enough time to respond timely to constituents, do more systems reviews, or do more follow up and evaluation of their work. In addition, some ombuds reported concerns about possible conflicts of interest for those ombuds who serve in additional roles.

1.6.4 Position Classification

About 40 percent of the ombuds who reported said the most senior ombuds in their office is classified in OPM series 301 (Miscellaneous Administration and Program Series). About 60 percent reported classifications in series 343 (Management and Program Analysis Series), series 905 (General Attorney), series 1801 (General Inspection, Investigation, Enforcement, and Compliance Series), series 1811 (Criminal Investigation Series), or series 101 (Social Science Series). Sixty percent reported that the most senior ombuds is a GS-15. More than 20 percent are classified as a member of the Senior Executive Service (SES). Almost 20 percent of these survey responders—who are meant to be the most senior person in their ombuds office (or function) in their agencies—are at GS-14 or below.

Just over half of respondents reported there are no educational or professional certification requirements for their jobs; the rest indicate that there are such requirements. The requirements most frequently mentioned included formal ombuds training or certification, mediation training, and/or a law degree.

1.6.5 Authorization of Ombuds Offices

The origins of the offices that responded to us are varied. Just under 40 percent were created by legislation, and over 60 percent by agency action. The data provided on the survey include some unique office histories. We learned that about 20 percent of all agencies responding to the survey, irrespective of their origins (including a few resulting from judicial determination pursuant to court action), were thereafter configured in different ways through legislative, or agency action—or subsequent additional judicial determination pursuant to court action.[25] A few ombuds reported that they did not know how their office was created. Accordingly, the major finding is that there are many variations.

1.6.6 Charters, MOUs, and Terms of Reference

More than 75 percent of the offices reported some sort of a charter. There were many sources cited for the contents of these charters, including ABA, IOA, USOA, COFO, Intelligence Community Directive 203 and Analytic Ombudsman Guidelines, Whistleblower Protection Enhancement Act, and the FAR.

More than 40 percent follow the IOA standards; more than 15 percent follow USOA standards; more than ten percent follow ABA standards. Nearly 85 percent said that using the office was voluntary for a complainant, and nearly 45 percent that it is voluntary for a responder.

[25] About 20 percent of all ombuds said they were created a) by legislative action, *and* b) by the agency or department—*and/*or c) by some other means. Here is how our team allocated the unusual cases:

- "Legislative action" includes statutes and congressional staff recommendations.
- "Agency/departmental action" includes CEO decisions, other executive actions, labor/management agreements, and an office established pursuant to court action.
- There are ombuds offices, originally established by legislative action, but then powerfully configured through executive action, or, from a lawsuit settlement, configured by the agency. There are offices established by agency action, thereafter configured by legislative action. A significant number of agencies had origins in legislative or agency or judicial action, and then were reported to be configured through actions by more than one of the above. On the basis of the information from self-reports, the team assigned each office to what appeared to be the best definition about how each office was created.

Nearly 65 percent will respond to anonymous concerns. More than 55 percent will respond to a bystander or peer with concerns about which the bystander is a "third party."

1.6.7 Major Standards of Practice Reported on the Survey

- Confidentiality
- Credible Review
- Fairness
- Impartiality
- Independence
- Informality
- Neutrality

1.6.8 The Issue of Mandatory Reporting

The survey question asked ombuds which, if any, of the following concerns are they required to report: discrimination; sexual harassment; fraud, waste, abuse; criminal behavior; insider threat; national security concerns; other? Mandatory reporting requirements of many different kinds are reported by 40 percent of the survey respondents. This topic is a complicated one, which must be considered in relation to standards of practice for confidentiality.

Many ombuds told us that they are able to help constituents report on their own about serious concerns, for example, anonymously—or that the ombuds can get permission from the constituent to get information where it needs to go, or that the ombuds can discover some other responsible path for vital information to be "found," (for example by a compliance office) without breaching the confidence of a constituent. Thus the issue of mandatory reporting seems, in practice, a problem that usually can be dealt with in a responsible fashion without breaching confidentiality— even though most ombuds tell us that they deal regularly with serious cases. In addition, in an extreme case, many ombuds offices adhere to standards providing that when the ombuds determines that there may be imminent risk of serious harm, confidentiality may be breached.

It is also likely that most ombuds who do not answer that they are required to report these topics, nevertheless use the same or similar options to get information about serious concerns where it needs to go.

1.6.9 Reporting Structure

The survey asked to whom the ombuds office reports: head of agency; chief operating officer or equivalent; Congress; other senior leadership, or none of the above. Most ombuds offices responded that they report to the head of the agency or other senior leadership. External ombuds are less likely to report to the top of the agency. We heard, outside of this survey, about a number of ombuds who report rather low in the hierarchy of their agencies. A number of ombuds identified an inappropriate reporting arrangement to be a problem that must be addressed if ombuds are to be effective.

1.6.10 Issuing Reports of Activities

In the survey, ombuds were asked whether they issue: non-public reports to senior management, or reports to Congress, or public reports as a matter of professional practice, or public reports by statutory directive, or no reports. About 75 percent of the ombuds report that they make some kind of reports of activities.[26] About half of those who responded to the question said they report privately within their agencies. Fifteen percent indicated they report to Congress, while another 15 percent report as a matter of professional practice. Only 10 percent of respondents are required by statutory directive to issue reports.

1.6.11 Maintenance of Case Records

In the survey, ombuds were asked about their office's case recordkeeping practice.

[26] Approximately 5 percent of respondents selected more than 1 option.

Forty percent keep some kind of case records with identifying information of those involved; of these most, but not all, serve external constituents. The remaining 60 percent report keeping statistical records without identifying information of those involved. The record-keeping practices of the ombuds who took the survey are vastly varied. Just over half of all ombuds report maintaining a record retention schedule—half of these are externals and half are internals. In some cases, this accepted schedule permits destruction of case records when a case is closed, a practice described to us anecdotally as a best practice.

Forty percent keep records of settlements and outcomes. Thirty percent keep records for compliance purposes. Notably, most of the ombuds who keep records of outcomes are those who work with external constituents.

1.6.12 Access to Independent Counsel

In the survey, ombuds were asked whether they had access to independent counsel to advise them on their legal responsibilities and options as ombuds, when needed. Access to independent legal counsel, which is universally recommended as a best practice by ombuds associations, was reported as wide-ranging. Only ten percent of ombuds reported having access to legal counsel at any time. Forty percent reported that they have such access but only in some instances. Twenty percent reported having no access but the office would benefit from it. Thirty percent reported having no access "but the office did not need it." Legal counsel access— and views about this matter—were about equal, for externals and internals.

1.6.13 Issues Addressed by Ombuds Offices

As expected, there are clear differences with respect to the issues that different ombuds examine. This is true between internals and externals, and also there were variations within the two groups.

Internals report most commonly dealing with ethics, harassment, abusive behavior, leadership and management skills, and performance evaluations. Importantly, about 75 percent report dealing with safety and whistleblowing issues, an important safety valve for organizations. Most internals report working for systems change. That is, they work not only on individual cases but also to make recommendations about organizational improvements.

A large majority of externals also report dealing with (some kind of) serious concern on a frequent basis. Sixty percent report dealing with alleged malfeasance by government employees. Approximately 40 percent report dealing with safety issues and whistleblowing issues.

About 65 percent of all ombuds reported dealing with excellence, integrity and rigor in thinking and work. One-third reported dealing with acquisition and procurement issues. Well over half of "all" ombuds reported dealing with whistleblowing issues. These reports indicate that many of the "generalist" ombuds regularly receive some of the issues more usually associated with the "specialty ombuds" like those assigned to procurement, analytic excellence and whistleblowing.

1.6.14 Functions of Ombuds

We discovered wide commonalities among the functions performed by these varied ombuds. Almost all the ombuds in this survey report working—in many different ways—to be seen as fair, accessible, and credible. Almost all report that they do not have management decision-making functions. Most report working to develop responsible, ethical and effective options for their constituents and to provide relevant referrals. Importantly, these are functions and characteristics of ombuds across the U.S. both in the public and private sectors. They also provide the platform of greatest unanimity among the ombuds who responded to the survey.

The functions of ombuds tend to elide into each other. They may seem somewhat distinct on a list in this report, but in actuality some ombuds reported thinking of their work as "all of one piece" in serving constituents as professionals in dispute resolution and conflict management.

Almost every respondent reported delivering respect with careful attention to the feelings of both complainants and responders; providing a chance to be heard; giving and receiving information one-on-one; and helping to understand and reframe issues. Seventy percent monitor accessibility, use of the office by diverse constituents, and monitor their office response time.

Almost all report ways in which they function within an organizational conflict management system. This systems approach includes frequently offering referrals and working together, given permission, with line and staff managers to resolve issues. That is, ombuds appear not to respond as "loners." The picture of federal ombuds that emerges from the survey is that of distinctive, independent and neutral professionals—supporting a conflict management system—helping constituents and responders within the organization to find and use "appropriate" dispute resolution options and practices.

Most ombuds reported various kinds of systemic work throughout the survey, such as working for improvements in the functioning of their agencies. For example, nearly 70 percent report alerting their agencies to "new problems" and to providing their agencies with information that will help in dealing pro-actively with new problems as well as with patterns of problems. Seventy percent report being alert, by virtue of their role as ombuds, to urgent issues and the possibility of an emergency. Forty percent work as neutral facilitators to assist senior leaders in resolving issues. Seventy percent may work on generic (or systems) improvements.

Almost all ombuds report helping their constituents collect, organize and understand their own information. Sixty percent report helping constituents in dealing with matters on their own and resolving their concerns. We were told that these functions seem to contribute to helping to

resolve concerns at the "lowest possible level" in the organization, in a way that may help decrease costs.

On the other hand, "helping people to help themselves" does not mean just leaving constituents alone with their issues: 80 percent of the ombuds report informal fact-finding, and 60 percent report reviewing data files and studies to make systems recommendations. Many ombuds reported meeting with groups, in many different ways, to learn about group-related issues, to offer training and briefings, and to facilitate generic approaches to individual and group problems. Almost a third provide special skills training. More than 20 percent bring together task forces, and run focus groups.

Thirty percent see themselves as helping informally (and often invisibly) to coordinate services across their agencies; this is seen by one ombuds as "a critical service in these days of perceived lack of coordination in government services." About 40 percent report themselves as working—within the system—for specific systems changes, and for specific mission-related agency initiatives, and as following up on their own recommendations. Each of these functions may be important in supporting coordination of the relevant conflict management systems.

Well over half of the ombuds report themselves as working as intermediaries—as shuttle diplomats and mediators. As conflict management professionals with no management decision-making authority, ombuds directly provide "interest-based" options. On the other hand, "offering options" also includes ombuds providing information about formal grievance procedures—procedures that most ombuds offices do not provide on their own. Sixty percent of ombuds report helping their constituents to understand their legal rights.

Some ombuds report working to *support* constituents in taking formal approaches. Thirty percent assist with process issues in an appeals process. Twenty percent may advocate for an injured party within the agency. A few ombuds say they conduct formal mediation where the

agency keeps settlement agreements, occasionally write official investigatory reports, and issue public reports. A few externals may provide input to a court or in a legislative process. However, no ombuds report that they act as a witness, accompany a party in a formal process, or act as arbitrator or judge. No ombuds reported issuing decisions on appeals or making binding decisions on a grievance or conflict.

1.6.15 The Nature of Ombuds Advocacy

Seventy percent of ombuds report that they advocate for fair and equitable processes; almost 30 percent advocate on behalf of those who have been wronged; over ten percent report they advocate for certain actions and for change in the organization.

1.6.16 Key Accomplishments

Consonant with the traditional values of ombuds everywhere, all our respondents named "contributing to the respect, dignity and fairness with which concerns are handled" as a contribution of their work. Other important traditional responses—where externals and internals reported the same or almost the same contribution—include cost savings, significant service to individuals, systems improvements, and effectiveness in picking up new issues:

- About half of all respondents reported supporting significant systems changes;
- About 80 percent reported having helped individuals in a significant way;
- About half reported having contributed to significant cost savings by dealing with complaints, reducing litigation, and settling serious disputes;
- More than half reported picking up "new issues" for their agency;
- About 40 percent reported significant contributions in effective handling of very serious problems, and helping with "early warning;"

- About 60 percent reported identifying significant patterns of concerns that were not well known or being ignored;
- About 70 percent reported preventing problems through trainings and briefings;
- About 75 percent reported serving as an important liaison between colleagues, units or agencies; and
- About 90 percent reported their work resulted in a constituent receiving a fair process who previously did not.

Externals in this survey were more likely to report supporting the agency with specific mission-related initiatives, helping the agency to improve specific policies, procedures, or structures, making administrative decisions to resolve specific issues, helping within the agency to keep its organizational processes coordinated, and advocating on behalf of individuals.

Internals in this survey were more likely to report helping to provide a safe way for constituents to discuss perceptions of unsafe or illegal behavior, helping constituents to develop and use fair and helpful options, and helping to prevent problems by coaching one-on-one and by providing group trainings and briefings.

Whistleblower ombuds and procurement ombuds—consonant with their particular focus on tightly-defined responsibilities—described their accomplishments as providing specific information and education, and guidance about very specific matters of concern to their constituents.

1.7 Qualitative Survey Summary Findings: Thematic Analysis

The material in this section summarizes the data collected from the nine open-ended, qualitative questions in the survey.[27] It is designed to identify the points the ombuds believed most important to address in response to the questions. However, since we sought responses at the *office level*, the data collected most likely represents the information of several hundred individual ombuds.

This summary may be viewed along with the full thematic report which includes the research methodology used, found in **Appendix E**. This summary, and the more complete thematic report, offers evidence to support the recommendations contained in **Parts 3 and 4** of this Report. It also helped guide the Research Team toward identifying themes to explore further in the case study portion of this project. The following overview provides:

- List of Open-ended Interview Questions
- Highlights Summarized by Theme
- Additional Items Worth Noting
- Examples of Promising Best Practices highlighted in Qualitative Report

Respondents had a choice of completing the open-ended questions electronically along with the other components of the survey or telephonically in more of an interview format conducted by a graduate student at Nova Southeastern University, Ft. Lauderdale, FL, who would record their responses. Thirty respondents or 56 percent overall chose the telephonic interview.

1.7.1 List of Open-ended Interview Questions

1) Considering all that your office does, in what ways do you think your work is adding the most value?

[27] As noted earlier all survey responses are self-reports. The Research Team did not have the resources to make any independent assessment of responses.

2) What changes would you suggest to improve, and also to demonstrate the value of your office?

3) As an ombuds, what would you like to spend more time on? Less time on?

4) What elements of your ombuds work give you the most personal satisfaction?

5) We seek illustrations of promising practices AND innovations among federal ombuds offices. Has your office initiated any efforts or practices you consider promising or innovative? Please describe them.

6) Have statutory or legal requirements or limitations affected your ability to fully comply with the ethics or standards of practice applicable to your office (e.g., confidentiality)?

7) What would you say to ACUS regarding the NEED and VALUE of ombudspersons in federal agencies now and in the near future?

8) What specific recommendations about ombuds would you want ACUS to consider?

9) Please feel free to share any additional information about the structure, standards, functions, innovations, or practices of your office that you believe were not covered in the survey, or that need clarification, and should be included.

1.7.2 Highlights Summarized by Theme

The following represents common statements by a significant number of respondents—with 30 or more comments per theme. Themes with the greatest number of comments are listed first. Summaries contain the respondents' own words, with longer or unusually worded phrases or sentences in quotations.

1) **Training and Education for Ombuds and Constituents.** This topic received more comments than any other. There was a strong desire expressed for consistent, formal, government-wide training for anyone holding the position of ombuds to ensure some standardization of practice. Some respondents suggested that there might be two training tracks—one for ombuds serving internal visitors and one for ombuds serving external visitors. Respondents also noted that "single purpose" ombuds do not ordinarily receive training typically associated with the ombuds position. They found this lack of ombuds training to be confusing, if not potentially problematic. Several respondents also suggested the need for employees and managers (in the case of internal ombuds) and external visitors to be better educated about the role and duties of ombuds.

2) **The Value of Ombuds Supporting Good Communications.** This topic was deemed of vital importance to ombuds. Ombuds were seen as providing value in assisting visitors to navigate a confusing government bureaucracy, and providing a bridge between concerns of individuals and offices of the government. Particularly noted was the value of the ombuds in providing a voice, and options for understanding and resolution, for populations that would otherwise be ignored or have limited options. Ombuds were credited in helping both internal and external visitors to receive guidance on information and resources, "next steps" they might pursue, and coaching suggestions on conflict resolution strategies. Furthermore**,** ombuds who were interviewed believe they add value by "humanizing" the federal government and helping others "to find their own voice and resolve their own issues." In addition to providing knowledge of resources to visitors, ombuds assist others in gaining a different perspective, feeling affirmed and valued, and thereby reducing frustration and confusion. Ombuds expressed pride in being **positive change agents.**

3) **Organizational Hierarchy.** The status and position of the ombuds in the organizational hierarchy was a matter of concern for many ombuds. A strong belief was expressed that in order for ombuds to be effective, ombuds should be at a senior grade, have access to the most senior leaders in the agency, and have "buy in" from leadership on their role and functions. Additional concerns were expressed such as lack of an ombuds classification approved by the Office of Personnel Management (OPM), and the lack of specified "independence" as a clear-cut standard. Organizational ombuds believe they assist management by raising issues to the attention of senior management, and providing a "sounding board" for dialogue with leaders to discuss agency challenges and options on how to address them. They consider the status and independence of the ombuds office to be essential for effectiveness in supporting good management.

4) **Ambiguous Definition of Ombuds.** Respondents offered numerous comments on how the role and functions of ombuds are not universally understood by their internal and external constituents—and that lack of clarity limited their credibility and effectiveness. Along with this need for definitional clarity was a call for more uniform and consistent standards of practice. In particular, they called for clear distinctions between ombuds and other ADR professionals, and between ombuds and "single purpose" practitioners—such as "Whistleblower Protection Ombudsmen"—who serve a narrowly defined population and/or specific educational function. Though the work of the whistleblower ombuds is seen as meaningful and important, many respondents found it confusing to call them "ombudsmen."

5) **Standardization.** This was a recurrent theme of major interest and concern throughout the survey responses. Respondents expressed a strong desire for a standard description of federal ombuds, and standardization of practice consistent

with ombuds' standards. Several commentators requested that COFO review all ombuds offices to ensure standardization of programs, policies and procedures. Several respondents noted that offices of different kinds may follow standards and guidelines from IOA, from ABA, from USOA, and from the Office of the Inspector General. This lack of standardization leads to some confusion.

6) **Under Standardization, there were subcategories** with numerous comments on several of the core standards of ombuds.

Confidentiality. This standard of practice is seen as key to the ombuds role. Respondents addressed the issue from three different perspectives. Some respondents (serving external constituents) believe that their position could not always offer confidentiality; they do not represent their interactions with that guarantee. Some respondents (including mainly those serving internal constituents) provide confidentiality as a standard procedure, though some responded that all they can do is "maintain their best attempts at confidentiality within the bounds of the law."

There are ombuds who felt the ambiguity around confidentiality was highly problematic—by being implied but not guaranteed by the limits of their legal protection; they felt this ambiguity serves as a significant inhibitor to their effectiveness. Several commentators expressed the belief that more "sensitive issues" would come to ombuds if they could *guarantee* that communications with the ombuds would be privileged. Overall, the issue of confidentiality is of most concern for ombuds who serve internal constituents.

Independence. Independence was seen as a critical foundational standard for ombuds' effectiveness. Independence serves as a necessary prerequisite that allows ombuds to "raise questions that others can't or won't do" and to "provide unbiased and unfiltered perspective."

Neutrality. Although neutrality did not receive enough comments to be its own "theme," several comments addressed the difference between neutrality and impartiality, specifically between the practices and standards of organizational ombuds in contrast to the practices of specialty advocates such as the taxpayers' advocates, whistleblowers, long term care advocates and the wounded warriors' advocates.

Fairness. This is a cardinal tenet of ombuds practice and was viewed as very important to respondents and cited as an area in which they feel they add considerable value. Ombuds took great pride in demonstrating "fairness of government to employees and the public" and assisting in settlements "where all parties can accept a decision as fair."

Credentialing of ombuds professionals was a suggestion offered by several respondents. This could be done by an accrediting body that would offer

certificates for on-going training, and/or require or recommend a degree in conflict management or organizational behavior. Another suggestion offered by some was to provide minimum "core competencies" for ombuds.

7) **Office Staffing and Resources.** Several respondents commented on the need for additional staff to handle the heavy workload and visitor requests. The desire was especially expressed by commentators from agencies that do not now have, but desire to have, organizational ombuds. Specific staff needs included access to independent counsel, a program analyst for continuous evaluation, and "an ombuds from the corps of senior ombudsman executives that would operate across all agencies." Ombuds believe that one of their primary and meaningful functions was one of providing **accessibility** for constituents to managers with the power to address issues and rapidly move to resolution. Ombuds felt great pride in their ability to provide "prompt responses, accurate information and an explanation of a process to follow to everyone with an inquiry." As such, several ombuds mentioned they would like to spend "less time on" **administrative duties** such as phone calls, clerical duties, meetings and data entry.

8) **Coalition of Federal Ombudsmen (COFO).** There were several requests for an "enhanced role for COFO" for functional oversight and review. Some interviewees saw COFO as very helpful in setting up new offices. Some suggested that COFO might in the future have major responsibility for "credentialing" federal ombuds and helping with self-assessment.

9) **Marketing and Promotion.** Many respondents addressed the need for federal ombuds offices to pay more attention to marketing and promotion and a need to conduct outreach to highlight their role and function, address misconceptions of the ombuds role, and "raise awareness of the benefits of the program." Respondents cited the need for **structural clarity** with regards to the ombuds role and functions inside the office and agency. The ombuds profession needs to be differentiated from other ADR professionals and offices such as EEO and Human Resources.

10) **Systemic and Policy Solutions.** Organizational ombuds believe some of the functions that add most value include addressing systemic issues, performing system reviews, "making recommendations the agency may be aware of, but doesn't have the bandwidth to review," as well as "raising policy issues that others cannot or will not discuss…such as barriers in governance structures." Several interviewees saw this as an area of their work that yields the greatest "return on investment," and expressed their desire to do more work of this kind. Ombuds stated that they add value by providing an **early warning system** for government agencies by providing feedback and getting ahead of issues before they become systemic issues, or a major violation, or require costly and time-consuming formal processes.

1.7.3 Additional Themes Worth Noting

11) Internal ombuds believe they contribute significantly in creating a **positive work environment** by "increasing morale and helping employees and managers to refocus, reframe, and address conflict…in a healthy and productive manner." In addition, we heard agreement with the sentiment that "an ombudsman that is truly independent of management and unions sends a strong message to the workforce—you have somewhere to go even if it is just to sort out your thoughts." Additional comments cited ways in which ombuds add value to the workplace under the theme "**enhanced outcomes**." Comments included improving conflict resolution processes, promoting interest based problem-solving, being proactive and creative (coming up with "cutting edge solutions") in addressing problems and **problem solving** before the issues that are troubling to employees and external visitors "infect the workplace."

12) The ombuds function of providing an **informal process** to understand and help resolve workplace disputes before they went to legal proceedings or costly formal processes, is seen as a "cost effective" means of conflict resolution. Importantly, ombuds see these informal processes as filling a gap that existed before when "some issues went to a formal dispute resolution process that really had no business being there, but there was no other alternative." One quote conveying the overall value of ombuds states, "ombuds know how to navigate through the agency, employees, industry, advocate organizations and the public."

13) Regarding **accountability** for ombuds, **program evaluation and metrics** was an area of divergent comments. Some respondents mentioned the need for regular assessments of their office and offered several suggestions such as a five-year peer review and a facilitated self-assessment for ombuds, and weekly, or mid-year updates for stakeholders. While some found the emphasis on metrics detracted from their more meaningful work (because they lack administrative support), others offered ideas about how the ombuds office facilitated very useful ongoing assessment of *other* offices in their agencies.

1.7.4 Examples of Promising Best Practices Highlighted in the Qualitative Report

1) Mentorship /or Shadowing another ombuds

2) Training for constituents and other ombuds
   a. Creating training modules, programs and videos
   b. "Quarterly conflict resolution series"
   c. Group trainings or facilitating group sessions
   d. Conflict resolution skills trainings / training as a preventative tool
   e. An "ombuds forum" as a means for exchanging information

3) Supporting leaders in setting the tone, preparing the agency for the role of the ombuds, taking responsibility for the agency's conflict competence and creating the appropriate ethical culture

4) Supporting leaders to allow for time for one on one and team building sessions with their ombuds

5) Supporting leaders using the ombuds as a "sounding board" for the benefit of having an objective audience

6) Supporting leaders in helping to get a records schedule approved by the "U.S. Archivist" as "temporary" so that ombuds records may be destroyed once an issue is resolved

7) Having an office run by an "individual with ADR knowledge and appreciation"

8) Using technology, to offer webinars, pre-taped content, virtual presentations, and using an online interface to submit questions

9) Developing an "infomercial" to increase awareness of ombuds role and functions

10) Implementing an internal and outreach plan along with an office strategic plan with objectives

11) Starting an "Ombuds in Practice" section for the agency's annual ombuds' report

12) Utilizing detailees

13) Creating a slideshow on educating the whistleblower

14) Facilitated self-assessment as an evaluation tool

15) Access to independent legal counsel

16) A peer review process to evaluate individual ombuds and the ombuds program

17) An ombuds of the day to handle walk-ins

18) 24-hour commitment to start on problem resolution from initial contact

19) Several federal ombuds have made presentations and written excellent reports about their own work and about various aspects of the federal ombuds map. This by itself is a "promising practice" in the field and deserves particular mention.

2.0 Research Phase 2

2.1 Introduction: Showcasing Ombuds Programs and Practices

While **Phase 1** of the research provided an historical account of the literature, as well as aggregate information about the range, variations, commonalities and practices among federal ombuds offices, **Phase 2** offers a more detailed and nuanced analysis of effective ombuds' offices, procedures, and activities. Phase 2 consists of five complementary sections: (1) case studies, (2) profiles, (3) summary of insights and promising best practices, (4) possibilities for further research, and (5) a policy discussion on the critical importance of standards.

2.1.1 Case Studies of Current Ombuds Offices

The case studies in Phase 2 carry the report beyond the limited self-reports of ombudsmen that characterized Phase 1. Phase 2 provides a more thorough analysis of effective ombuds' practices with inquiry into the complex conditions and variety of factors that shape ombuds offices, and how they operate. The themes that surfaced in the Phase 1 qualitative analysis informed our case study investigation,[28] in conjunction with the qualitative responses, which gave weight to certain commonalities and differences among ombuds offices.[29] What the reader will discern in the case studies are perspectives from multiple stakeholders involved in a federal ombuds function (e.g., key leadership, ethics counselors, counsel's office, equal employment opportunity office, and constituents who have utilized the ombuds' services). The case studies offer a variety of viewpoints on criteria for measuring ombuds' effectiveness and

[28] See Qualitative Survey Summary Findings: Thematic Analysis Section 1.7 and Appendix E for a description of themes.
[29] See Appendix D for graphical analyses of the survey data.

impact, and provide powerful examples and stories of success. Furthermore, they may serve as informative models in the future.

The choice of case studies was based on the following criteria: (1) specific ombuds programs or practices identified by peers in Phase 1 as positive models; (2) ombuds identified in Phase 1 by researchers as utilizing innovative or effective practices (e.g. based on findings from Phase 1 analyses or as described in relevant literature); (3) ombuds offices that demonstrate differences and illustrate important variations in practice; and (4) ombuds willing to participate as a case study. The selected offices included the Consumer Financial Protection Bureau's Ombudsman's Office, the Department of Energy's Office of the Ombudsman, the Department of the Interior's Organizational Ombudsman, and the Internal Revenue Service's National Taxpayer Advocate and Taxpayer Advocate Service.

A team of three, including Head Researcher Dr. Neil Katz, Project Manager Lauren Marx, and Research Assistant Kathleen Watkins-Richardson, conducted dozens of 30-45 minute on site interviews with ombuds and key stakeholders from the four agencies during the week of July 18 - 22, 2016. Follow-up telephone interviews occurred in August. The case studies were written to represent the results of these discussions.

2.1.2 Profiles

In addition to case studies, three important profiles will be presented. A major finding from many months of research was the discovery of the extraordinary complexity of federal ombuds office configurations and achievements. The Research Team continually discovered new aspects of the field, as well as new horizons for research. In an effort to add a few important ombuds configurations and achievements to the main report, substantial profiles of the Long Term Care Ombuds Program (LTCOP), the Navy Family Ombuds Program, and an additional, smaller profile of the Coalition of Federal Ombudsmen (COFO) were included. The first two

were originally assembled by students from the Harvard Law School Negotiation and Mediation Clinical Program, supervised by their Clinical Fellow and Associate. Becky Kurtz, Director of the Long Term Care Ombuds Program, provided valuable comments and additions to the LTCOP profile. Dr. Mary P. Rowe produced the COFO profile with major input from the present COFO chair.

The first two programs, in tandem with the Taxpayer Advocate Service (one of our case studies), are the face of federal ombudsmen for many Americans. As one might imagine, their reach is very broad and their structures, complex.

2.1.3 Insights and Promising Best Practices

The Research Team gained enormous insights while conducting the face-to-face interviews. These observations have been shared, as well as promising best practices that could be replicated—with the potential for adding value and advancing the professionalism of the federal ombuds, as well as informing decisions of agency leaders, federal ombudsmen, and others interested in establishing new programs, re-designing current programs, or the expansion of existing programs.

2.1.4 Possibilities for Further Research

The scope of this project was defined, and it had been a long time since the last study on ombuds in the federal sector was conducted. Given the parameters of the assignment and the challenges of locating those who could be of most assistance in this study, we discovered that research about actual ombuds practice is difficult, in part due to the nature of the job. Ombuds generally do not seek publicity and are not accustomed to touting their own accomplishments or outcomes. Further, ombuds find it hard to evaluate their own work. We offer in this section of the Report, suggestions for future research that would encompass a wider spectrum of views and important information.

2.1.5 Standards of Practice and Policy Considerations

The policy discussion hones in on the specific standards of practice and implications for effective ombuds operation. Specifically, this section describes how the standards might be applied with regard to the various permutations of federal ombuds, as determined in our taxonomy, and most importantly, how the standards themselves underlie the value that ombuds bring to the federal agencies that employ them.

2.2 Case Studies

Consumer Financial Protection Bureau Ombudsman's Office
Department of Energy Office of the Ombudsman
Department of Interior's Organizational Ombudsman
National Taxpayer Advocate

2.2.1 Case: Consumer Financial Protection Bureau Ombudsman's Office

The Consumer Financial Protection Bureau (CFPB) is an independent agency funded by the United States Federal Reserve. The Bureau was established in 2011 by the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*[30] (Dodd-Frank) as a legislative response to the financial crisis of 2007–08. It serves as a "single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace" (Consumer Financial Protection Bureau [CFPB], "The Bureau," n.d.). Before its creation, that responsibility was divided among seven agencies, including the Board of Governors of the Federal Reserve System (Federal Reserve), the Office of Comptroller of the Currency (OCC), the Federal Trade Commission (FTC), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Department of Housing and Urban Development (HUD), and the Office of Thrift Supervisions (OTS) (CFPB, 2012, p. 5).

The purpose of the CFPB is to promote fairness in the marketplace for mortgages, credit cards, and other consumer financial products and services. More specifically, the agency states on its website that it is responsible for:

- Rooting out unfair, deceptive, or abusive acts or practices by writing rules, supervising companies, and enforcing the law;
- Enforcing laws that outlaw discrimination in consumer finance;

[30] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o)

- Taking consumer complaints;
- Enhancing financial education;
- Researching the consumer experience of using financial products; *and*
- Monitoring financial markets for new risks to consumers.
  (CFPB , "The Bureau," n. d.)

The CFPB has "supervisory authority over banks, thrifts, and credit unions with assets over $10 billion, as well as their affiliates. In addition, [the CFPB has] supervisory authority over nonbank mortgage originators and servicers, payday lenders, and private student lenders of all sizes." The Bureau "also supervise[s] the larger participants of other consumer financial markets as defined by Bureau rules. To date, this includes larger participants in the following markets: consumer reporting, consumer debt collection, student loan servicing, international money transfer, and automobile financing" (CFPB, "Institutions," n.d.). Its headquarters are in Washington, D.C., with four regional offices in the Northeast, Midwest, Southeast, and West.

According to the *CFPB Strategic Plan 2013-2017* (CFPB, "Strategic Plan," 2016), the Bureau's nine top-level priorities for the next two years are (in alphabetical order) arbitration, consumer reporting, debt collection, demand-side consumer behavior, household balance sheets, mortgages, open-use credit, small business lending, and student lending.

In the five years since it opened, the CFPB has faced a high level of public scrutiny. This fact, along with the CFPB's relative youth among federal agencies, makes invaluable the process review role performed by the CFPB Ombudsman's Office.

2.2.1.1 Origins and Evolution of the CFPB Ombudsman's Office

The CFPB Ombudsman's Office was authorized by the Dodd-Frank Act 2010:

"(5) AGENCY OMBUDSMAN.—

> (A) ESTABLISHMENT REQUIRED.—Not later than 180 days after the designated transfer date, the Bureau shall appoint an ombudsman.
>
> (B) DUTIES OF OMBUDSMAN.—The ombudsman appointed in accordance with subparagraph (A) shall—
>
> (i) act as a liaison between the Bureau and any affected person with respect to any problem that such party may have in dealing with the Bureau, resulting from the regulatory activities of the Bureau; *and*
>
> (ii) assure that safeguards exist to encourage complainants to come forward and preserve confidentiality" (Dodd-Frank Act, 2010).

Wendy Kamenshine set up the CFPB Ombudsman's Office and has served as the CFPB Ombudsman since the Office opened its doors in 2011. Kamenshine has an undergraduate degree in economics and practiced international trade law prior to her start in the ombudsman profession at the U.S. Department of Homeland Security's Citizenship and Immigration Services Ombudsman's Office. She is an active member of the federal ombudsman and broader ombudsman professional community and served two terms as Chair of the Coalition of Federal Ombudsman (COFO), an interagency forum that provides collaboration, advice, and guidance on professional ombudsman standards, skills development, program development, and effectiveness of federal ombudsmen (COFO, 2012).

In her capacity as COFO Chair, Kamenshine was asked to meet with the implementation team setting up the CFPB and offer advice on the establishment of the CFPB Ombudsman's Office. She subsequently accepted an offer, first as a detail[31] employee and then a full-time employee (FTE), and modeled the new office similar to her previous office at DHS, where she

[31] During a detail an office keeps an individual's position while that person has a temporary assignment elsewhere. At the detail's conclusion, the individual returns to the home office and position.

had served in that office's leadership. Initially, the office had only one FTE, but Kamenshine was able to contract for administrative support and ultimately hired one FTE Assistant Ombudsman. She brought on board two Associate Ombudsmen, first as detailees, and later hired two FTE Associate Ombudsmen.

Kamenshine hit the ground running. Employing the CFPB organizational chart as a roadmap, she set out to meet with everyone on the chart to share about the role of the Office as an independent, impartial, and confidential resource to informally assist consumers, financial entities, and others in addressing process issues resulting from the CFPB's activities, and to learn about the various parts of the agency.

Furthermore, Kamenshine created an Office Charter based upon the International Ombudsman Association (IOA) and United States Ombudsman Association (USOA) standards, COFO/Federal Interagency ADR Working Group guidelines, other ombudsman programs of the same type, and from her prior ombudsman experience.

At its inception, the CFPB designated that the Ombudsman's Office was to report to the Associate Director for External Affairs. Kamenshine recognized that this could compromise the Office's independence and impartiality, so early on she met with the Executive Committee of the Bureau to recommend the reporting structure within which the Office has operated since it opened in December 2011. Specifically, the Office was removed from the External Affairs Division and placed organizationally outside the CFPB's business lines altogether, as well as outside of the Director's Office. In keeping with Kamenshine's recommendation for a high reporting structure in conjunction with ombudsman professional standards, the Office's first-line report is to the CFPB's Deputy Director, and its second-line is the CFPB's Director.

2.2.1.2 Structure of the Office

The Office has expanded to five full-time staff—one Ombudsman, one Deputy Ombudsman, two Associate Ombudsmen, one Assistant Ombudsman, and one or two detail positions, one of which was filled in FY2016 as an Acting Outreach Specialist.

The Ombudsman's Office is nimble by design. It works collaboratively and smartly to eliminate a single point of failure. For example, the team is in different locations, but by utilizing the communication technologies available to them, they easily remain in constant communication and are possibly more accessible than if they worked from the same location. The ability to instantly update one another enables them to seamlessly step in for each other when needed. Given the breadth of stakeholders, and their external focus, Kamenshine believes in the importance of having a "built-in continuity plan" so that the team is capable of responding to issues as they arise.

The team regularly self-assesses against specific ombudsman standards criteria. The members of the Office belong to a group of financial regulatory agency ombudsmen as well as lead or participate in other professional ombudsman groups, which enables regular discussions and the exchange of ideas. Further, the ombuds are members of, and hold or have held leadership positions within COFO.

2.2.1.3 Standards of Practice

The CFPB Ombudsman's Office defines their standards of practice as:

- **Independence:** "The CFPB Ombudsman reports to the CFPB's Deputy Director with access to the Director. This reporting line ensures the Ombudsman's independence within the CFPB. It also allows us to act as an early warning system and serve as a catalyst for change."
- **Impartiality:** "We do not advocate for one side, but for a fair process."

- **Confidentiality:** "We have put safeguards in place to preserve confidentiality. We will not share your identifying information outside the Ombudsman's Office unless you tell us we can. We also may have to share it if there is: a threat of imminent risk of serious harm; you have raised an issue of government fraud, waste, or abuse; or if required by law." (CFPB, "CFPB Ombudsman", n.d.)

During our interviews, we were able to learn what this means in their day-to-day practice. In terms of *independence*, as previously mentioned, the Ombudsman's Office is not part of any of the CFPB's six divisions, is not part of the agency Director's office, and reports directly to the Deputy Director with access to the Director. Furthermore, the Ombudsman makes all hiring decisions and the Office has a separate budget line under the Bureau's "Other Programs." The Office normally receives legal advice from the CFPB's Legal Division, but within the Office's budget is a line for independent legal counsel, should a circumstance arise where protection of the ombudsman tenets require its use. The Office's outreach with external stakeholders is scheduled and conducted independently from the CFPB and not subject to review or approval by the Bureau. The Ombudsman's Office produces an Annual Report to the Director which is reviewed by CFPB senior leaders for a period of ten business days pursuant to the Office's Charter. Further, the Charter states, "To maintain the Ombudsman's independence, such review is not for concurrence purposes; except for questions of law, the Ombudsman's Office determines which changes to include, if any" (CFPB, "Ombudsman Charter", 2011). The Office issues reports in keeping with ombudsman professional practice.

For the Ombudsman's Office, *impartiality* means they advocate for a fair process and do not take sides. In short, they do not take the side of the Bureau nor speak on its behalf and also do not take the side of the person or entity contacting the office. This is similar to the standard of neutrality practiced by many internally-facing ombuds in that they both do "not take sides."

However, impartiality provides the Office the ability to make a recommendation to the agency on how fair process should be achieved.

The Office has implemented many safeguards to protect the *confidentiality* of its inquirers. For example, machines to drown out sound are attached outside the office doors in Washington so as to ensure any conversation cannot be heard; the offices are perpetually locked when unoccupied. Facilities personnel are not allowed to enter without permission from the Office and any confidential paperwork is in locked cabinets in the offices, limiting the risk that information residing within the office will be revealed. The records retention schedule the Ombudsman's Office follows was approved by the National Archives and Records Administration (NARA) and includes the provision to destroy all individual inquiry records 90 days after the Ombudsman's Office closes the inquiry. For their second Ombudsman Forum, the CFPB Director provided a welcome video for attendees, rather than joining the meeting in person, so the Ombudsman's Office could maintain the meeting's confidential setting. Additionally, the Ombudsman's Office arranges all meetings with outside organizations themselves, not going through External Affairs, in order to maintain independence, impartiality, and confidentiality.

2.2.1.4 Stakeholders, Issues, and Activities

"Advocating for Fair Process in Consumer Financial Protection"
(CFPB, "CFPB Ombudsman", n.d.)

The Ombudsman's Office informally assists in resolving process issues that inquirers may have with the CFPB at both the individual and systemic level. Inquirers include consumers, financial entities, consumer groups, trade groups, and others. The Ombudsman's Office also considers the CFPB to be one of its stakeholders. According to Kamenshine, "basically, anyone outside the four walls of the CFPB can come to us for assistance" (Personal Communications,

July 22, 2016). As such, the CFPB Ombudsman's Office is considered an externally-facing ombuds.[32]

Broadly speaking, they provide effective informal dispute resolution for inquirers seeking assistance; help the agency improve specific policies, procedures, or structures; informally look into issues of concern; study systemic process issues and offer recommendations for agency action; and focus the agency's attention on issues of concern. Further, the Ombudsman's Office contributes to the respect, dignity, and fairness with which such process concerns are handled.

The Ombudsman's Office receives inquiries across the full spectrum of CFPB stakeholder process issues. Focus areas include, but are not limited to, supervisory activities, such as those regarding an examiner or the examinations process; process issues surrounding enforcement activities; issues surrounding the CFPB's consumer complaint process; supervisory appeals, either to facilitate resolution of issues before an appeal is filed with the CFPB, or address process issues during the appeal; and matters between agencies, as a facilitator. "Below are some examples[33] of the CFPB process issues shared with [the Ombudsman's Office in fiscal year 2015] that demonstrate how the Ombudsman worked in practice:"

- Ensuring Acknowledgement to Correspondence
- Suggesting Updated Communications on the Consumer Complaint Process
- Identifying Issues with How the Public Interfaces with the CFPB
- Offering Observations and Feedback from Inreach Visit to the Contact Center
- Highlighting Issues with Third Party Consumer Complaint Submissions

[32] These are ombuds who serve external or primarily external stakeholders, such as citizens, vendors, contractors or others outside of the Federal government. Based on our taxonomy, the CFPB Ombudsman's Office would be considered an externally-facing, subject matter expert ombudsman: an independent, impartial office with authority and responsibility to receive, investigate or informally address complaints about their agency, official, public employee, or contractor, and, when appropriate, make findings and recommendations, and publish reports.
[33] From the CFPB Ombudsman's Office's 2015 Annual Report to the Director.

- Informing about Multiple Profiles Occurrences and Their Impact
- Providing Feedback and Suggestions on Normalization of Data
- Suggesting Clarity Between the Supervision and Enforcement Processes
- Facilitating Communication to Address Process Questions and Issues
- Highlighting Concerns Regarding Company Portal Communications

The Ombudsman's Office offers a range of services to assist with an inquiry such as providing feedback and making recommendations, brainstorming and evaluating options and resources, facilitating discussions, and engaging in shuttle diplomacy, among other options. They regularly meet with CFPB employees to share information about their role and how they may be a resource, provide feedback on what they are hearing, as well as to learn about new initiatives and developments they would not learn about otherwise. To the extent available, the Ombudsman's Office will receive data and various reports from such divisions as Consumer Response to further inform the Office's work. Other activities include researching/analyzing issues, hosting forums, outreach, and as mentioned, highlighting systemic issues and making recommendations to address an individual or systemic issue.

The Charter states that the Ombudsman's Office "does not address matters currently in litigation; delay any statutory, regulatory, or other CFPB deadlines; make decisions or legal determinations for the CFPB; serve as a formal office of legal notice for the CFPB; nor does the office address internal human resources matters."

In a typical day, the Ombudsman's Office might interact with stakeholders, develop and/or share feedback and recommendations with a Bureau division, spend some time on outreach and educating stakeholders, and analyze data. When asked to describe their process,

one member of the team shared, "We analyze and learn about all perspectives of an issue by looking at the applicable laws, regulations, policy, and data, speaking with the individual and/or stakeholders involved, and meeting with CFPB officials. We then may make a recommendation on how the CFPB should address the issue" (Personal Communications, July 21, 2016).

CFPB's Consumer Complaint Process.

The CFPB's Office of Consumer Response handles consumer complaints about an array of financial products and services. The CFPB shares that cutting-edge technology, including secure company and consumer portals, makes the complaint process efficient and user-friendly for consumers and companies.[34] In addition, the CFPB has established a government portal to securely share complaint data with the prudential regulators and state regulatory and law enforcement agencies.

To support their work assisting consumers, the Ombudsman's Office has read-only access to consumer complaints. As of this writing, Consumer Response has handled nearly one million complaints from the public.

Consumer complaints are integral to the CFPB's work, or as the Assistant Director of Consumer Response articulated, "[c]omplaints are the compass to guide the Bureau's work" (Personal Communications, July 21, 2016). The Ombudsman's Office plays an important role in promoting a fair complaint process by regularly providing Consumer Response with feedback for improving the stakeholder experience and safeguarding fairness, consistency, and transparency. Last year, the complaint system was named by Time Magazine as the "Best new tool in the government."[35]

[34] Over 3,800 companies have responded to consumer complaints through the secure company portal.
[35] See Calabresi, M. (2015, August 24). The Agency that's Got your Back. *Time, 168* (7), 42-47.

The Ombudsman's Office serves as an office of last resort[36] for the consumers, financial entities, consumer groups, trade groups, and others who contact the Office. Inquirers may contact the Ombudsman's Office at any time, but the Office asks them to try the agency's regular process resolution avenues first, where possible, unless the inquirer wishes to reach the Ombudsman's Office in confidence. For example, a consumer may contact the Ombudsman's Office when he cannot resolve an issue with part of the consumer complaint process after contacting the CFPB. If what the consumer is identifying to the Ombudsman may be unclear for other consumers, the Ombudsman's Office may bring it forward to the relevant office, which in this case is Consumer Response. Ultimately, the consumer complaint form may be changed for greater clarity. The Assistant Director of the Office of Consumer Response characterizes the interaction between his office and the CFPB Ombudsman's Office as "bi-directional feedback" (Personal Communications, July 21, 2016).

Inreach/Outreach: Meetings, Reports, Forums, and Literature.

With regard to reporting, "[T]he Ombudsman's Office [issues] an annual report to the CFPB Director no later than November 15 and may issue periodic reports to highlight systemic issues and make recommendations for systemic change" (Ombudsman's Office Charter). As stated earlier, and set out in the Office's Charter, each report is reviewed by CFPB senior leaders for a period of ten business days, and to maintain the Ombudsman's independence, such review is not for concurrence purposes; the Office determines which changes to include, if any. According to the Office's *2015 Annual Report to the Director* (CFPB, "CFPB Ombudsman Reports," n.d.), the Office received 1,166 individual inquiries from consumers, financial entities,

[36] Our case study interviews revealed different timings for when visitors contact the ombudsman, either first or last. The mission, structure, and processes employed by the agency appear to affect this variation.

consumer and trade groups, and others in fiscal year 2015. These represented forty-four (44) states, the District of Columbia, Puerto Rico, and other countries.

The CFPB Ombudsman's Office is a good educator across the Bureau in the way it models the tenets of the ombudsman in practice. Various inreach (inside the CFPB) and outreach (outside the CFPB) efforts are made through a robust schedule of meetings, as well as a brochure, reports, and other informational devices. As described in its FY2015 Annual Report, the Office's outreach includes: "in-office introductory and follow-up meetings, teleconferences with groups' memberships, presentations to board meetings, speaking at conferences and in smaller gatherings, and informal visits to financial entities' operations." In addition, the Office has regular monthly, bi-monthly, and quarterly meetings with CFPB divisions, offices, and individuals. The Office continuously explains what an ombudsman is, what it is not, and how it works as an independent function. Ideally, this effort will have a multiplying effect, and their stakeholders will become ambassadors sharing about the resource with others who could benefit from it.

We found text from the Ombudsman's Office-produced information sheet and brochure very informative and potential examples for other ombuds. Here are three questions that help an inquirer to the Office identify the support the Ombudsman's Office can offer:

> **Why should I contact the Ombudsman?** We can assist in informally resolving process issues by: facilitating discussions, brainstorming and evaluating options and resources, sharing independent analyses, offering an impartial perspective, ensuring confidentiality of someone's identity, engaging in shuttle diplomacy, and providing recommendations, among other options.
>
> **When should I contact the Ombudsman?** Try us when you have not had success with existing CFPB processes to address your process concerns, or because you want to keep your concerns confidential. You are welcome to contact the Ombudsman at any time, but we ask you to try the existing CFPB avenues for resolution first.
>
> **Can we meet again?** Stakeholders who previously connected with our office are welcome to re-connect to share further feedback, (CFPB, "CFPB Ombudsman", n.d.)

2.2.1.5 Ombuds Characteristics and Skillset

One team member told the interviewers: "It takes a special sort of person to be an ombudsman. It's not quantifiable. It's a warmth of character. A need and desire to help people" (Personal Communications, July 21, 2016). Collectively, and through separate interviews, the ombudsman team generated the following list of key interpersonal and professional skills (in no particular order):

- Analytical/critical thinking
- Ability to identify issues
- Public speaking, writing, i.e., communication skills
- Creative
- Willing to provide feedback
- Facility with data
- Patient
- Enjoy learning
- Flexible/generalist
- Honest/trustworthy
- Respectful
- Self-confident
- Disciplined
- Organized
- Humble (no interest in self-status; selfless)
- Meticulous
- Even-keeled nature
- Cool under pressure
- See both sides of an issue
- Quick learner—get conversant on the topic
- Can relate to everyone
- Naturally neutral and empathic
- Entrepreneurial

(Personal Communications, July 21-22, 2016)

The ombuds team explained that it is difficult to have a specific ombudsman background. The skills needed are not easily assigned to a particular credential. There are however, certain backgrounds and skills that seem to be useful, such as a law degree. They stressed the

importance of being knowledgeable enough to assist visitors, such as the ability to ask the right questions and spot the relevant issues. As an impartial resource, the ombudsman assists the inquirer with understanding and learning about agency processes. Therefore, an Ombudsman's Office must maintain awareness of developments at the agency.

One team member shared that being an independent office requires them to be a close team. It is tough work at times, and they all support each other. They hold weekly team meetings, offer suggestions to each other and brainstorm next steps. One team member shared that, "as an office of last resort, you may encounter those people who are very upset. Self-care is necessary to prevent burnout in this role." Another team member shared, "It is never about you, and your satisfaction can't be derived from specific tangible results or instant gratification. One has to be okay with not knowing if you really made that difference on one specific issue. The goal is to be part of process improvement—teaching a man to fish" (Personal Communications, July 22, 2016).

2.2.1.6 Perception of Value or Overall Contribution to the Agency

During his interview, the CFPB Director stated that he had no prior familiarity with the ombudsman role and thus no clear expectations about the creation of an ombudsman office when he took the position after serving in a state government function. He likes the fact that the CFPB's Ombudsman's Office is active in the field and community because it brings renewed energy and great access for the public. The Ombudsman's role "encourages another line of input…Constructive criticisms come out" (Personal Communications, July 21, 2016). When asked how his staff feels about being called out for a problem or need for correction in their particular areas of responsibility, the Director replied he has not witnessed any "push back" toward the options offered by the Ombudsman's Office. He has further indicated to his Bureau that all should utilize the Ombudsman's Office.

When asked how he evaluates success, the Director stated that the Ombudsman's Office provides a mechanism for the CFPB to look back at the end of the year and assess gaps. There has been a steady stream of matters being raised and acted upon, and the results seem both constructive and productive. The Annual Report gives a good accumulation of activity and serves as a reminder of the work that has been accomplished. He emphasized the value in having an internal organization face externally to observe and raise issues, and that the Ombudsman's Office is an "early warning mechanism for potentially negative or highly impactful problems"—providing a critical risk management perspective (Personal Communications, July 21, 2016).

The Acting Deputy Director and Associate Director for Research Markets and Regulations told our interviewers: "The Ombudsman's Office has educated us about confidentiality and impartiality in the operation of their Office—beyond things that even occurred to me." The Office "holds up a mirror to our Bureau…and elevates our visibility into certain issues …The Office is a safety-valve, giving one more place for consumers to go…[W]e are still young enough as an organization to want feedback, to improve." Further, he stated that there were two strategic imperatives when setting up the CFPB: "build a great institution and deliver tangible value to consumers." This is not a culture that is ingrained in long-established practices. The Ombudsman's Office makes things more salient for broader understanding (Personal Communications, July 22, 2016).

The Assistant Director for Financial Institutions and Business Liaison told interviewers that he meets monthly with the Ombudsman's Office. Most often issues overlap, which creates a synergistic perspective that "moves the Bureau in a balanced way" (Personal Communications, July 21, 2016). Listening to the Ombudsman's Office helps to reinforce or verify a problem—and from a totally independent source. This area of CFPB manages 750 external issue meetings per year with CFPB stakeholders. Further, the Annual Report issued by the Ombudsman's

Office helps the Assistant Director with policy and makes his job somewhat easier—especially because the Ombudsman's voice reaches the Director, shining a light on certain issues. An example he raised was a topic involving enforcement attorneys being present in examinations. In that example, both the Ombudsman and his office made recommendations. The Assistant Director for Financial Institutions and Business Liaison added, "The Ombudsman's Office makes us better. They are a conduit to improvement" (Personal Communications, July 21, 2016).

The Acting Principal Deputy Assistant Director and Chief of Staff for the Office of Enforcement stated that her impression of the Ombudsman's Office is "a welcomed second set of eyes on CFPB processes." She went on to say:

> The result of their approach is smart and thoughtful feedback. They are reflective and calm in presenting information, good at relaying what they have heard. The input doesn't come with an opinion; they are just passing it along. They are good and patient listeners. (Personal Communications, July 22, 2016).

Before leaving a conversation, the Ombudsman's Office asks the question: "what can I share?" then does what is necessary for the next step. Some of the people interviewed shared that without the Ombudsman's Office, the CFPB would not be getting important feedback on CFPB processes. "The CFPB is a new agency that is still calibrating," according to the Assistant Director, Intergovernmental Affairs, and she added:

> The Ombudsman is deliberate and intentional…an immediate window into how policymakers and other stakeholders view the Bureau's policy and regulatory work…The Ombudsman often voices concerns that have not been heard using normal Bureau stakeholder channels… We have a 21st century ombudsman. She [Kamenshine] is a

thought leader and ultimately adds value influencing how the Bureau does its work (Personal Communications, July 22, 2016).

The following represent a few examples of the value added by the Ombudsman's Office, which were provided to our team through interviews with senior staff who manage process, execution, policy, and communication:

1. *Consent Orders and Corresponding Press Releases: Comparing the Language Used.* A sensitive issue occurred regarding press releases issued accompanying enforcement consent orders. There was a perceived gap, or disparity between the language negotiated in the consent order and what was detailed in the press release (PR). The Ombudsman's Office did an independent analysis to see what was occurring and to determine how the Office could assist. They pulled all consent orders and PR issued over a defined period of time, and concluded that the language generally *did* match but at the same time highlighted three issues to the CFPB for their consideration for future press releases. For example, the Ombudsman's Office highlighted words in the PR that could have legal meaning that were not used in the consent order. Later that year, the Ombudsman's Office performed another review which again showed that the language generally matched, as between the PR and the consent orders, but that there were fewer instances of the issues previously highlighted to the CFPB. The Ombudsman's Office then closed the review.
2. *The Public Consumer Complaint Database: Defining Company Response Options.* As shared in their Annual Report, in FY2015 the Ombudsman's Office "heard concerns from industry groups and companies regarding the response categories that companies use to respond to consumer complaints." To study this issue, [the Office] "considered both the use of these categories as well as the information that users of

the CFPB's public Consumer Complaint Database have as they draw conclusions that may inform the marketplace and, in turn, impact consumers." In the Office's 2016 Mid-Year Update, the Ombudsman shared that the CFPB implemented the Office's recommendations, "updating the definition for a duplicate consumer complaint and providing a clearer distinction between the administrative and substantive company responses to consumer complaints."

3. *CFPB Public Actions and Redress: Information Sharing with Consumers.* "In FY2014, consumers contacted the Ombudsman's Office seeking information concerning their eligibility for a payout or amount of a payout from CFPB public actions – settlements or judgments arising out of the activities of CFPB's Division of Supervision, Enforcement, and Fair Lending. The CFPB disseminates information about public actions via press release, its website, its telephone contact center, third-party administrators (for callers to the administrator), and in some cases, letters to consumers." Research on the issue led the Ombudsman's Office to recommend, for example, that the CFPB "[standardize] informational documents [that] assist contact center staff in locating information quickly" and that the CFPB "find ways to make information easier to find for consumers on consumerfinance.gov." The Ombudsman reported in its FY2015 Annual Report that the CFPB implemented these recommendations, for example, "standardizing the order in which frequently requested information…is presented to contact center staff" and creating a single "Payment to Harmed Consumers" destination on the agency website.

2.2.1.7 Innovations and Promising Best Practices

In creating this model program, Kamenshine informed her process through review of best practices she garnered from her own federal ombudsman experience, her role as the COFO

Chair, and leadership and participation in the broader ombudsman community. She knew that getting the proper structure, such as an office charter, records schedule, and reporting to the top-most level were immediate priorities. In addition to focusing on the Office's foundation, she established rapport and began building connections. She became an ambassador, prepared an "ombudsman elevator speech," and using the organizational chart as a road map of sorts, began meeting with everyone. As previously mentioned, the Ombudsman's Office continues to engage regularly with stakeholders through regular communication, as well as leadership and team-to-team meetings, with a wide range of offices at the CFPB.

The perceptual difference in how members of the Ombudsman's Office operate is also a promising best practice. This team, for instance, will not attend most CFPB social events because of strict adherence to the standards of practice, stating: "We put everything possible in place to adhere to the tenets [of independence, impartiality, and confidentiality]" (Personal Communications, July 22, 2016).

As mentioned earlier in this case study, the measures taken to ensure confidentiality, such as sound machines and offices locked and off-limits from the Facilities staff without a team member present, also support the tenets.

In 2015, the Office debuted a new program as a means for further informing the Office's work as they provide feedback and recommendations to the CFPB: the Ombudsman's Forum. Two forums have been held: one for industry stakeholders, which was a half-day event in the fall of 2015 about process issues that were previsly shared with the Ombudsman's Office. Topics included regulatory compliance, the intersection of supervision and enforcement, field hearings, company responses to consumer complaints, research and studies, and the CFPB website and social media. The other was a forum with national and regional consumer focused organizations, occurring in the spring of 2016, with topics including the consumer complaint process,

connecting in to the CFPB, the CFPB's consumer outreach, the public Consumer Complaint Database, the creation and consumer usage of CFPB educational products, and access to the CFPB for the disability community. For both Forums, the Office reached out to stakeholder groups with which the Ombudsman's Office had previously connected through outreach or otherwise, and held the forum in a neutral, undisclosed location made known only to those invited. The topic areas were based upon issues shared with the Ombudsman's Office from the groups and the CFPB. Notes were taken without attribution. The Ombudsman's Office shared the unattributed feedback with the CFPB as well as in their FY2015 Annual Report and will include a discussion in their upcoming FY2016 Annual Report. In the end, the Office shared that these forums were very beneficial in fulfilling the Office's statutory mission. The Ombudsman's Office plans to hold another forum soon and make these regular events.

Other **promising practices or innovations** were noted (in no particular order):

- *Regular check-in meetings with the divisions, offices, and others within CFPB.* The Acting Deputy Director, who is also the Associate Director for Research, Markets, and Regulations, noted that every month the Ombudsman meets with him and identifies issues. In their FY2015 Annual Report, the Ombudsman's Office referenced 27 regular meetings with CFPB offices, divisions, or individuals. Furthermore, the Ombudsman's Office presents issues and recommendations twice a year to the CFPB Executive Committee. Members of the Ombudsman's Office will join the Ombudsman in the Executive Committee briefings, so as to add color and/or context, if beneficial.
- *Ombudsman in Practice.* A few years ago the Ombudsman's Office started including an "Ombudsman in Practice" section in the *Annual Report* which serves to illustrate how the Ombudsman's toolbox was used in practice that year.

- *Mid-year Update*. Last year, the Office launched a mid-year update for all stakeholders so they could learn what the Ombudsman's Office was doing without waiting until the end of the year.
- *Strategic Planning*. The Ombudsman's Office has, thus far, developed two, two-year strategic plans to set out objectives during that timeframe. Inreach and outreach plans accompany the strategic plan so that the ombudsman team is organized and deliberate in how it conducts activities with internal/external stakeholders. The Office currently has an Acting Outreach Specialist detailee who is enhancing the literature and event-planning.
- *Shadowing*. The Ombudsman's Office shadows some agency activities, such as the company examinations process, to further inform their work.
- *Resource List*. The Ombudsman's Office developed an ongoing list of resources from which to draw options to share with inquirers to the Office who may benefit from contacting another place for individual assistance.
- *Independent Counsel*. The Office budget includes a small line item for independent counsel should the need arise to use that resource.

Finally, having an organizational culture that aligns with the function of the ombudsman is also a promising practice. The Assistant Director for Consumer Response stated that "the spirit within CFPB is one of a passion for continuous improvement and for the mission of the organization." It is a culture that both nurtures problem-definition and resolution, and provides a positive platform on which the Ombudsman's Office can contribute. CFPB has inculcated the Ombudsman's Office within the Bureau, making it a valid part of assisting in resolving issues without compromising confidences—and this model illustrates a discernable example of how

multiple channels cause change. More importantly, we witnessed a concurrent synergy whereby the culture desired by the Bureau leadership reinforces the Ombudsman's Office's activity, which in turn further reinforces the culture.

2.2.1.8 Interview Observations and Conclusions

What might we learn from this model to enhance the federal ombudsman's value?

The CFPB has established a unique culture throughout the entire organization. The accumulation of certain personal traits possessed by the ombudsman team provided a new perspective on our research. The eight most salient qualities were selflessness, patience, self-confidence, meticulousness, natural neutrality and empathy, trustworthiness, entrepreneurial spirit, and communication skills—the last being key to conveying all the other traits. Finally, strict adherence to the standards of practice provided the third leg of the stool. The impeccable manner in which these ombudsmen exercised independence, impartiality, and confidentiality truly represented a role model for the federal ombudsman community and the entire organization.

2.2.2 Case: Department of Energy Office of the Ombudsman

The Department of Energy (DOE) has a workforce of approximately 14,000 federal employees and 100,000 contractor employees scattered across more than 30 states, operating with an annual budget of about 30 billion dollars. The stated mission of DOE is to "ensure America's security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions." The four pillars that underlie its mission embrace energy, science and innovation, nuclear safety and security, and management and operational excellence (The Department of Energy [DOE], "Mission", n.d.).

Prior to the establishment of the current Office of the Ombudsman, DOE had twice before attempted to create an ombuds function. The first occurred in the mid 1990's when an ombuds position, headed by a political appointee, was created within the Office of Economic Impact and Diversity. The position was eliminated, however, with the change in administration less than a year later. A more significant attempt occurred in January 2000, in response to a controversial crisis a year earlier involving the alleged espionage and sharing of nuclear secrets with the People's Republic of China by Asian Pacific American (APA) employees and scientists. The dismissal of a laboratory scientist at the Los Alamos National Laboratory and a call for polygraph testing sparked anger and the threat of a boycott from much needed APA employees who believed their patriotism and loyalty were being questioned.

These developments led to the creation of the "Task Force Against Racial Profiling" who later recommended the creation of an ombuds office, again within the Office of Economic Impact and Diversity. In addition to the mandate for an ombuds office to engage in general issues of information requests and assistance, employment barriers, and management and accountability, there was a special focus on security-related matters including concerns related to double-standards, racial profiling, use of polygraph tests and reporting contacts and sensitive countries. The ombuds office would serve as "a catalyst in building trust and producing positive change to advance a diverse, hospitable, and productive work environment." It would attempt to accomplish this by providing services in four areas:

1. Ombuds services such as referrals, coaching and facilitation, interest-based conflict resolution, outreach, and handling sensitive cases from the field;

2. Measuring the workplace climate especially in terms of diversity and hospitable work environment;

3. Coordinating ombudsman-related activities and functions through adherence to standards of practice for all ombuds; *and*

> Serving as an agent for systemic changes for a diverse and productive workplace in a respectful environment. (Wu, 2001, pp. 9, 10, & 19)

Due to shifting organizational priorities and funding challenges in the early-2000s, the ombuds office was reevaluated, and ultimately became absorbed by other DOE resources. Although both of these initiatives undoubtedly delivered some value, they did not practice according to the critical ombuds standards of independence, neutrality or impartiality, and confidentiality.

2.2.2.1 Origins and Evolution of Current Office

In the early spring of 2012, there was a renewed and educated effort to create an organizational ombuds function within the Department. Learning from past experiences, the ombuds would practice according to widely accepted standards and ethics, as well as receive support from leadership. Then Secretary of Energy, Steven Chu, who had a favorable view of the ombuds from his time at Stanford University, formally established the office on March 6, 2012, to provide a similar entity for a "safe, independent, and confidential environment for employees…to feel empowered to share their ideas, voice their concerns, resolve workplace matters, and complete the department's mission" (Chu, "Letter," 2013).

Rita Franklin was selected to serve as the Ombudsman and Director of the office. Having served in three federal agencies for over thirty years, progressing her career from a clerical position to the level of Senior Executive Service (SES) and the Deputy Chief Human Capital Officer, she was familiar with the ombuds community in the federal government, and DOE leadership was confident in her ability to successfully establish, manage, and grow the office. She consulted with other federal ombuds programs, the Coalition of Federal Ombudsmen (COFO), the International Ombudsmen Association (IOA), and the Ombudsman Committee of the American Bar Association, and proceeded to design and negotiate a detailed *Ombudsman*

Charter and Records Retention Policy, which was updated in 2013. The Charter's core expresses the purpose to "provide an informal, neutral, independent, and confidential resource for DOE's federal workforce" by:

A. Raising and resolving issues of concern in a safe, informal, confidential environment to the extent allowed by law;

B. Facilitating recognition, prevention and resolution of workplace disputes without resorting to formal means of dispute resolution;

C. Providing anonymity, to the extent allowed by law, to any employee wishing to address a workplace issue with the Office;

D. Providing DOE leadership with independent sources of information about persistent, continuing, or systematic concerns and issues;

E. Assisting in coordinating the processes by which questions or concerns are adequately addressed; *and*

F. Facilitating review of Department processes or procedures, which may adversely affect the Department's mission, workplace, or employee morale.

The Charter also clearly illuminates, in the section: *Principles of the Ombuds,* how the core standards of practice are applied, and how the reliance upon existing processes such as Equal Employment Opportunity (EEO), negotiated grievances, and reporting and record keeping obligations remains in place. The Charter contains language detailing the ombuds' access to all levels of management, as well as what their office shall NOT do, such as "decide or attempt to decide any matter concerning any workplace issue or dispute" or "to advocate for, or represent, the interests of any individual employee." Notably, the Charter explicitly states that employees "seeking assistance from the Office will be free from retaliation or reprisals for requesting or using the services of the Ombudsman" (Franklin, 2013, pp. 1-3).

In addition to carefully crafting and negotiating a Charter, Franklin prioritized the development of relationships with key constituents, education of potential visitors from all

organizational levels, and the design and implementation of a marketing campaign. She knew that most DOE employees were not aware that the office existed and that knowledge of the ombuds role and functions was limited. Key initiatives included one-on-one meetings with potential partners such as union heads, and leaders of offices such as Equal Employee Opportunity (EEO), General Counsel (GC), the Inspector General (IG), Human Capital, the Employment Assistance Program (EAP), and the Alternative Dispute Resolution (ADR) unit of the Hearings and Appeals Office. General marketing and education were initiated during many "All Hands Meetings," led by individual programs and the Secretary of Energy when Franklin would briefly discuss how the ombuds function and the services offered.

Recruitment of a talented and diverse staff also demanded attention. Although Franklin first relied on detailees, she was soon authorized to hire three full-time staff. Her first hire was Cathy Barchi (who left DOE in 2015 and initially served as Deputy before all staff were elevated to GS-15), who brought to the office a conflict resolution, EEO, and legal background. Associate Ombudsman, William Maurer, was hired shortly thereafter and came with an impressive background including a Master's in Public Administration, many years of experience in a non-profit mediation center, and critical work at other federal agencies, where he designed and delivered national workshops on improving performance deficiencies, and facilitated meetings and workshops related to transforming agency business processes. Later Franklin added two additional Associate Ombuds to her staff. One, Felicia Bunns, has a Master's of Business Administration (MBA) degree and fifteen years of experience in training, organizational development, and leadership experience in local government, healthcare, market research, financial services, and the legal field. Patrick Holman, the most recent addition to the staff, holds a doctorate in political science and public policy, an MPA degree, and had worked for DOE for 15 years in various capacities, including stints as Chief Business Operations Officer

for the Under Secretary for Science and Energy and Director of Budget and Planning for the Office of Nuclear Energy. To complement their formal education and work experience, each of the staff members had undertaken various training and certifications in key ombuds skills, such as mediation, conflict resolution, executive/leadership coaching, and organizational transformation. All are very active in the ombuds community as well. Maurer is the current COFO Vice-Chair while the other members attend IOA and COFO conferences (The Office of the Ombudsman Team, Personal Communications, July 19-20, 2016).

Franklin appears to have recruited an exceptionally well-credentialed staff—a staff that exemplifies her intent to ensure overlapping skills and knowledge coupled with diverse experience in key areas such as human resources, organizational development, public administration, and training. Another priority—and success—was the elevation of the Associate Ombudsman to a GS-15 designation, recognizing the complexity of issues addressed by the Office.

2.2.2.2 Structure of the Office

The structure of the DOE ombuds office is both unusual in its size and complete autonomy, which has proven effective in helping the team carry out their mission and practice according to their professional standards. For example, although the budget comes from the Office of Management, the Office has complete control over expenditures. Moreover, the Director reports directly to the Secretary through the Secretary's Chief of Staff within the Office of the Secretary. The Chief of Staff conducts the Director's performance review with input from the Secretary and Deputy Secretary. According to the ombuds team, this reporting line to senior leadership is critical to protect their independence and reassure employees that the ombuds are neutral.

The location and layout of the Office of the Ombuds was designed for maximum privacy and confidentiality. The office is deliberately situated in a low-traffic area within DOE's Headquarters in Washington, D.C. Each of the ombuds has their own office with doors that can be closed and cabinets that can be locked. There are separate, larger rooms for team or teleconferencing meetings. 'Kudos' statements—from employees who have benefited from the ombuds office—adorn the walls to provide inspiration to the staff and confidence for visitors.

Although the ombuds continually discuss ideas to improve effectiveness, they also meet more formally twice a week for planning purposes—determining staff responsibilities and new cases. These routine meetings also serve as an opportunity to discuss more challenging cases and seek input from the team. In this way, they can take advantage of both their common and unique talents and experience, as well as increase the capacity of their small team by being able to step in for one another when the need arises.

2.2.2.3 Issues, Services, and Constituents

Strategically placed throughout the office are 3 by 17-inch informational flyers and a more detailed brochure describing the ombuds' role and function. The two promotional documents state that the Office of the Ombudsman is an independent, neutral, confidential, and informal resource available to all DOE federal employees, and that its primary purpose is "to increase organizational focus on mission critical activities by helping senior leaders, managers, supervisors and staff to:

- Minimize unwarranted distractions in the workplace;
- Increase employee engagement;
- Expeditiously address individual and organizational matters."

Furthermore, the brochure indicates that the office shares conflict prevention strategies with senior leaders when appropriate.

In their written materials and in presentations, the ombuds explain that their primary services are referrals, coaching, informal mediation, team building, group facilitations, organizational transformation consultations, shuttle diplomacy, training/education, and elevating issues when appropriate. They also provide helpful examples of situations in which an employee could contact the Office. The few examples include:

- When you are uncertain about where to take a workplace problem;
- When you would like to discuss strategies for preventing, managing, and resolving conflicts;
- When you might want an independent facilitator to assist you or your group in addressing workplace challenges. (Department of Energy Flyer, n.d.)

Sample Issues.

Between our interviews with the ombuds team, visitors, and stakeholders, as well as the written material provided to the Research Team, we understood how the ombuds has become a reliable source of information about DOE's policies and procedures and for referrals to other programs. The team also came to recognize similar types of issues that caused individual employees, managers or supervisors, or groups to seek the ombuds' services. Some of the recurring concerns include: how to have a difficult conversation, performance appraisals, information flow, bullying, retaliation, unequal treatment, and personality conflicts, as well as leadership, managerial, and supervisory skills, transitioning to a new role and/or work team, and a need for reasonable accommodation. Management might request facilitation, organizational assessments, and training to address team dynamics, low morale, intra-team conflict, and layoffs or reorganization. As change agents, ombuds might engage in education and advocacy work concerning fair process, diversity, leadership skill building, intra-agency concerns about policies and procedures, and consistency in service delivery.

The office estimates that in the four years of its existence it has worked with over 1,700 visitors and an additional 4,000 staff as part of group engagements. Within the past year, the ombuds report working on approximately 550 cases. They estimated that about 80 percent of their caseload was spent working with individuals and 20 percent with groups. However, these numbers might shift as the office continues to receive an increasing number of requests for group interventions. They also acknowledged a trend toward working closely with more managers and supervisors (The Office of the Ombudsman Team, Personal Communications, July 19-20, 2016).

Indeed, when we interviewed senior leadership about the interventions of most value, almost all of them spoke of the impact of interventions at the team and group level.[37] For instance, the Deputy Director of Field Operations/Science expressed strong appreciation for help navigating and limiting the negative impact of a significant realignment and reorganization at one of their science facilities. The process spanned several months and included multiple facilitated sessions and individual interviews to elicit concerns and suggestions, as well as working with the leadership team on development and implementation of a plan for continued success. He also praised the guidance and support the ombuds provided to him and his supervisory team on at least two other occasions: rebuilding a critical team after an abrupt change in leadership, and a major restructuring at one of the laboratories.

Another executive, the Chief of Staff and Associate Principal Deputy Administrator of the National Nuclear Security Administration (NNSA) described the ombuds team as vital to the success of his staff's retreats and merger of two of his offices. He described the ombuds process as: 1) gathering data; 2) conducting one-on-one interviews with staff; 3) facilitating a group

[37] Note: These individuals would most likely not have known about many interventions with individual employees who report to them because of strict confidentiality.

workshop, i.e., the intervention; 4) following up with the manager; and 5) following up at the agency level. It is worth noting that many of the interventions shared with us occurred outside of headquarters, often in somewhat remote locations, and required two ombuds (Personal Communications, July 20. 2016).

Recently, the Office was asked to assist senior DOE leaders in their design and facilitation of "listening sessions" for DOE employees following the spate of police shootings of African American men and subsequent shooting of police officers in July 2016. Senior DOE leaders were committed to engaging in discussions regarding race, diversity and inclusion, requiring an exceptional level of sensitivity and skill to execute. Predictably, there were many questions about whether to move forward with the schedule or temporarily postpone the meetings. The ombuds office provided senior leadership with pros and cons including risks and rewards for their decision to carry on with employee sessions and after numerous discussions with many Departmental stakeholders. According to the Chief of Staff, the event was a success and prompted more focus on efforts to enhance diversity and inclusion. The ombuds team will continue to play a key role in such initiatives.

2.2.2.4 Perceived Value of the Office of the Ombuds

One of the main motivations of the Research Team to hold on-site interviews was to learn about the perceived value of the ombuds from those to whom the ombuds report, support, and have served. Fortunately, the Office was able to secure participation from thirteen of these representatives, ranging from the Secretary's Chief of Staff to the Deputy Secretary to leaders of important offices or divisions like Human Capital, the National Nuclear Security Administration Office of Science, General Counsel Intergovernmental Affairs, and EEO, as well as two non-supervisory employees who had worked with the ombuds office.

Some of their contributions were described in unique terms such as "they [ombuds] give me important data, insight and possible options when issues are 'left of boom' (prevention stage) as opposed to being 'in the boom' (problem or crisis), and they also help us with conflict occurring 'right of boom'" (consequence management). They operate like a "switchboard operator" to channel people to the most appropriate resources (Chief of Staff, Personal Communications, July 19, 2016). The Associate Principal Deputy Administer said, "They give me a more accurate and holistic picture of what is happening than I have myself, since I am in the midst of the crisis/issue…they can prevent problems so I don't have to clean them up" (Personal Communications, July 20, 2016). Similarly, the Deputy Chief of Staff describes the value of the ombuds as "providing senior leadership with a 'front page' about things that are 'bubbling'" (Personal Communications, July 20, 2016).

Perhaps even more telling were the unsolicited comments, such as: "they provide an incredibly valuable resource by complementing a manager's skill set…I have known them to always operate with the utmost integrity, accountability, and responsibility…The ombuds create an environment of comfort and confidence that gives people strength to come forward…They are a conduit that helps a manager to be proactive, solve a problem early…They can diffuse a potentially controversial issue…great value as an in-house capability" (Deputy Director for Field Operations/Science, Personal Communications, July 19, 2016); they and their contributions are "one of the best ideas in government" (Chief of Staff, Personal Communications, July 19, 2016; Associate Principal Deputy Administrator, Personal Communications, July 20. 2016); and "when I think about the ombuds, I have a smile on my face even though the topic I have to talk to them about is difficult" (Security Officer/Science, Personal Communications, July 20, 2016).

Visitors who were interviewed lent other perspectives. One interviewee had been debating whether or not to file a formal grievance and wanted to talk things through with

someone before she made a decision. She had initiated contact with labor relations and union representatives but was concerned that the confrontations inherent in the process might help her "win the battle, but lose the war," (Visitor, Personal Communications, July 19, 2016). When a colleague suggested she try the ombuds office, she had no idea what to expect. Today she describes the ombuds as a safe space to speak openly and be heard and figure out your options. Moreover, she praised the ombuds for being "calming, patient, always available—if one ombuds is unavailable the rest of the team is up to speed on your case and can seamlessly step in," and for the comfort to "never feel nervous that confidentiality would be breached" (Visitor, Personal Communications, July 19, 2016).

Another visitor spoke about her feelings of despair in having "nowhere to go and no one to trust." She heard the ombuds speak at a leadership meeting and decided to schedule an appointment. The ombuds helped her "develop skills, and provide a different perspective by pointing out communication breakdowns." Even more beneficial to this visitor was role-playing with the ombuds a conversation between herself and her supervisor. The role-play provided her "a great opportunity to find out how she really sounded and to fine-tune what she wanted to say and how to say it." The visitor described the office as a "safe place to bring concerns, to vent, and to feel supported" and added that she believes the ombuds "really want to problem solve and help everyone—they don't take sides." She went as far as to say "just the act of coming to the office gave some sort of release and feeling of empowerment." Overall, she remarked, "around DOE, people really like the ombuds office. They have a great reputation" (Visitor, Personal Communications, July 20, 2016).

2.2.2.5 Personal Characteristics and Skill Set

The Interview Team learned a great deal about the essential personal characteristics and skill sets of the ombuds, the ways in which they operate as a team of ombuds within the

organization, and how important the "fit" of those characteristics and skill sets are to their success. The ombuds themselves listed important qualities for their role, such as caring deeply about the strategic vision and mission of the organization, enjoying working in the "gray" areas (as opposed to black and white areas), "dancing in the moment," being comfortable with conflict and emotion, and being somewhat selfless so that one both believes and behaves as if it is "not about you" (The Office of the Ombudsman Team, Personal Communications, July 19-20, 2016). They also mentioned the importance of being comfortable with working at all levels of the agency. Ombuds Bunns stated that she relishes the moments when her constituents take ownership of ideas. This, she claims, comes through good conflict coaching which emphasizes the importance of providing employees with support and resources to be successful (Personal Communications, July 20, 2016).

Other interviewees described these qualities they observed in the ombuds: as trustworthy, emotionally intelligent, proactive, calming, genuine, respectful of "boundaries" in relation to other employee resources, welcoming, supportive, creative, non-threatening, neutral, and fair.

In terms of the "fit" of ombuds characteristics and skills, there seems to be high congruence between what they do and the skills they possess. As mentioned, collectively the ombuds have expertise in human resources, management and supervision, organizational development and transformation, public administration, executive/managerial coaching, conflict resolution, mediation, facilitation, training, and change management. They all possess highly refined skills in interviewing, data gathering and analysis, critical thinking, maintaining confidences, staying neutral and impartial, designing and delivering trainings and education/outreach.

An additional factor that stood out in the site visit—and that contributes to the success of the ombuds' effectiveness—was the success of these ombuds in functioning as a team. The

members of the DOE ombuds team were conscientiously selected because of the variety of experiences and talents they bring to the group, as well as their overlapping personal characteristics and ability to uphold the strict standards of their role. While interviewing members of the ombuds team—both as a group and individually—the Interview Team heard many declarations of appreciation for other members of their team, as well as praise of how they functioned together. For instance, one member commented, "as a team we are conscious of the stresses we are under…we practice self-care by laughing a lot, supporting each other, taking time for ourselves, and looking out for one another" (The Office of the Ombudsman Team, Personal Communications, July 19-20, 2016).

The value of the ombuds office as perceived by visitors and partners corroborated the value the ombuds team places on their contribution. The ombuds assess that their services "reduce legal costs, improve employee morale, increase employee engagement, improve product and services to be more efficient at advancing the Agency mission, and help DOE personnel navigate transitions in a highly political and bureaucratic infrastructure" (The Office of the Ombudsman Team, Personal Communications, 2016).

2.2.2.6 Standards of Practice

On numerous occasions, each member of the ombuds team emphasized that the standards of practice—independence, neutrality, confidentiality, and informality—are the "glue and anchor of everything we do" and inform specific guidelines on how to approach situations in terms of what they can and cannot do. Further, they confirmed that for each of them, practicing according to the standards are "at the heart of the ombuds profession" and allow them to be successful, which contributes to the ability of DOE to achieve its mission. Bill Maurer, Associate Ombuds, remarked, "Rita is always reminding us of the need for utmost devotion to the standards. One of

her famous sayings is 'the moment confidentiality is breached we should just close our doors'" (Personal Communications, July 19, 2016).

For the Ombuds Team, the standards are "front and center" in their discussions with potential visitors, as well as in all promotional and outreach materials. They want visitors to know "what to expect" when they come to the ombuds office, because if they do not, the ombuds team is convinced visitors will not even come close to the level of courage and trust required to seek their assistance.

The Office's record retention policy is designed to protect visitor confidentiality and includes specific provisions regarding written notes. The policy states, "The Office of the Ombudsman meets with visitors and takes rough notes during these meetings. These rough notes are not circulated and are not used for official purposes or to conduct agency business. These notes will be purged as soon as the contact with the visitor(s) is closed and the notes are no longer needed by the creator" (DOE Office of the Ombudsman Record, 2013).

Further stipulations to ensure privacy include *permanently* deleting email exchanges with visitors three years from the date their case is closed, and that in the ombuds case database which is kept for reporting obligations, visitors are listed by number only—with general information regarding the nature of the visitor's concerns accessible only to members of the ombuds staff. Temporary working notes might be collected so the Office can assess the need for follow-up actions, identify trends, and make recommendations for conflict intervention strategies and prevention. Information in the database is purged when no longer needed in accordance with General Records Retention Schedule (GRS) 20, item 4, Data Files Consisting of Summarized Information (DOE Office of the Ombudsman Record, 2013).

Though the ombuds are able to practice according to standards in all aspects of their work, thanks to the support of general counsel, senior leadership, and DOE staff, they strongly

believe that more legal protection is needed for the entire federal ombuds community to uphold the standards of practice. Specifically, they were concerned that offices both within and outside DOE might run into trouble if situations arose, such as requests for confidential information from the Inspector General, future DOE Leadership, Congress, and others, who interpret confidentiality differently and may not be not familiar with the functions of an organizational ombuds. They were also adamant in stating that without the standards it would be nearly impossible to add value as an ombuds and that the standards are what distinguish them from other DOE resources.

2.2.2.7 What Might Be Learned to Enhance the Value of Federal Ombuds

The DOE Office of the Ombuds has developed a model program that might be worth study and consultation by other existing federal organizational ombuds offices, and more importantly, by those establishing new offices. We note a few of these particular initiatives emphasized by the ombuds as critical to their success:

1) One-on-one education about the ombuds office to potential constituents and key stakeholders is a top priority. Many of the senior leaders and division directors said they were unsure of what an ombuds is and does, and commended Franklin's efforts to educate them within the first few weeks of her arrival. In particular, they noted Franklin's ability to clarify the importance of the standards as the foundation of the ombuds' practice and helping them to see ways in which the ombuds would be a valuable organizational resource. It appears critical that awareness should be created in multiple ways.
2) Support from the top of the organization is essential for legitimacy and credibility. Several interviewees remarked that the Office was established by agency mandate and that the ombuds director has direct access to the Secretary, Deputy Secretary,

Chief of Staff, and Deputy Chief of Staff. This was viewed as instant prestige and ensured independence. Overall, the ombuds have strong support from the leadership of DOE and feel "very lucky to work in an organization that truly values what we do."

3) There are certain personal characteristics, competencies, and skill sets that appear to be essential for success. The ombuds talked about the need to be comfortable working with highly emotional visitors while simultaneously managing their own emotions, requiring patience, compassion, and self-care. Moreover, the need for self-awareness, building rapport, and managing relationships are also viewed as essential. Among the competencies that stood out are process design, facilitation, data analyzing and data organizing skills in their group work, which seemed to yield high value in their assessment of a return on investment.
4) Group facilitations and briefings as well as trainings and workshops are effective and efficient methods for outreach and education because they demonstrate the value of the ombuds and create opportunities to build rapport and connect the ombuds work to the organizational mission. The design of the facilitation/briefing materials are not often thought of as a necessary competency, though perhaps it needs to be emphasized more as a critical skill for organizational ombuds.
5) The whole is greater than the sum of the parts. Organizational ombuds must wear many different hats—facilitator, policy expert, coach, referral hub, presenter, trainer, marketer, and many more. As such, when expanding an ombuds office, it is important to assemble a complementary team that allows for the coverage of a broad set of issues. Though the ombuds team shares many of these same essential skills and characteristics, it also brings a variety of work and educational experiences. This

diversity enables the team to mix and match resources to meet the unique needs of their visitors, and to handle more complex interventions. Equally important is the affirmation, support, genuine appreciation and "taking care of each other" the team provides one another as they perform in their sometimes very stressful functions and roles. Positive relationships among all members of the team appears important to their effectiveness—maybe more so than with other organizational teams.

6) As the ombuds continue to build credibility and trust in their work and value, they will likely be involved in more complex interventions, most often at the group level. For optimal effectiveness, they need to be well versed in both covert and overt group and team dynamics, serve as strong facilitators of group process, and be able to guide leaders through interventions and offer suggestions for enhanced team functioning. One of the key contributions to management might be in the facilitation of team "audits," as well as strategic planning processes in which the group observes what is working/not working well in their group, identifies challenges and specific strategies to overcome obstacles, and commits to action plans with specific tasks and established deadlines (R. Franklin, Personal Communications, July 19, 2016).

2.2.3 Case: Department of Interior's Organizational Ombudsman

The Department of the Interior (DOI) is one of the longest-existing cabinet-level departments in the federal government. Created by the 30th Congress on March 3, 1849, the Department has been responsible for managing the Nation's domestic concerns for over 165 years. Today, DOI's mission is protect and manage the Nation's natural resources and cultural heritage; provide scientific and other information about those resources; and honor its trust

responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities (The Department of the Interior [DOI], "Who We Are," n.d.).

The DOI manages more than 530 million acres (or about 20 percent of the land area of the United States), 700 million acres of subsurface minerals, and 54 million acres of submerged land in five Pacific marine national monuments. The DOI has jurisdiction over an additional 1.7 billion acres of the Outer Continental Shelf. It administers 56 million acres of land belonging to Indian tribes and individuals, provides education services to nearly 50,000 Indian children, and manages the federal government's relationships with 566 federally recognized tribes. It is also responsible for protecting endangered and threatened species and, through the U.S. Geological Survey, performs scientific research and mapping services (DOI, "Who We Are," n.d.).

In support of its mission, the DOI has over 70,000 employees, including expert scientists and resource-management professionals, in nine technical bureaus and various offices in over 2,400 operating locations across the U.S., its territories, and freely associated states. Furthermore, the DOI benefits from approximately 280,000 volunteers who provide nearly ten million hours of service, valued at an estimated $224 million per year (DOI, "Who We Are," n.d.).

2.2.3.1 Origins and Evolution of Conflict Management Services at the DOI

The DOI ombuds function was preceded by two significant initiatives resulting from the Administrative Dispute Resolution Act of 1996: the creation of the Office of Collaborative Action and Dispute Resolution (CADR) and CORE PLUS, a departmental-wide organizational workplace conflict management system.

CADR was established by Secretarial Order on October 28, 2001, as a central hub for DOI to "oversee implementation of the Administrative Dispute Resolution Act (ADRA) of 1996 and the Department's policies on conflict management, public management, collaborative

problem solving, alternative dispute resolution (ADR), and negotiated rule-making to produce innovative, equitable, and durable solutions, decisions and policies." ADRA tasked each Federal agency to "adopt a policy that addresses the use of alternative means of dispute resolution and case management" (Department of the Interior, 2008).

Centralized coordination has enabled the Department to identify one primary source for dispute resolution information and assistance, establish consistent standards and quality assurance throughout the DOI, improve administrative efficiency, and maximize the use of its existing resources. This includes all workplace, procurement, regulatory, and programmatic dispute resolution. CADR's mission is "to improve the efficiency and effectiveness of the Department's operations, enhance communication, and strengthen relationships within the Department and with all customers, constituents, private organizations and businesses, Federal, State, Tribal, and local government entities, and local communities with which the Department interacts to accomplish its work" (Acting Director, CADR, Personal Communications, July 18, 2016; CADR "Who We Are", n.d.; DOI, 2008). Unlike many other federal conflict management and ADR programs, CADR serves all DOI employees (internal stakeholders), as well as those external stakeholders previously listed.

To successfully achieve its mission, given the size and breadth of DOI, CADR sought to create a workplace program that was comprehensive, sustainable, and would strengthen the Department's own resources to manage conflict. Essentially, the developers wanted to create an environment throughout the organization in which issues and concerns could be raised at the appropriate level, with confidence that they would be respectfully heard and responsibly addressed—and creating a system for raising and resolving concerns that would be fair, friendly, and flexible. After meeting with many leading experts in the conflict management, alternative dispute resolution, and organizational development fields, as well as several ombuds, CORE

PLUS—as a key workplace element of an integrated conflict management system (ICMS)—was created in 2002 by a multi stakeholder group representing DOI stakeholders and bureaus.[38]

2.2.3.2 CORE PLUS

CORE PLUS replaced and expanded on prior ADR programs previously managed by the Office of Human Resources (CORE) and the Office of Civil Rights (EEO PLUS) in the 1990s. Unlike its predecessors, the "implementation of CORE PLUS is the shared responsibility of all DOI employees, and its operation crosses bureau and office boundaries—involving a coordinated effort of functional areas including human capital, human resources, civil rights, collaborative action and dispute resolution, training centers, and attorneys" (DOI, 2013, p. 2). Furthermore, it has been established in the Departmental Manual (DM) at 370 DM 770, which applies to all bureaus and offices.

CADR works in close coordination with the Directors of the DOI's Office of Human Resources and Office of Civil Rights, as well as the Office of the Solicitor to ensure that all CORE PLUS policies and guidance are clear and consistent with all relevant laws, regulations and Departmental policies. CADR provides leadership in partnership with the Senior Counsel for CADR and the designated Bureau Dispute Resolution Specialists (BDRS). A BDRS resides within each bureau, serves as a counterpart to the director of CADR, and is responsible for leading implementation of CORE PLUS policy and procedures in their respective bureau, as well as recruiting collateral duty neutrals. Today, CORE PLUS has approximately 70 in-house collateral duty neutrals on its roster who serve as mediators, facilitators, and trainers for internal

[38] As part of its Department–wide integrated conflict management system, CADR offers services and resources for collaborative efforts with its external stakeholders in the environmental and public policy arena on a wide variety of topics. For the purpose of this case study, we will limit our discussion to CORE PLUS, the workplace ICMS component.

workplace disputes, as well as access to over 250 vetted external neutrals available via an external contractor.

CORE PLUS provides impartial and confidential assistance to any employee seeking to improve or resolve a workplace issue or concern. Services such as confidential consultation, conflict and executive coaching, communication and conflict management training, climate assessment, facilitation, teambuilding, and mediation are available for all levels of employees and managers, including bargaining unit employees when the union elects to participate. The program averages 750 engagements and works with 6,000 to 8,000 employees annually.

There are many similarities between CORE PLUS and organizational ombuds offices – including confidentiality, independence, and impartiality, as well as referring visitors to appropriate resources and working at a systemic level. In fact, the Deputy Assistant Secretary for Technology, Information, and Business Services (and former CADR Director), relayed that they had considered creating an ombuds program instead of CORE PLUS in 2001, and to this day, grapple with the question of whether or not CORE PLUS is a hybrid ombuds office. She mentioned, "We could've easily called CORE PLUS an ombuds program" (Personal Communications, July 18, 2016). According to CADR's Acting Director, "[I]n 2008, CADR deliberated the ombuds concept, but ultimately decided that "for such a large, decentralized agency, a single Department ombuds program did not make sense at the time" (Personal Communications, July 18, 2016).

Events in 2011 raised the ombuds concept once again. The Office of the Special Trustee (OST) for American Indians was undergoing significant organizational changes, including relocating its operations to Washington D.C., closing some of OST's departments, and offering early retirement, which led to a great deal of fear and anxiety among employees. As conflict management experts, CADR suggested a neutral, independent, informal resource who could be

dedicated to OST and help employees assess their options and serve to support managers and employees through this transition. However, while various resources could be leveraged to provide support for OST, no such dedicated function or role then existed within CORE PLUS. The previous Bureau Dispute Resolution Specialist (BDRS) may have been well positioned for the task, but had recently transitioned into the role as Principal Deputy Special Trustee (PDST) for OST. OST and CADR decided to use their external contractor to procure an experienced ombudsman to help support the change management efforts and address conflict, and selected Brian Bloch.

Bloch, an experienced ombudsman, IOA Board Member, and graduate of the highly regarded Peace and Conflict Resolution Program at Eastern Mennonite University in Virginia, designed, launched, and implemented the OST ombuds function. As the first organizational ombuds at the DOI and someone new to the federal government, Bloch sought guidance from other private and public sector ombuds, specifically through COFO and IOA. For a one-person office, having mentors and resources from professional associations was valuable.

Additionally, he worked closely with the new Principal Deputy Special Trustee, as well as the OST Chief of Staff, the Solicitor's Office, and CADR in designing the ombuds program. The PDST was a major advocate of the ombuds. As a former BDRS within the Assistant Secretariat for Indian Affairs, the PDST intimately understood the value of organizational ombuds and championed Brian as a resource to OST management and employees. Together, they introduced themselves to all 700 OST employees—meeting with small groups of thirty employees at a time. Bloch maintains that leadership support is critical to the success of the ombuds program.

In the beginning, Bloch spent the majority of his time making connections with supervisors and senior management since a Memo of Understanding (MOU) with the Federation

of Indian Service Employees Union was not yet finalized. Developing these positive connections and educating OST on his role and function has always been a top priority. According to another CADR staff member and part-time ombuds, Sigal Shoham, this face-to-face interaction and education on the ombuds role and function was critical. Shoham recalled, "Rolling out the ombuds program required a lot of communication with leadership and information dissemination; we had many one-on-one meetings throughout the organization. In the end, the face-to-face rapport was most beneficial in building trust and being viewed as a resource" (S. Shoham, Personal Communications, July 18, 2016).

Within four months of establishing the ombuds function at OST, the ombuds and the PDST signed a MOU with the President of the Federation of Indian Service Employees Union so the ombuds could meet visitors covered by the collective bargaining agreement. The MOU stated that the ombuds would:

- Be available for OST employees who wish to raise and/or resolve OST-related issues or concerns in an informal setting;
- Provide general information on, and contact information for, existing means available to address concerns;
- Provide anonymity to any party wishing to raise a workplace issue;
- Provide OST leadership with early warning information that they may not have that might suggest persistent, continuing or systemic concerns and issues that merit attention;
- Serve as a facilitator of meetings and/or projects at the request of OST leadership; *and*
- Provide feedback on OST processes or procedures which may affect OST's mission.

In a separate document, OST employees were also given a list of possible ombudsman functions and examples of ways in which the ombuds might help resolve workplace concerns by:

- Providing a safe place to share concerns;
- Serving as a neutral and impartial resource;
- Operating independent of management;
- Providing services on an informal basis;
- Striving for fairness in all dealings;

- Working to facilitate early resolution of problems;
- Promoting better communication;
- Listening to concerns;
- Asking questions;
- Answering questions;
- Providing information about formal and informal grievance options;
- Helping to analyze complex and difficult situations;
- Helping to clarify OST policies and procedures;
- Constructing non-adversarial approaches to address concerns; *and*
- Making referrals to other resources, if needed.

For the next 16 months, Bloch worked with over 300 visitors on 669 issues providing services such as listening, discussing options, informal coaching, facilitating discussions, training, and recommending policy changes/adjustments. Two years later, he was brought on as a full-time federal employee and the first internal organizational ombuds at the DOI.

Today, the ombuds function supports additional DOI entities, including the Solicitor's Office (SOL), Interior Business Center (IBC), Office of Natural Resources Revenue (ONRR), Bureau of Safety and Environmental Enforcement (BSEE), the Office of Chief Information Officer (OCIO), Office of Hearings and Appeals (OHA), and the Office of Facilities and Administrative Services (OFAS), and the Bureau of Indian Education (BIE) although much of its work is still within OST. Surprisingly, this only accounts for one-seventh of DOI. When asked how the various bureaus and offices were selected by the ombuds, Bloch explained that each of them had either approached CADR in crisis or CADR identified a potential need and approached the organization, which illuminated the need for dedicated, confidential conflict management services. He went on to say, "As a large, decentralized Department, having an adaptable ICMS allows CADR to respond to the changing needs of the Department of the Interior" (Personal Communications, July 18, 2016).

2.2.3.3 The Ombuds Function

"At the end of the day, all that matters is that there is another door for people to get their needs met" (Deputy Assistant Secretary for Technology, Information, and Business Services, Personal Communications, July 18, 2016).

The ombuds function at DOI is unusual in that organizationally it is located within the CADR office and operates as part of a larger and more comprehensive ICMS. Initially, this might sound a bit confusing or in contradiction with the standards of practice. However, the unique reporting lines and only semi-permeable boundaries between the ombuds function and the rest of the CADR staff and operations appear to work well, since the ombuds staff can rely on resources within the larger CADR office—with its nine full-time employees—for assistance, counsel and relief from potential case overload as well as support for more formal processes within organizations in which the ombuds function exists. The members of the CADR team, including the ombuds, provide needed professional and emotional support for each other since conflict resolution work can often be stressful. Confidentiality protections under ADRA for CADR staff and the ombuds are also strengthened by CADR's organizational structure, reporting relationships, access to their Solicitor, and clear language in their Departmental Manual.

Sigal Shoham (part-time CADR Conflict Management Specialist and part-time Ombuds) assists CADR in providing an ombuds function for several of the DOI units previously mentioned. Shoham is based in California, which is helpful given that DOI has a large presence in the seventeen Western states, and there is a significant amount of travel involved in providing ombuds services. The two current ombuds estimate they visit 50 regional offices annually.

The ombuds can discuss their cases confidentially with any of the CADR staff to get a different perspective on complex issues. Sometimes the matter is transferred to a CADR specialist when there is a timing issue, or if the intervention being considered is more appropriate for a formal process, such as a mediation of an EEO case. Similarly, if a complex environmental

issue involving external stakeholders is raised, it may be considered out of the purview of the organizational ombuds and is often referred to CADR. Alternatively, if a visitor comes first to CADR with a workplace-related issue, and the matter is not part of any formal grievance or complaint process, the person may be referred to the ombuds serving the relevant office.

Bloch and Shoham report to the Acting Director of the CADR office, who serves in a supervisory role with regard to their performance evaluations. To assist in performance evaluations, informal feedback is sought from Bureau leadership and the Bureau Dispute Resolution Specialists with whom the ombuds work. Furthermore, each ombuds has a performance plan, which include annual reports, ombuds services, launching new ombuds programs as appropriate, and other duties as assigned, such as developing a business case for CADR's and the ombuds' value (Acting Director CADR, Personal Communications, July 18, 2016). A decentralized agency such as DOI can present more of a challenge in determining if goals and needs are being met in the field.

2.2.3.4 Structure and Standards of Practice

Bloch defines his role as an "independent and neutral person with whom all employees may speak confidentially, informally, and off-the-record about work-related concerns or questions," offering his role as a "safe place" and a "pressure relief valve." He modeled the function on the IOA standards of practice, which specify independence, neutrality, confidentiality, and informality. Both ombuds go to great lengths to explain the standards of practice and what they mean to visitors and prospective visitors. They include a description of the standards in emails, at the beginning of conversations with visitors, and in all their publications.

CADR, CORE PLUS, and the ombuds place a great deal of emphasis on confidentiality. Several pages in the *CORE PLUS Implementation Handbook* are devoted to a full explanation on

how confidentiality is practiced and "protected in the resolution of workplace conflicts or disputes to the maximum extent provided by the Administrative Dispute Resolution Act of 1996" (DOI, 2013, pp. 18-19). A strict adherence to confidentiality is seen as "integral to an effective ADR program," and guidelines on confidentiality are provided to neutrals and parties that engage in the use of CORE PLUS to resolve workplace conflicts or disputes (DOI, 2013). The Associate IG for Whistleblower Protection and Ombudsman, interviewed for this case study, took this one step further when she proclaimed, "the ombuds need to have confidentiality protection in order to do their job" (Personal Communications, July 18, 2016).

Bloch and Shoham have learned how to be effective while maintaining confidentiality. For example, when working with other offices, they will share an issue in more general terms, without making it identifiable. They describe trends, rather than people. Moreover, the OST Deputy Ethics Counselor stated that "Brian [Bloch] is able to bring forward the issues that management needs to hear without breaching confidences." When managers ask for confidential information, the ombuds do not provide details or anything that may be considered confidential. Instead, they offer information on patterns or aggregate data. If they are going to refer a case or speak to one another, they ask for permission from the visitor first. The ombuds will also check to see who else within the organization may be involved with a matter, for if a visitor is working with IG or law enforcement, the ombuds will wait until the fact-finding is completed because they cannot promise confidentiality during an investigation. In terms of recordkeeping, Bloch acknowledged the Federal Records Act can make it difficult to maintain confidentiality. As long as the limits and guidelines of federal records are known, however, one can work within the system (Deputy Assistant Secretary for Technology, Information, and Business Services Personal Communications, July 18, 2016).

CADR is strategically located outside the bureaus, which allows the organization to be seen as neutral and benefit from an 'insider-outsider' status. The group reports to the Deputy Assistant Secretary for Technology, Information and Business Services, who reports to the Assistant Secretary for Policy, Management, and Budget. This reporting relationship provides a degree of independence in a decentralized and highly diverse organization like DOI. How the ombuds is perceived within the organization is key to its success, however. "The ombuds have maintained independence by holding confidences. They are able to bring concerns forward without breaking confidentiality" (OST Deputy Ethics Counselor, Personal Communications, July 18, 2016).

2.2.3.5 Issues, Services, and Visitors

As organizational ombuds, Bloch and Shoham work to informally facilitate the resolution of issues or disputes of DOI's employees. This includes those among peers and colleagues, management and an employee or employees, intra-agency groups, or organizational units. The three most common issues that come to their attention are: 1) employees who are unhappy with their supervisors or feel they have been treated unfairly; 2) employees or managers who are dissatisfied with a colleague; and 3) managers with challenging employees (S. Shoham, Personal Communications, July 18, 2016). To the OST Deputy Ethics Counselor, the ombuds are a great resource for addressing systemic issues (Personal Communications, July 18, 2016).

Bloch lists some of the potential services offered to visitors as empathic listening, helping to sort/frame issues, training, coaching, facilitation, two-way informal communication/mediation and shuttle diplomacy to resolve issues that might escalate into time-consuming and expensive formal processes, serving as an information and referral resource, and providing "an early warning system" to leadership about new things they hear within the workplace. Moreover, the ombuds see their role as one who can confidentially become informed about, and then address,

undetected/unreported policy violations or unethical behavior. In a typical year, the ombuds function handles approximately 250 cases and initiates about five systemic reviews. Bloch attends bi-weekly OST executive team meetings, and both ombuds present at new hire orientations. Both ombuds stress that accessibility, relationship-development and maintenance are critical functions of their role.

The ombuds also work cooperatively with management, Human Resources (HR), Equal Employment Opportunity (EEO), Ethics, Strategic Employee and Organizational Development (SEOD), Employee Assistance Program (EAP), Unions, the Inspector General (IG) and Whistleblower Ombuds, and Human Capital. These offices comprise the organizational members of DOI's Integrated Conflict Management System (ICMS) (B. Bloch, Personal Communications, July 18, 2016). The Associate Inspector General (IG) for Whistleblower Protection and Ombudsman works concurrently with the ombuds, stating, "I will refer visitors to the ombuds when neutral and impartial counsel is needed. The ombuds is valuable as a pre-IG function. His is the informal process to our formal process. Brian [Bloch] is able to ask questions that can prompt people to take action" (Personal Communications, July 18, 2016). In addition, the teams have trained together on whistleblower rights and options.

When asked how overlapping issues are managed without breaching confidentiality, the Associate IG for Whistleblower Protection and Ombudsman replied, "Those conversations are difficult because we are both protecting different interests and rights" (Personal Communications, July 18, 2016). She went on to say that once a case gets to the IG, it's considered a brand new case and formalized as such.

Recently, the ombuds have noted a shift towards working with groups as opposed to individuals. One of Bloch's most successful intervention strategies involves facilitating group discussions using Marie Dugan's (1996) *Nested Theory of Conflict*, which examines overlapping

spirals of conflict, including issue-specific, relational, subsystems-level, and systems-level conflicts. One intervention resulted in restructuring a reward system so that groups, rather than individuals, were rewarded for meeting collective goals. Another created non-monetary awards to keep morale high during times of financial constraint when raises were disallowed.

Bloch also delivers many training sessions and "brown bag lunch" programs on a variety of topics. He sees these trainings and lunch presentations as not only beneficial to the personal and professional development of DOI employees, but also as a way to get to know people and create awareness of the ombuds function. Some of the trainings he has delivered include: How to Change Habits; Mindfulness; Cross-Cultural Communication; Difficult Conversations; Getting to the Core of Conflict; Single Tasking; Logical Fallacies; and Public Speaking. By virtue of his academic and professional training prior to joining DOI, he has designed and implemented more complex interventions, such as strategic planning and circle processes.

In summarizing their overall impact, the ombuds believe that they "contribute to the respect, dignity, and fairness with which concerns are handled; help constituents to develop and use fair and helpful options; provide effective informal dispute resolution for complainants; help prevent problems by coaching one-on-one, as well as group trainings and briefings; help the agency improve specific policies, procedures, or structures; help within the agency to keep its organizational processes coordinated; informally look into issues of concern; focus attention on issues and concerns" (B. Bloch, Personal Communications, July 18, 2016).

2.2.3.6 Personal Characteristics and Skill Set

Many of the ombuds' colleagues stated that Bloch has a demeanor and skill set that is not only congruent with the functions of an ombuds, but also works well within the structure of CORE PLUS. "Brian [Bloch] has the perfect demeanor for the job: caring, relaxed, holds

confidences, non-threatening. This is why people are comfortable going to him" (OST Deputy Ethics Counselor, Personal Communications, July 18, 2016). In addition, by consistently exhibiting highly refined rapport-building, communication, coaching, and conflict resolution skills, as well as easy accessibility, Bloch reinforces his message that any employee can talk to him about any workplace conflict, issue, or challenges. The Associate IG for Whistleblower Protection and Ombudsman reiterated this belief by saying "Brian's [Bloch's] approach allows him to gain the trust of people easily. Anyone who has come to us via the ombuds only has positive things to say" (Personal Communications, July 18, 2016).

Consistent with the strong emphasis on relationship-building, the informal persona of the ombuds is also a key to their success, as exemplified by the slogan, "Need to talk to someone off the Record?" which is an invitational inquiry featured prominently on the hybrid informational-business card distributed to potential visitors. The card is a great tool for creating awareness and educating constituents about the ombuds function and services.

A few ways that the ombuds have been able to gain the trust and confidence of their constituents have been through assisting visitors in brainstorming options, thinking through consequences of various choices—short- and long-term, and *suggesting* various ideas for possible systemic change such as group recognition versus individual achievement, brainstorming "out of the box" ways to inspire and recognize employees, and exploring innovative ways on how work can be distributed (B. Bloch, Personal Communications, July 18, 2016).

2.2.3.7 Perception of Value

For the ombuds, success is not necessarily determined by dispute resolution rates. Repeat service requests from high-level personnel, expansion of constituents served, meeting with all staff when visiting offices, and a general understanding of the ombuds role and function are all

much stronger indicators of success (Acting Director, CADR, Personal Communications, July 18, 2016; S. Shoham, Personal Communications, July 18, 2016).

People in the agency see the ombuds as someone they can seek for asking questions, learning about processes, obtaining good direction, and having a person who will listen. The ombuds is an option for those who are fearful of bringing concerns to management because of the perceived threat of retaliation (OST Deputy Ethics Counselor, Personal Communications, July 18, 2016). Thus, the ombuds role is seen as a critical point of initial contact and "sounding board" for many employee issues and conflicts, providing a place for employees "to be heard, an opportunity to vent and/or learn about their rights, and a reality check" (Associate IG, Personal Communications, July 18, 2016). The ombuds has gained credit for "helping to change the culture of DOI so that the norm is now for disgruntled employees to sit down and try to work through conflicts *first* instead of filing grievances; a reduction of suggestions going to the DOI Workplace Improvement Team (WIT); and for assisting in training that has led to a decrease in reprisal complaints and an increase in positive responses about confidence in not being reprised (as noted in the employee viewpoint survey)" (Deputy Assistant Secretary for Technology, Information, and Business Services, Personal Communications, July 18, 2016; Associate IG for Whistleblower Protection and Ombudsman, Personal Communications, July 18, 2016).

The ombuds' contributions, as well as those of the entire CADR team and CORE PLUS, have been touted for their emphasis on the importance of "conflict competencies" as a priority within the Department, and for installing conflict management competency as part of performance evaluations for managers (CADR Acting Director, Personal Communications, July 18, 2016; Deputy Assistant Secretary for Technology, Information, and Business Services, Personal Communications, July 18, 2016). The ombuds are seen as critical assets in this cultural shift from adversarial processes to more collaborative processes, and were viewed as particularly

valuable outside the Washington D.C. area because of their extensive involvement in regional and remote offices around the country. Furthermore, their accessibility, informality, and absolute confidentiality were especially helpful for those working in small offices where employees might be particularly fearful of retaliation if management were to know which employee revealed concerns to a third party.

The perceived overall value of the ombuds can be captured in the expression of one interviewee who proclaimed her belief that "DOI could prosper by having an ombuds in every office," and it would be even more beneficial if the ombuds could be a "cloning of Brian Bloch." (Associate IG for Whistleblower Protection and Ombudsman, Personal Communications, July 18, 2016).

Another interviewee stated that there are usually several cases a year that have saved the Department some embarrassment, proving the "case for the ombuds." For example, one visitor didn't want to report sexual harassment because of the culture of the office and the patriarchal nature of the tribe. Brian was able to bring the issue of sexual harassment to leadership without breaching confidentiality. He ended up conducting a training on sexual harassment to all leaders, which stopped the harassment.

2.2.3.8 Recent Developments

The National Park Service (NPS) is currently in the spotlight for an alleged failure to respond to gender bias, sexual harassment, hostile work environments, and retaliation that female criminal investigators, park police and rangers may have faced in national parks across the country for decades. In early efforts to identify resources to support employees and the Department in addressing such allegations and instances, per the request of the Secretary, the ombuds and CADR's Acting Director have been going to all the Bureaus within DOI to educate leadership about the ombuds and CORE PLUS, how they work, and ways in which they might

assist with the current challenges should the ombuds function and resources available be expanded to incorporate additional Bureaus.

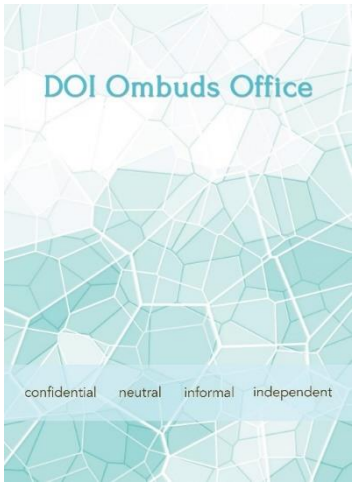
2.2.3.9 Promising Best Practices

The following are a compilation of the noteworthy observations, trends, and best or promising practices identified during our interviews at DOI:

1) Recruit and develop champions throughout the agency, especially in key places. The ombuds and CADR staff continually work on developing champions from within key leadership positions. They accomplish this through networking, relationship-building, pilot projects that have proven their value, as well as through the overall good work that they perform. This has allowed them to continue to grow through multiple administrations (Acting Director, CADR, Personal Communications, July 18, 2016). Recently, the former PDST participated in IOA's training for new ombuds and has encouraged additional DOI leaders to attend future trainings. According to Bloch, this is indicative of the strong value the Department places in the ombuds and their role, and their desire to understand in detail what ombuds do, how they do it, and approaches they use (B. Bloch, Personal Communications, July 18, 2016). It was noted that though gaining the trust of leadership is critical, the ombuds cannot be perceived as a pawn of leadership—a fine, but important, line.
2) The Agency Secretary's support can prove critical in gaining resources and in having access. The fact that CADR, the ombuds and CORE PLUS are all part of the organizational cultural priorities of the Department allows these functions to have the resources and access pivotal to success. For instance, CADR has a separate budget for training performed on behalf of all Departmental bureaus and offices and CADR has integrated its training into numerous other training offerings. An extension of this

best practice is the emphasis on the importance of "conflict competencies" as a priority within the Agency. It is further inculcated by incorporating a conflict management competency rating as part of performance evaluations for managers. This strengthens the shift from an adversarial climate to a collaborative one.

3) Outreach is critical "to get the word out." CADR, CORE PLUS, and the ombuds are all visible in Departmental newsletters, new employee orientations, free trainings, "brown bag" programs, and dialogues offered by the conflict resolution personnel. The ombuds distribute their creative, attention-grabbing hybrid informational-contact card to any and all potential and current visitors. In addition, many, if not all the offices with which the ombuds work (HR, EAP, etc.), distribute the ombuds' informational card as well. It is represented here:



4) When managers ask for confidential information, the ombuds do not disclose details or anything confidential. Instead, they offer reports of new things they are hearing or aggregate data.

5) Approaching a problem through group facilitation helps to make a difference in the kinds of alternative solutions imagined because issues that generate conflict do not happen in a vacuum, nor can they be resolved in a vacuum.
6) Utilize every opportunity to proactively reach out to offices who might worry that there is a territorial issue between them and the ombuds. This may well be the first time that individuals are working with an ombuds; many may not even know what one is. Explain the ombuds role, figure out how the offices can collaborate, and set up a referral structure. The ombuds must be persistent, persuasive, and dedicated, especially when there is turnover in offices such as HR, SOL, EEO, because rebuilding, reeducating, establishing the role and ultimately, justifying the ombuds function over and over again is required.
7) Participate in and perhaps help convene on-going Integrated Conflict Management System meetings with the various constituents (HR, EEO, etc.). Work as an organizational ombuds within that system to maximize the chances of all employees getting their concerns addressed.
8) Design and deliver several trainings on practical topics to impart skills, change habits, and provide services to many constituents in a non-threatening environment.

2.2.4 Case: National Taxpayer Advocate

The National Taxpayer Advocate (NTA) is an externally-facing ombuds position at the head of the Taxpayer Advocate Service (TAS). TAS is an independent office within the framework of the Internal Revenue Service (IRS) and is one of several advocate offices within the federal government. It operates with approximately 2000 employees, most of whom serve as case advocates. Since 1979 the organization has steadily adapted and transformed to meet the

needs of taxpayers, and in particular, to assist individuals and business taxpayers in resolving problems that have not been resolved through normal IRS channels, as well as address systemic issues that cause harm or disadvantage to taxpayers. TAS self-identifies as *Your Voice at the IRS*.

Within the variety of ombuds classifications, the National Taxpayer Advocate is distinct from other federal ombuds because while it embodies the traditional characteristics of independence, impartiality in conducting inquiries and investigation, and confidentiality it is also considered by the American Bar Association's definition an *Advocate Ombuds*. This is exemplified by the National Taxpayer Advocate's authority and duty to advocate on behalf of individuals or groups found to be aggrieved, as well as issue reports to Congress advocating for legislative action (Lubbers, 2003). Though considered to provide impartial assessments, by means of analysis and recommendations to congress, the NTA wields significant levels of authority and influence. "The sheer size of the NTA's office and the built-in controversies inherent in tax matters, make the NTA a unique institution, and one that requires continuous 'state of the organization examination'" (Lubbers, 2003, p.vi).

2.2.4.1 Origins and Evolution of the Ombuds Office

The history of the advocate office began in 1979 when Congress formalized a *Problem Resolution Program* (PRP), with a staff of 250 persons, by providing increased authority and visibility inside and outside of the IRS to mitigate a wide range of tax administration problems experienced by taxpayers (Conoboy, 1999, p.1404). As a result of lacking both independence from management and the authority to impose final solutions to create change, Congress enacted the Omnibus Taxpayer Bill of Rights 1 (TBOR 1), designed to help change the perception of the IRS and provide provisions to aid interactions with the IRS (Cross, 1989). The advocate position

was "codified in the TBOR 1, included in the Technical and Miscellaneous Revenue Act of 1988[39] (TAMRA)" (National Taxpayer Advocate [NTA], 2016, p.106).

The TBOR 1 supplied taxpayers with a framework that included taxpayer advocates. "Congress added IRC § 7811, granting the Ombudsman (now the NTA) the statutory authority to issue Taxpayer Assistance Orders (TAOs) if, in the determination of the Ombudsman, a taxpayer is suffering or is about to suffer significant hardship because of the way the Internal Revenue laws are being administered by the Secretary" (NTA, 2016, p.106). In 1996, the Taxpayer Bill of Rights 2[40] (TBOR 2) amended IRC § 7802 (the predecessor to IRC § 7803), and replaced the Office of the Taxpayer Ombudsman with the Office of the Taxpayer Advocate and expanded its powers, explaining that "in order to ensure that the Taxpayer Ombudsman has the necessary status within the IRS to represent fully the interest of taxpayers, Congress believes it appropriate to elevate the position to a position comparable to Chief of Counsel." The Chief Counsel of Advocacy is the sister position in the Small Business Administration. TBOR2 also described the office's functions as follows:

- To assist taxpayers in resolving problems with the IRS;
- To identify areas in which taxpayers have problems in dealing with the IRS;
- To the extent possible, propose changes in the administrative practices of the IRS to mitigate those identified problems; and
- To identify potential legislative changes which may be appropriate to mitigate such problems (Internal Revenue Service [IRS], "History of the Office of the Taxpayer Advocate", 2016).

[39] See Technical and Miscellaneous Revenue Act, Pub. L. No. 100–647, § 6226, 102 Stat. 3342, 3730.
[40] Taxpayer Bill of Rights 2, Pub. L. No 104-168, § 101(a), 110 Stat. 1453-54.

Although these bills were significant milestones for taxpayer rights, the tax code included numerous taxpayer rights, but were scattered throughout the code, making it difficult for people to track and understand, including IRS employees (IRS, 2014). In 1997, audits of the IRS revealed that there had been quotas, improper seizures, and insufficient customer resolution. Hearings were held before the Committee on Finance in which Senators and witnesses supported the bill to restructure the IRS in an attempt reduce abuse of authority and protect taxpayers. One example of this was part of Senator Roth Jr.'s opening statement:

> A vital part of increasing taxpayer protection includes increasing accountability among IRS employees, bringing simplicity and consistency to the process that governs a taxpayer's interaction with the agency, and includes bringing sunshine to the IRS, stripping away the cloak of secrecy and mystery and the use of intimidating tactics, and making the Office of Taxpayer Advocate truly that, the taxpayers' advocate, completely independent of management influence and bureaucratic interferences (Internal Revenue Service Restructuring, 1998, p.4).

As a result, the office was further strengthened with the IRS Restructuring and Reform Act of 1998 (RRA98), signed by President Clinton, that replaced the Taxpayer Advocate with the *National Taxpayer Advocate* (NTA). The bill also strengthens the NTA's ability to bring about substantial reform within the IRS (Conoboy, 1999). This is primarily guaranteed by the NTA's authority to file two annual reports with Congress without "any prior review or comment from the Commissioner, the Secretary of the Treasury, the Oversight Board, or any other officer or employee" (Lubbers, 2003, p.vii). The reform act also mandated an independent reporting structure for all TAS employees and required Local Taxpayer Advocates for every state (NTA, 2016, p.106).

In the year 2000 the office that houses the National Taxpayer Advocate became known as the Taxpayer Advocate Service (TAS) and was "charged with carrying out both systemic and casework advocacy" (Lubbers, 2003, p. iv). The National Taxpayer Advocate is appointed by the Secretary of the Treasury with consultation from the Commissioner of the IRS and IRS Oversight Board (Lubbers, 2003). The position serves without a set term and must meet the following qualifications and provisions:

(1) A background in customer service, as well as tax law;

(2) Experience in representing individual taxpayers; and

(3) The NTA cannot be an officer or an employee of the IRS for two years preceding or five years following his or her tenure as the National Taxpayer Advocate (Internal Revenue Service Restructuring and Reform Act of 1998).

2.2.4.2 Organizational Structure

The Taxpayer Advocate Service is one of the largest advocate/ombuds office in the federal government. The National Headquarters is located in Washington, D.C., co-located with the IRS. Nationally, they have seventy-seven local offices with a minimum of one in each state and nine area offices which oversee the local offices. The National Taxpayer Advocate and TAS have a unique position within the Internal Revenue Service organizational structure. They are both a part of, and yet independent of, the IRS. In short, together the NTA and TAS play the role of check and balance relative to the IRS, which historically has held onerous power by the very nature of its revenue generating function for the federal government. The stated mission of the TAS is to "help taxpayers resolve tax problems with the IRS and recommend changes that will prevent the problems" (IRS, 2014, 13.1.1).

The TAS organization seeks to ensure that every taxpayer is treated fairly and that taxpayers know and understand their rights. This is particularly important for taxpayers who

have little knowledge of the complicated tax system. According to Nina E. Olson, the appointed National Taxpayer Advocate since 2001, the two complementary aspects of their work carry out this mission. One avenue is to help taxpayers by providing individual case advocacy and protecting taxpayers' rights by utilizing their expert knowledge of tax laws and ability to negotiate or advocate directly with the IRS on behalf of taxpayers. The second is the responsibility to identify and address systemic issues that affect groups of taxpayers and to make recommendations for administrative and legislative changes. Examples of both are illustrated in the *Issues, Services, and Constituents* section of this report.

National Taxpayer Advocate Olson is a licensed attorney with an A.B. in Fine Arts, a J.D. from North Carolina Central School of Law, and a Master of Laws in Taxation, with distinction, from Georgetown University Law Center. Olson has had a long career performing considerable pro bono work, "advocating for the rights of taxpayers and for greater fairness and less complexity in the tax system" and she was recently honored by *Tax Analysts* as one of ten Outstanding Women in Tax for 2016 (NTA, "Tax Analysts", 2016). She currently holds what is considered to be one of the most powerful ombuds positions in the federal government, due in part to the protections her position is given by the statutory authority provided by IRC §7803 and IRC §7811 and other authority granted by delegations found in IRM 1.2.2, Delegations of Authority (IRS, 2014). She oversees the overall administration of the nationwide Taxpayer Advocate Service. Olson publishes, with the assistance of her staff, two reports a year that are submitted to the House Ways and Means Committee and the Senate Finance Committee, and she testifies before Congress on these matters. All employees in the TAS organization report directly to the NTA or a delegate thereof (IRS, 2014, 13.1.1.3.1).

The Area Directors in the nine Area Taxpayer Advocate (ATA) offices provide guidance and direction to Local Taxpayer Advocates (LTA) located in each of the fifty states, the District

of Columbia, and Puerto Rico. "They ensure that the program is conducted in accordance with national guidelines and instructions and that Local Taxpayer Advocates are carrying out their responsibilities" (IRS, 2014, 13.1.1.3.3). The Local Taxpayer Advocates are responsible for resolving all TAS advocacy cases, coordinating local outreach efforts and maintaining relationships with congressional staff for constituent issues (IRS, 2014). "Depending on the size of the office, the LTA's staff can be comprised of Associate Advocates (AA), Senior Associate Advocates (SAA), Program Analysts, Technical Advisors, Group Managers and Administrative Support" (IRS, 2014,13.1.1.3.4).

The Local Taxpayer Advocate (LTA) offices are a critical gear in the overall organizational function because they enable TAS to provide strategic services via advocates who understand local conditions and make impartial assessments for taxpayer assistance--especially for those who are experiencing significant hardship. According to Olson, another key function within the process lies in the role of the intake advocates, a position she implemented because the first interaction with a taxpayer who is under duress from the IRS is critical. Intake advocates have some authority to problem-solve issues while remaining empathic and non-judgmental, a prudent approach that takes into consideration special populations of taxpayers who may be dealing with domestic violence or other vulnerable and often highly emotional situations.

Also included under the auspices of the National Taxpayer Advocate (NTA) are two programs, the Taxpayer Advocacy Panel (TAP) and the Low Income Taxpayer Clinic (LITC) program. The Taxpayer Advocacy Panel (TAP) listens to taxpayers, identifies taxpayers' issues and makes suggestions for improving IRS' service to customers. The TAP acts as a two-way conduit; serving as a focus group for the IRS to establish strategic initiatives, as well as providing a venue for raising issues identified by citizens. These Area Boards address local

issues and schedule outreach activities. The goal is to have panel members who are demographically diverse, with at least one member from each state, for a total of 95 members. The Low Income Taxpayer Clinic (LITC) assists low income individuals, who qualify based on the income threshold, in disputes with the IRS. "LITCs can represent low income individuals before the IRS or in court on audits, appeals, tax collection matters, and other tax disputes" (NTA, "Low Income Taxpayer Clinics", n.d.). According to Olson, "we administer and oversee over $12 million in federal grants each year to about 136 clinics throughout the US – and those clinics are dedicated to representing low income taxpayers basically for free in disputes they have with the IRS." (N. Olson, personal communication, September 1, 2016).

On the systemic side of the mission, the Executive Director, Systemic Advocacy (EDSA), has the responsibility for systemic advocacy and the NTA's annual reports to Congress. To compose the reports, both the Business Advocacy (DBA) and Individual Advocacy (DIA) divisions must identify and raise awareness of systemic issues. The TAS Systemic Advocacy function identifies systemic issues through many channels, including Internal Revenue Manual Reviews and IRS forms and publications, participating in IRS-wide teams, and the Systemic Advocacy Management System--a web-based portal through which taxpayers, employees, and practitioners can submit potential issues for SA review. "The TAS Office of Systemic Advocacy receives administrative and legislative proposals from a multitude of sources, including internal and external sources" (IRS, 2014, 13.1.1.3.5). Furthermore, the goal of advocacy analysts under this division is to "prevent or reduce taxpayer burden; represent taxpayer interests during decision-making processes; improve customer service; and address inequitable treatment of taxpayers" (IRS, 2014, 13.1.1.3.5).

2.2.4.3 Standards of Practice and Taxpayer Bill of Rights

The National Taxpayer Advocate standards of practice are primarily statutory as they stem from a series of legislation described in the origin and evolution of the office. The NTA uses the Taxpayer Bill of Rights (TBOR) to advocate and address unresolved issues faced by taxpayers. Within the TBOR are fundamental rights that guide the practices of TAS but also oblige the IRS to comply and protect them. There are ten fundamental rights:

1. The Right to Be Informed
2. The Right to Quality Service
3. The Right to Pay No More than the Correct Amount of Tax
4. The Right to Challenge the IRS's Position and Be Heard
5. The Right to Appeal an IRS Decision in an Independent Forum
6. The Right to Finality
7. The Right to Privacy
8. The Right to Confidentiality
9. The Right to Retain Representation
10. The Right to a Fair and Just Tax System (IRS(c), 2016.)

In addition to statutorily informed principles, the NTA uses the American Bar Association's Standards for the Establishment and Operation of Ombudsman Offices which include guiding principles on confidentiality, impartiality, and independence to ensure the effective operation of an ombuds (ABA, 2004). It also includes clarification of the standards for advocate ombuds by explaining their duties as follows:

1. to have a basic understanding of the nature and role of advocacy;
2. to provide information, advice, and assistance to members of the constituency;
3. to evaluate the complainant's claim objectively and advocate for change relief when the facts support the claim;
4. to be authorized to represent the interests of the designated population with respect to policies implemented or adopted by the establishing entity, government agencies, or other organizations as defined by the charter; and

5. to be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant. (p. 8)

Independence is afforded to the National Taxpayer Advocate and her staff through a unique arrangement. The NTA's position is protected by statute. Although the NTA reports to the Commissioner of the IRS, she has a direct communication and accountability line to the Congress of the United States through her reports to the House Ways and Means Committee and the Senate Finance Committee as well as her testimony before Congress on these matters. All employees in the TAS organization report directly to the NTA or delegate thereof (IRS, 2014).

Internally, TAS has guiding principles and policies for advocates and employees, especially concerning confidentiality. For example, each office must maintain means of communication that are independent of the IRS. Each office must have a separate phone, fax machine and post office address, as well as other independent electronic communication access. Furthermore, TAS employees must inform taxpayers that the TAS operates independently from, and yet within, the IRS, and reports directly to Congress through the National Taxpayer Advocate. The NTA also has the discretion not to inform the IRS of any contact or any information provided to the local TAS office by a taxpayer. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information. The IRS website also discloses that taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer, or by law.

This is a point of contention because ambiguities exist in the intersection between the NTA's statutes and other provisions of the Internal Revenue Code. For example, "The NTA's statute (S 7803(c)(A)(iv)) provides that each local taxpayer 'may, at the taxpayer advocate's

discretion, not disclose to the IRS contact with, or information provided by, such taxpayer'" (Lubbers, 2003, p.66). However, this statute does not extend to "information obtained from a party other than the taxpayer," and it does not extend to "disclosure to a party other than the IRS." TAS employees do report threats of significant personal injury, harmful criminal violations of the tax law, and civil fraud, and may report them to the Department of Treasury or the Department of Justice (Lubbers, 2003).

Notwithstanding the overall noteworthy accomplishments of the TAS program, it has not been immune from criticism. For example, in March of 2002, the Tax Executive Institute (TEI), a preeminent association of tax professionals worldwide, critiqued the organization, stating that:

> Although TEI appreciates the special role the Taxpayer Advocate has in respect to smaller, often underrepresented taxpayers, we are disappointed that the office views its role as so limited…although Congress primarily intended the Office of Taxpayer Advocate to focus on individual and small business taxpayers, its statutory authority was not limited solely to assisting those groups (Ashby, 2002, p.261).

Then-TEI President Ashby stated that large and small taxpayers benefitted from the prior *Problem Resolution Program,* whereas large companies that are often under audit do not seek the assistance of the Taxpayer Advocate. NTA Olson explained that, "corporate interests have better spokespersons for their interests and her office was created to focus on individuals and smaller businesses" (Ashby, 2002, p. 261). It appears that fourteen years after this critique, the focus remains on individuals and smaller businesses. However, it should be acknowledged that the standards of practice, Taxpayer Bill of Rights, and focus on systemic issues also benefit larger taxpayers.

There is also some controversy surrounding the potentially competing interests of impartiality and advocacy. How can one be an activist for taxpayers and also unbiased when

assessing taxpayers' situations? According to Lubbers (2003), "the Taxpayer Advocate owes a duty to the tax system, in addition to her duty to the IRS and the taxpayer. It is only through impartiality that the advocate is able to balance these three competing interests" (p. vi). For this reason, it is necessary for the advocates to have guiding principles to facilitate objective decision-making. One critical way to balance these three duties is to utilize the Taxpayers Bill of Rights framework and language for impartial decision-making. Olson has played a significant role in advocating for a codified and simple-to-understand bill that "ensures a fair and just tax system and protects all taxpayers from potential IRS abuse" (NTA, 2007, p. 278). In her *2015 Annual Report to Congress*, Olson acknowledged that "Congress passed and the President signed into law legislation that codified the provisions of the Taxpayer Bill of Rights (TBOR)" and that "the need for and protection afforded by it could not be overstated" (p. vii). Furthermore, Olson explained that adherence to the principles of TBOR would provide taxpayers a reason to trust their administration of tax laws and that the TBOR "is the roadmap to effective tax administration" (NTA, 2015, p. viii).

2.2.4.4 Issues, Services, and Constituents

In the 2014-2015 fiscal year, TAS handled 227,189 cases (NTA, 2015). TAS provides services to all taxpayers who are eligible under one of the nine *Case Acceptance Criteria* that classify a taxpayer under at least one of four categories listed in the table below: Economic Burden, Systemic Burden, Best Interest of the Taxpayer, or Public Policy. This criterion enables advocates to create a case for the taxpayer and process it directly with the IRS for appropriate action.

According to the Local Taxpayer Advocate of Maryland, the local offices are field designees dedicated to the NTA's mission with the primary responsibility for examining cases that provide taxpayers the appropriate level of relief. Taxpayer advocates first make sure a

taxpayer's issue meets the criteria of burden and then use their insider tools to problem-solve or negotiate the appropriate relief for each individual case. The "remedies are constantly changing based on the specific facts and circumstances of the individual case" (Deputy Executive Director of Case Advocacy, personal communication, August 10, 2016). In addition to each taxpayer's case being unique, tax code and technology also evolve, so what may mitigate a refund issue for one taxpayer may differ significantly from a negotiation over an appropriate amount of collection for another taxpayer.

The Local Taxpayer Advocate of Maryland further expounded, "for example, in the case of identity theft, there are processes in place to help the taxpayer get their refund. If the taxpayer is experiencing economic hardship because they depend on that refund, and the IRS promised a refund in forty-five days yet the taxpayer hasn't received any correspondence or assistance, the advocate can ensure that the process is followed" to provide relief for the taxpayer (personal communication, August 10, 2016). Sometimes the issue might be that the IRS is threatening to take payments from a bank account or social security that would create an economic hardship. Case advocates communicate directly with the appropriate IRS Business Operating Division (BOD) representative, and they work together to resolve the issue. The IRS is typically collaborative in case advocacy because the TAS also helps them manage their long queue of cases. This likely contributes to the 78 percent relief rate of cases closed in 2015 (NTA, 2015). The TAS does not currently have a queue and fulfills its promise that the taxpayer will be contacted again within five days.

> "The goal is to work collaboratively to get the right answer on behalf of taxpayer…we are independent but also co-located within the same building. We want our employees to develop good relationships with the IRS but we are also advocates so when it needs to get

> adversarial we are not afraid to push it to that level" (Deputy Executive Director of Case Advocacy, personal communication, August 10, 2016).

When relief is not possible, case advocates file a Taxpayer Assistance Order (TAO), "a powerful statutory tool," with the IRS which means they formally request that the case go up to a higher level of review (NTA 2015, p. 555). "Once the Taxpayer Advocate Service (TAS) issues a TAO, the Business Operating Division (BOD) must comply with the request or appeal the issue for resolution at higher levels" which ultimately may go before the Deputy Commissioner or Commission of the IRS for review (IRS, 2014, 13.1.20.5(2)). According to the Deputy Executive Director of Case Advocacy, sometimes a TAO may serve as a way to communicate to the IRS that there are emerging issues with undeveloped methods for resolution (personal communication, August 10, 2016). In recent years, TAOs made up a small percentage of total cases while over 66 percent of the 2015 cases utilized the Operations Assistance Request (OAR) process as the primary vehicle to drive case advocacy by facilitating cooperation between the case advocates of the NAS and the IRS BOD representatives. TAS uses *Form 12412, Operations Assistance Request* as "an advocacy tool to communicate a recommendation or requested action for the IRS to resolve the issue, along with documentation" (NTA, 2015, p. 554). In fiscal year 2015, TAS issued 254,671 OARs, of which about half requested expedited action. It is evident that the interdependent and collaborative OAR process with the IRS plays a significant role in the TAS' ability to assist taxpayers without needing to proceed frequently to the more formal TAO level. The TAS only had 2.6 percent of OAR requests for action rejected by the IRS (NTA, 2016).

The Systemic Advocacy (SA) organization carries out the second part of the TAS mission and is responsible for "continuously driving procedural, systemic, and legislative change to benefit taxpayers" (IRS, 2014, 13.1.1.2). Due to the nature of bureaucratic and systemic

change this aspect of the work requires developing congressional relationships, negotiating and collaborating with the IRS, conducting research, and utilizing conflict resolution skills. In the most recent report to Congress, twenty-four specific problems were "identified, analyzed and offered recommendations" (NTA, 2015, p.1). A few examples are presented below to illustrate how systemic advocacy works on a number of different levels.

The NTA addressed the potential negative impacts of the IRS Future State Vision that predicts how the agency will operate in five years. The number one most serious problem for taxpayers was the "future of taxpayer service" based on their analysis of the IRS' plan, formally known as a Concept of Operations (CONOPS), which includes intentions to restructure services by increasing online accounts and enhancing third party assistance from tax return preparers and tax software companies (NTA, 2015). The critique of this plan focused on three primary factors: the absence of information on how much telephone service and face-to-face services will be reduced, thereby asking for transparency from the IRS; the additional financial burden imposed on taxpayers if asked to use third party assistance for services the IRS provides; and the millions of taxpayers who either do not have internet access or the skills to handle complex financial transactions online. The analysis is supported extensively using taxpayer service trends and the history of IRS technology advancements, and it also provides two primary recommendations: that the IRS publish CONOPS to seek feedback from the public, and that Congress hold hearings on the future state of IRS operations to include "testimony from groups representing the interests of individual taxpayers (including elderly, low income, disabled, and limited English proficiency taxpayers), sole proprietors, other small businesses, and Circular 230 practitioners and unenrolled tax return preparers" (NTA, 2015, p.13).

The report also made ten recommendations to reduce the taxpayer burden affected by the Affordable Care Act (ACA), addressing financial and procedural burdens. The

recommendations were made in the name of taxpayers' rights to be informed; right to quality service; right to pay no more than the correct amount of tax; right to appeal an IRS decision in an independent forum; and right to finality (IRS, "Taxpayer Bill of Rights", n.d.). Furthermore, the report also made four recommendations to address procedural issues that impose excessive burden and delay in refunds for victims of Identity Theft (IDT), which represented the largest number of cases handled by TAS. These recommendations were made in the name of taxpayers' rights to quality of service and right to finality.

In addition to addressing the IRS's restructuring proposal, making procedural recommendations, and addressing specific case issues, the report also identifies groups who are disproportionately affected and makes legislative recommendations advocating for fairness. For example, the report recommended that Indian Tribal Governments (ITGs) be treated as States for Social Security tax purposes, stating that it currently "undermines the right to a fair and just tax system" because ITGs are treated as States for many tax purposes except for Social Security taxes (IRS, 2016). This exception places an unfair burden on ITGs because it makes it financially difficult to recruit and retain police officers, especially in the face of increased crime on tribal lands and ITGs' needs to address it. The NTA recommends an amendment that includes Social Security as one of the tax purposes for treating ITGs as States.

2.2.4.5 Significant Contributions and Perceived Value of the NTA/TAS

Significant contributions can be supported by the innumerable legislative changes influenced by TAS since its inception, represented by the 78 percent relief rate in cases last year, and symbolized by the fact that the TAS does not have a queue of unresolved cases. The TAS also has an 88 percent customer satisfaction rate in which "taxpayers indicated they were very satisfied or somewhat satisfied with the service provided" (NTA, 2016, p.1), even when they did

not find relief of their case (personal communication, August 10, 2016)—all of which is evidence of the organization's due diligence and ongoing creative problem-solving.

Furthermore, the evolution of the office indicates a progressive increase of authority and advocacy responsibilities for the NTA and the TAS since its inception. In particular, the 1997 IRS audits revealed an abuse of power by way of improper seizures and quotas, which outraged Congressional representatives and led to the landmark 1998 Restructuring and Reform Act that gave the NTA the ability to bring about substantial reform within the IRS (Conoboy, 1999). Coupled with the NTA's eight-year call for legislative action on codifying the Taxpayer Bill of Rights "to protect all taxpayers from potential IRS abuse" (NTA, 2007, p. 278), it is evident that the National Taxpayer Advocate plays a valuable check-and-balance role to the Internal Revenue Service's authority.

Although the NTA and TAS represent all taxpayers and their mission is embodied in their slogan, *Your Voice at the IRS*, they are of particular service to vulnerable groups, such as those who are low income, disabled, elderly, or anyone experiencing even temporary hardship. They demand accountability, and shape the nature of the IRS and taxpayer relations through representation, ongoing negotiation, and legislative influence.

A significant contribution that exemplifies the value of the NTA and TAS is the legislation passed by Congress and signed by the President in 2015 that codified the Taxpayer Bill of Rights. NTA Olson has advocated for this act since 2007 as a means to "ensure a fair and just tax system and protect all taxpayers from potential IRS abuse" (NTA, 2007, p. 278). She rooted it in the need to strengthen the social contract between the government and its taxpayers. During a telephone interview with the Local Taxpayer Advocate of Maryland, the Deputy Executive Director of Case Advocacy and the Washington, D.C. Local Taxpayer Advocate, it was explained that it will not only facilitate their work, but that it also has large-scale

implications for the future of taxpayers' rights. By law, the IRS is now required to integrate the Taxpayer Bill of Rights into their policies and procedures, effectively shifting how the IRS operates and conducts business. The TAS recognizes that it will take time but they have begun training IRS employees on TBOR and the work that they do. There is optimism that it will grow taxpayer trust in the system.

Additionally, the TAS advocates we interviewed spoke about their excellent customer service ratings and five-day call back standard, once a case has been created. "Even when they don't get full relief, their satisfaction is still high," explained the Deputy Executive Director of Case Advocacy. This is at least in part due to the empathetic approach they employ that helps taxpayers in stressful situations feel supported. The advocates also reported to us their high employee satisfaction rates, especially compared to other federal sectors. Olson acknowledged the emotional impact of the work on employees and the importance of providing her staff with support through leadership orientation, workshops for managers, newsletters, and personal coaching. The TAS advocates also cited the importance of integrating emotional intelligence training--including stress management and/or dealing with difficult people--with training on technical skills to improve the quality of life for their advocates, which they strive to provide despite budget constraints.

2.2.4.6 Personal Characteristics and Skill Set

One interesting finding collected from interviews was the fact that the advocates consider themselves ombuds, or at least encompassing the work of an ombuds. To the taxpayers they are advocates, yet internally amongst themselves the top leaders also identify themselves in the role of an ombuds. The fact that some advocates self-identify as ombuds speaks to the organizational culture at the TAS in which the leadership believes they are faithful to the ombuds principles of independence, impartiality, and confidentiality in their respective roles while acknowledging

that, in their role, impartiality means they make an independent, truthful assessment of a case before taking on more of an advocacy role in "the best interests of the taxpayer" (Local Taxpayer Advocate of Maryland, August 10, 2016). This is also representative of their influence in decision-making as "advocate ombuds" who are responsible for taking action on behalf of taxpayers.

When asked about characteristics or skill set necessary for advocacy, the number one characteristic identified in interviews was empathy. Empathy is defined as "the ability to share someone else's feelings or experiences by imagining what it would be like in that person's situation" (Cambridge Dictionary, 2016). The advocates described it as a necessary ability to meet the taxpayer in his/her emotionally vulnerable space, via a role that is part tax expert, part social worker, and part educator (Deputy Executive Director of Case Advocacy, personal communication, August 10, 2016) "Taxpayers in need are typically emotional, angry, frustrated, or in disbelief. We have to be patient and give them the space to talk about it, even if it takes twenty minutes. We give them respect and dignity but we also have to be able to educate them to correct disillusionment in the IRS" (Local Taxpayer Advocate of Washington, D.C., personal communication, August 10, 2016). Potential employees have to first and foremost be passionate about helping people because that underlies the entire organization. Additional important characteristics mentioned by interviewees were for case advocates to exhibit being courteous, professional, understanding, non-judgmental and nimble to adjust to rapidly different situations.

As for the National Taxpayer Advocate, a wide variety of leadership skills are necessary to lead the TAS and meet the day-to-day emotional challenges, while simultaneously collaborating with the IRS and congressional staff for long-term strategic planning. The advocates interviewed identified the NTA's relationship management skills as particularly important. One example provided was Olson's awareness of the need to maintain a power

balance with the IRS so as not to make them feel as though the TAS has leverage *above them* and instead that they face challenges such as budget constraints right *alongside them*. Self and social awareness as well as relationship management skills are all components of emotional intelligence, which our interviewees acknowledged is just as important in their success as technical skills on tax laws and taxpayer rights. Of course, balance, bridge-building, or even integration of somewhat competing forces is also a critical component of those working in the taxpayer advocate system.

2.2.4.7 Recent Developments

According to the most recent NTA Objectives Report to Congress, TAS is making significant efforts to improve their advocacy and services to taxpayers. For example, increasing a Centralized Case Intake (CCI) process that will create a more robust initial filter and case creation process as well as "advising taxpayers on steps they can take to prepare for the first call with their Case Advocate" (NTA, 2016, p. 88). For such a broad reach and diversity of issues, the intake system developed by the NTA is most appropriate and critical for routing the problem swiftly and effectively. This effort requires increased training and further "negotiations with the National Treasury Employees Union to officially stand up CCI as its own group within TAS" (NTA, 2016, p. 89). Along with this process is the need to develop a quality measurement system to track its effectiveness. Another example is the further expansion of first step "self-help" options that are mobile friendly, recognizing taxpayers' access needs to informative videos, links, and Q&A options. This effort requires creating self-help topics as they arise, like one for the Affordable Care Act 2016 filing season. More employee training and expanding research initiatives that inform their work, such as the multi-year study that seeks to "explore whether outreach and education efforts positively affect compliance and trust in the IRS" (NTA, 2016, pp. 95-96) are also TAS initiatives to enhance their value.

2.2.4.8 Promising Best Practices and What Might Be Learned to Enhance Value

Three specific promising best practices include a well-supported research team, a media/public policy component staff, and leadership training. The NTA employs nine researchers that aid the understanding, impact, and reporting of systemic issues. The publication of their studies helps drive systemic change. Likewise, having a media group that promotes an "independent state of mind," as Olson described, aids in the ability to institutionalize warranted systemic change. Finally, the strength of knowledge and emotional intelligence possessed by the local tax advocates is vital to this operation. The NTA has created leadership-oriented training workshops and personal coaching for new and existing managers that helps to flatten such a large organization so that it can move nimbly to resolve taxpayer issues and stakeholder conflicts.

On a broader level relative to ombuds value within the federal sector, there is a need for further clarification of ombuds standards around a common definition or principle of "impartiality." Although the National Taxpayer Advocate and her staff seem to be able to execute their unique and important statutory task while remaining faithful to the traditional ombuds standards regarding independence, impartiality and confidentiality, there is some debate among the wider federal ombuds community about whether one can do a "fair, independent, truthful assessment" while also serving as an advocate in the best interest of any particular group since many ombuds, particularly organizational ombuds, typically pride themselves as being nonaligned with any particular side. This is an important question since there are other advocacy groups such as Long Term Care Ombudsmen and Small Business Administration Advocates who are also identified with the ombuds community. This discussion would be particularly useful for the creation of future advocate offices within and outside of the federal sector. Olson recommends implementing working groups to write and develop the "big picture, definition of

what an ombuds is, and what it is not, characterized by the common characteristics of independence, impartiality, and confidentiality while acknowledging that internal facing ombuds have different functions than external facing ombuds (N. Olson, personal communication, July, 20, 2016). The standards and functions of ombuds would likely have to reflect broader principles and be carefully nuanced at a more symbolic and creative level due to the agency situation and nature of the versatile role an ombuds plays.

Based on interviews with the NTA, the TAS employees, and published reports, there also appears to be a need for more protection for confidentiality and independence. This is a recurring theme across all types of ombuds offices. For example, although Congress protects the TAS' line item budget, there is no statutory protection of budget and it has not increased for several years, even though costs and workload have increased each year. Access to independent counsel is also important. The NTA and the TAS may need to seek legal advice in defending their confidentiality, reporting, audits, etc. It is important for the ombuds to be able to access independent legal counsel if they take a position that is in conflict with the agency.

To serve a true "check and balance" role in relation to a powerful institution like the Internal Revenue Service with considerable enforcement power and to regularly answer to U.S. Senators and Representatives, it is important to have a confident and competent leader that has reporting lines independent of the agency overseen. Important factors in the success of the NTA include that Olson is seen as an influential and assertive leader by her key staff members and others in the federal sector, has guaranteed protection for her position, and reports directly to the Congress. This needed "strength of authority" comes ultimately from a carefully negotiated and artfully crafted statute.

Finally, a significant best practice from the NTA and the TAS leaders who continually meet, problem-solve and negotiate with their IRS counterparts on issues of compliance,

collections, appeals, and operators, is their collaborative approach. Their actions and collaborative initiatives promote good working relationships and partnerships. It is a "we can't do this without you" constructive approach to their interdependent relationships that is the art of continually balancing autonomy and dependence. Their success in bridging these different forces might inform and enhance the effectiveness of other federal ombuds.

2.3 Profiles:

Long-term Care Ombudsmen
Navy Family Ombudsman
Coalition of Federal Ombudsman (COFO)

2.3.1 Introduction to the Profiles

Long Term Care Ombudsmen. The Long Term Care (LTC) Ombudsmen are one of the two largest groups of ombuds in North America. They touch the lives of a great many people and—almost by definition—many citizens who are vulnerable and/or under-served. They bring comfort and security, and support compliance with relevant laws for many people in the U.S., and almost certainly save lives.

LTC ombuds appear relatively well known in the United States and are appreciated by many stakeholders, including the Congress, as well as persons in long term care and their families. However, some evaluations of LTC ombuds programs mention the need for more resources.

LTC ombuds are "advocates," when most ombuds around the world are designated as impartials and neutrals. However, LTC ombuds are expected, and trained, to approach a case as impartial professionals.

The LTC ombuds program appears sustainable and long-lived. They may be the most sustainable group of neutrals in the U.S., an important matter in the fields of conflict management and alternative dispute resolution.

LTC ombuds programs in most states provide significant training. The LTC ombuds training would appear to be a "promising best practice" in the ombuds profession in the sense of providing information and training about ombuds work to many people.

LTC ombuds professionals come from varied backgrounds in a nation where diversity and inclusion are big issues. LTC ombuds programs appear to be very cost-effective, likely in part because so many are volunteers and so many are part-time. This “community outreach" model might be of interest as a "promising best practice" in other domains of government.[41]

The foundational legal mandate for LTC ombuds (by statute) could be important for any other similar program. It was beyond the scope of this research initiative to make recommendations about the future, but it may make sense to ask the LTC program directors for formal recommendations for the future of this far-reaching program and for any others that might be similar.

Navy Family Ombudsmen. The Navy “Family” ombuds are another very large group of ombuds in North America that touch the lives of many Navy families. The Coast Guard[42] also has a longstanding family ombuds program modeled after the Navy program, while the other armed services have similar support persons who have different titles other than ombuds. Family ombuds support many citizens who are—almost by definition—vulnerable and/or under-served. Family ombuds bring better communication, comfort and support to many families around the world. They are also charged to support their relevant commanders and to be part of the communications structures in their specific services.

The family ombuds appear relatively well known in the context of the federal government. In fact, the word “ombudsman” is often associated with this program. However, the standards of practice and characteristics of family ombuds are not generally consonant with the work of other ombuds professionals.[43] A family ombuds is not designated to be independent,

[41] Collateral duty, quasi-ombuds, and “respectful workplace advisers” are increasingly of interest in organizational conflict management systems.
[42] The Coast Guard Ombuds participated in our survey although were not included in this profile, which looked only at the Navy’s program.
[43] See Taxonomy Chart in Appendix B.

or neutral. They may not offer a high degree of confidentiality, although they are charged to protect the privacy of family members and of their command. Like other ombuds they do not make management decisions. Family ombuds are specifically expected to be well informed, and are meant, in this sense, to be "credible" resources, but they are not charged with "fairness." In part because of these different standards and characteristics, some of the armed services have given different titles to their family support personnel. It may be the case that this important work, of family and military readiness support, should be delivered under a different title.

The contributions that family ombuds provide appear to be deeply appreciated by most of their stakeholders, including the Congress, and a substantial fraction of armed service members. Family ombuds come from varied backgrounds in a nation where diversity and inclusion are big issues. The family ombuds programs appear to be cost-effective, in part because almost all are volunteers and work part-time. The family ombuds program appears sustainable and long-lived. Could this "community outreach" model be seen as a "promising practice" in other domains of government—whether or not with a different title?

Coalition of Federal Ombudsman. The Coalition of Federal Ombudsman (COFO) is the only professional association dedicated exclusively to federal ombuds; it has provided many promising practices within the federal ombuds community and provided considerable support to these ombuds in their work. We have included a profile of COFO to highlight its unique role within the federal ombuds community and the many contributions it has made to the profession in the short time of its existence.

2.3.2 Profile: The Long Term Care Ombudsman Program – Three Case Studies[44]

Long-Term Care Ombudsman Program: Abstract.

[44] The LTCOP and Navy Family Ombuds profiles use Bluebook format rather than APA reference format, since they were created for this Report by Harvard Law School students.

The Long-Term Care Ombudsman Program (LTCOP) is a federally mandated program aimed at improving the quality and standard of long-term care facilities. Now statutorily implemented under the 1978 Amendments to the Older Americans Act of 1965, the idea of a long-term care ombudsman emerged in 1971. Since then it has developed and expanded greatly. This paper begins with a general introduction to the LTCOP, paving the way for a more in-depth discussion of the implementation and operation of the LTCOPs in California, Florida, and Massachusetts. Each state has acted independently in establishing a statewide LTCOP, leading to different approaches by different states. These states in our three case studies were selected for the varying structures of their programs, as well as their diverse geographic and social characteristics. The historical development; legal framework including the relationship between federal, state and local governments; and the primary purposes, characteristics, and principles of LTCOP will each be analyzed in turn. Core principles analyzed will include crucial components of ombudsman programs: independence, confidentiality, and impartiality. We conclude with possible areas for future research.

The Development of the Long Term Care Ombudsman Program.

Serious concerns about the level and quality of care and multiple failings in the nation's nursing facilities came to the fore in 1971. In August of that year, President Nixon proposed an eight-point initiative to address the issue of "substandard nursing home[s].[45] As a result, in 1972 five states were awarded demonstration grants for the implementation of nursing home ombudsman demonstration programs from the Department of Health, Education and Welfare:

[45] Announced on August 6, 1971 at the Greenbriar Nursing Home in Nashua, New Hampshire. *See* Subcommittee on Long-Term Care of the Special Committee on Aging, United States Senate, *Nursing Home Care In The United States: Failure In Public Policy*, 96 (Nov. 1974), available at https://archive.org/stream/nursinghomecarei00unit/nursinghomecarei00unit_djvu.txt.

Idaho, Michigan, Pennsylvania, South Carolina, and Wisconsin.[46] In 1973, the Older Americans Act of 1965 (OAA) was amended to establish the Administration on Aging (AoA), an agency reporting to the Office of the Secretary of Health and Human Services and responsible for carrying out the Act.[47] The OAA was again amended in 1975 to authorize the AoA to make grants for each state, except Nebraska and Oklahoma, to establish ombudsman programs.[48] In 1978, the Amendments to the Older Americans Act (OAA) required all states to establish a LTCOP with appropriate access to facilities and patients' records and envisioned that all nursing home facilities would have an ombudsman.[49] The legislation set out the mandate and the purposes which the programs were meant to serve, but left the actual implementation of the programs to each state. In 1981, the ombudsman program was broadened to include the category of board and care facilities, which, as Netting et al. note, gave rise to questions such as the definition and identification of these facilities.[50] In 2000, the OAA clarified that the program was authorized to serve residents of assisted living. Another issue was that the widened scope and responsibility was not matched with increased funding.[51] In 1987, two important legislative changes occurred. First, The Nursing Home Reform Act of 1987 (passed as part of the Omnibus Budget Reconciliation Act of 1987) introduced a requirement that nursing facilities "permit immediate access to any resident" by, inter alia, an ombudsman.[52] Second, the LTCOP was re-authorized under the OAA and reiterated that the Act continued to require that states grant

[46] The National Long-Term Care Ombudsman Resource Center, *Program History*, http://ltcombudsman.org/about/about-ombudsman/program-history (last visited Dec. 5, 2015).
[47] Special Comm. On Aging, 93d Cong., Older Americans Comprehensive Services Amendments of 1973, 1 (Comm. Print 1973), available at http://www.aging.senate.gov/imo/media/doc/reports/rpt473.pdf.
[48] Comprehensive Older American Act Amendments of 1975, Pub. L. No. 94-105, 89 Stat. 713, § 108 (1975).
[49] Comprehensive Older American Act Amendments of 1978, Pub. L. No. 95-478, 92 Stat. 1513, § 307 (1978).
[50] *See* F. Ellen Netting, et al., *Elder rights and the Long-Term Care Ombudsman Program*, 40 Social Work 351, 354 (1995).
[51] *See id*.
[52] 42 U.S.C. § 1395i–3(c)(3)(A).

ombudsmen access to facilities and patient records.[53] In 1992, further amendments to the OAA enabled state-level ombudsmen to officially designate responsibility to local ombudsmen and enabled the latter to have many of the same rights and privileges as representatives of the Office (i.e., local ombudsmen).[54] The 1992 amendments re-authorized the LTCOP along with other advocacy programs, legal services, and elder abuse programs under a new Title VII, "Vulnerable Elder Rights Protection Activities."[55] As a result of this combination, there was an increased emphasis on the advocacy functions. As Barker et al. note:

> While recognizing the unique role played by each of the four advocacy programs—Ombudsman, elder abuse prevention, legal assistance, and benefits counselling—Title VII emphasizes the benefit of a coordinated advocacy approach to address older persons' understanding and exercise of their rights and access to assistance with problems they encounter.[56]

In 1995 the Institute of Medicine called for a better reporting and data-recording system to be implemented across states so that it would be easier to compare and track the proliferation and success of LTCOP.[57] A system was put in place in 1995 and data was collected beginning in 1996.[58] Each state reports this data to the federal AoA, and it is then summarized in the National Ombudsman Reporting System (NORS) and made available on the Administration for Community Living website.[59]

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[53] Older Americans Act Amendments of 1987, Pub. L. No. 100-175, 101 Stat. 926, § 129 (1987).
[54] Older Americans Act Amendments of 1992, Pub. L. No. 102-375, 106 Stat. 1195, § 712 (1992).
[55] Older Americans Act Amendments of 1992, Pub. L. No. 102-375, 106 Stat. 1195, § 701 (1992).
[56] Barker et al., *State Long Term Care Ombudsman Program: A Primer for State Aging Directors and Executive Staff* 6, http://www.nasuad.org/documentation/nasuad_materials/ltc_ombudsman_primer.pdf (last visited Dec. 5, 2015).
[57] *See* Institute of Medicine, *Real People, Real Problems: An Evaluation of the Long-term Care Ombudsman Programs of the Older Americans Act* 42, 151–52 (Jo Harris-Wehling, Jill C. Feasley, and Carroll L. Estes, eds.), (1995).
[58] The National Long-Term Care Ombudsman Resource Center, *About Ombudsman Program*, http://ltcombudsman.org/about/about-ombudsman (last visited Dec. 5, 2015).
[59] Administration for Community Living, *Data-at-a-Glance (NORS)*, http://www.agid.acl.gov/DataGlance/NORS/ (last visited Dec. 5, 2015). The Administration for Community Living is an organization within the Department of Health and Human Services that incorporates AoA and operates an online data system called the Aging Integrated Database (AGID).

Legislative Framework.

The overall legislative framework is provided on the federal level under the OAA. States then have a wide range of discretion as to how to implement this framework in their own specific contexts. In this section, the basic expectations of all LTCOPs will be set out. These principles will be further discussed in the case studies on California, Florida, and Massachusetts.

Purposes.

The primary functions of all American ombudsmen have been "[t]rouble shooting and proposing ways to improve the delivery of government services."[60] In this general respect, the LTCOP is no different. However, as Gadlin and Levine note, "[a]dapting ombudsmen programs to the diverse cultures and organizational missions of different federal agencies has resulted in tremendous inconsistency in how agencies define and structure the role of the ombudsman, how ombudsmen officers interpret their role, and how the ombudsmen function is viewed and treated by agency leadership."[61] The LTCOP has itself developed along a somewhat unique course.

Title VII of the OAA outlines the responsibilities of the LTCOP. Section 712(a)(3) provides a list of functions, including: identifying, investigating and resolving complaints made by, or on behalf of, residents; providing services to assist the residents in protecting the health, safety, welfare, and rights of the residents; ensuring that the residents have regular and timely access to the services provided through the LTCOP; representing the interests of the residents before governmental agencies and seeking administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents; and analyzing, commenting on, and

[60] David Anderson and Diane Stockton, *Ombudsmen in Federal Agencies: Theory and Practice*, Report for Recommendation 90-2, Administrative Conference of the United States 111, 112 (1990), https://www.acus.gov/sites/default/files/documents/K1%201990-02%20ANDERSON-STOCKTON%20Ombudsmen%20Theory%20%2B%20Practice%20with%20add%20apps.pdf.
[61] Howard Gadlin and Samantha Levine, *Stranger in a Strange World: The Ombudsman in Federal Government,* 7 ACResolution Magazine 18, 20 (2008).

monitoring the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions.[62] Out of these numerous functions, there is potential for the important principles of independence and impartiality to be compromised, which will be discussed in further detail below.

Operation.

The LTCOP is mandated by the OAA and supported (in part) by federal funds, but is decentralized and each state is responsible for its implementation. The implementation on the state level is often handled by a designated state agency, sometimes called the State Unit on Aging (SUA).[63] One of the first tasks for an SUA is to decide how the LTCOP will be operated; the SUA may either establish and operate the Office of Ombudsman and carry out the program itself or it may contract with some other non-profit group or any public agency to operate it.[64] The overall State plan on aging is submitted to the federal AoA by the designated state unit on aging, and the AoA approves that plan for many programs and services, including in many instances a plan for the operation of the LTCOP.[65] Though the federal government provides a certain level of funding for the operation of LTCOP in each state, in most cases this is supplemented at state and local levels. In some states, for example, extra funding has been used to provide LTCOP services to individuals receiving long-term supports and services in in-home settings or in non-residential settings such as adult day health centers, which do not fall under the definition of long-term care facilities under the OAA.[66]

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[62] Older Americans Act Amendments of 1992, *supra* note 14.
[63] *Long Term Care Ombudsman*, Nat'l Ass'n of States United for Aging and Disabilities, http://www.nasuad.org/initiatives/protection-advocacy/long-term-care-ombudsman (last visited Dec. 5, 2015).
[64] 42 U.S.C. § 3058g (a)(4) (2006).
[65] 42 U.S.C. § 3027(a)(9) (2006)
[66] 42 U.S.C. § 3002(35) (2006)

Section 712 of the OAA requires that the head of the state ombudsman office "be selected from among individuals with expertise and experience in the fields of long-term care and advocacy."[67] That office can then establish policies and procedures for the operation of the program and designate local ombudsmen entities.[68]

Ombudsmen may either be paid or work as volunteers.[69] The ratio of paid to volunteer ombudsmen varies across states. Volunteers who fill positions of ombudsmen can investigate and resolve complaints; other volunteers may fill "adjunctive roles," accompanying the ombudsmen on visits to facilities.[70] Individual state programs and sub-state programs have discretion over how to utilize volunteers, as well as their training, certification, probationary status, and continuing education.[71]

The large level of discretion conferred upon states to implement the mandate of the OAA has, however, led to disparities and inconsistencies which may at times verge on a failure to comply fully with the mandate.[72] Recognizing the problems caused by this, the AoA issued a final rule in February 2015 to implement provisions of the OAA regarding states' LTCOPs. This final rule provides for uniform minimum requirements for all states and territories in program operations and services while allowing for significant diversity in how a program is implemented. The AoA observes that there has been "significant variation in the interpretation and implementation of the provisions of the Act related to the Ombudsman program among States," something that has "resulted in residents of long-term care facilities receiving inconsistent services from Ombudsman programs in some States compared to other States."[73]

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[67] 42 U.S.C. § 3058g (a)(2) (2006).
[68] 42 U.S.C. § 3058g (a)(5) (2006).
[69] *Id.*
[70] *See* Netting, et al., *supra* note 10, at 354.
[71] *Id.*
[72] *State Long Term Care Ombudsman Programs*, 45 C.F.R. Part 1324.
[73] *Id.* This regulation went into effect on July 1, 2016.

Core Principles: Independence, Impartiality, and Confidentiality.

"The American Bar Association standards have been an influential resource for Long-Term Care Ombudsman programs." The ABA Ombuds Committee has identified independence, impartiality, and confidentiality as essential characteristics of ombuds who serve internal constituents, ombuds in the private sector, and ombuds who also serve as advocates for designated populations.[74] Indeed, the United States Ombudsman Association codified these ideals as factors nearing a *sine qua non* quality of effective ombudsmen.[75] Some observers feel that the LTCOP offers a different type of ombuds in that it advocates for residents seeking resolution on both the individual and systemic levels. As the Institute of Medicine's 1995 report observed, "[a]lthough the classic characterization of the 'ombudsman' stresses neutrality and mediation, the role of the LTC ombudsman is considered a hybrid, since it was designed for active advocacy and representation of residents' interests over those of other parties involved."[76] The potential effects of this will be discussed separately in relation to independence, impartiality and confidentiality.

Independence.

Independence and impartiality, though closely related, are important to distinguish. Independence can be judged by objective standards, such as from where the ombudsman derives his or her authority and from which entities the ombudsman receives sufficient funding; impartiality is more subjective and based on perception.[77] Both, however, have an important bearing on the effectiveness of the LTCOP—independence in terms of the ombudsman's

[74] *See* American Bar Association, *Standards for the Establishment and Operation of Ombuds Offices*, 2001 ABA. Sec. Admin. L., Bus. L., Disp. Res. Rep. 1., available at http://www.usombudsman.org/site-usoa/wp-content/uploads/ABA_Standards.doc.
[75] *Governmental Ombudsman Standards*, United States Ombudsman Association (Oct. 2003), http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf.
[76] *See* Institute of Medicine, *supra* note 17, at 42.
[77] *See generally* United States Ombudsman Association, *supra* note 35, at 2–7.

activities and capabilities and impartiality in terms of residents' trust in an ombudsman and willingness to engage with him or her when faced with a problem. With both concepts of independence and impartiality it is useful to bear in mind from whom and for whom we seek the independence or impartiality.

The institutional structure of an ombudsman program is an important factor in determining its level of independence. Under the OAA it is required that LTCOP be sponsored by an office, which may either be outside the system being monitored (i.e., the providers of LTC services) or by the State Units on Aging directly.[78] This requirement serves the function of ensuring that the ombudsmen remain independent, by increasing the institutional distance between the office of the ombudsman and the subject of its inquiry. The OAA does, however, indicate that State Units on Aging may operate the ombudsman program directly, which is the case in most states currently. It is possible that an SUA that decides to contract out the operation of the LTCOP, and thus increases the distance between the ombudsman and the government, augments the likelihood that an ombudsman will be perceived as independent. Several states have utilized this option for the organizational location of the State LTC Ombudsman. Concerns about independence have been raised in recent years in response to incidents in several states implicating potential interference by the government in ombudsman activities.[79]

In terms of paid ombudsmen, the method of payment can be a factor in their independence.[80] There needs to be an assurance, for example, that their pay will not be reduced should they arrive at a decision or make a suggestion that is unfavorable to the government.

[78] *See* 42 U.S.C. § 3058g (a)(4) (2006); *id*. at § 3058g (f).
[79] *See, e.g.*, Jenni Bergal, *Ombudsmen face obstacles from state officials*, U.S.A Today, Jan. 27, 2013, available at http://www.usatoday.com/story/money/business/2013/01/27/ombudsman-nursing-home-elderly-disabled-obstacles/1868669/ (highlighting incidents in Florida and Iowa and legislative efforts in California).
[80] *See* United States Ombudsman Association, *supra* note 35, at 3.

Impartiality and Neutrality.

According to the ABA standards, ombudsmen of all classifications are expected to function as impartial parties to examine issues that arise from complaints of constituents without pre-existing bias.[81] ABA guidance clarifies that all ombudsmen also "ha[ve] the authority to become an advocate for change where the results of the inquiry or investigation demonstrate the need for such change."[82] However, as "advocate ombudsmen," long term care ombudsmen have an additional and unique duty of advocacy (and, therefore, need a basic understanding of the advocacy role), as they are both authorized and even expected to advocate on behalf of their constituents as part of their basic obligations.[83]

Given this expectation of advocacy on behalf of residents' interests, particularly since the 1992 amendments to the OAA, it is certainly true that they cannot be considered neutral in the conventional sense of that term. This does not necessarily mean, however, that they are unable to act impartially, managing to off-set their bias in favor of particular issues against their ability to properly evaluate the merits of claims and the course of action that should be taken between the parties.

Neutrality and impartiality, being inherently subjective and resting in large part on people's views and perceptions, are necessarily difficult concepts to measure. That said, any broad conclusion on the actual impartiality or neutrality of LTCOPs in their decision-making would be difficult to assert with any level of precision without conducting an analysis based on individual interviews or accounts from stakeholders, which was not part of our methodology. Notwithstanding, in addition to the balance of advocacy and neutrality articulated in ABA

[81] *See* American Bar Association, *supra* note 34, at 3.
[82] *See* American Bar Association, *infra* note 113, at 14.
[83] *See* American Bar Association, *supra* note 34, at 6.

standards, it is also worth noting that we see a strong link between independence and impartiality.[84] A LTCOP that is dependent on, and controlled in all of its actions by, a federal or state government to the extent that the ombudsman would be penalized if he or she made a decision criticizing that government, is in turn unlikely to be viewed as impartial in the conduct of its activities. Additionally, there have been a number of surveys carried out on the "perceived effectiveness" of LTCOPs, which provide some insight into how these programs may be viewed by some of the programs' stakeholders.[85] Estes et al. found, through a survey of ombudsmen, that several factors limit the perceived effectiveness of state LTCOPs, including insufficient funding and insufficient LTCOP autonomy caused by organizational placement.[86] This finding, to the extent that it bears on the resources allotted to ombudsmen programs and the institutional origins of those resources, suggests the linkage of independence to a perception of quality and effectiveness.

The need for ombudsman impartiality could be emphasized in the ombudsmen's training programs, so that even those who volunteer for the LTCOP out of a desire to advance the interests of those in long-term care facilities recognize and understand the importance of neutrality (and perceived neutrality) as well as impartiality in the ombudsman's role. Although, the training provided to ombudsmen, as well the number of voluntary ombudsmen engaged in

[84] *See* American Bar Association, *infra* note 113, at 14 ("The ombuds' structural independence is the foundation upon which the ombuds' impartiality is built.")
[85] *See, e.g.*, Carroll L. Estes et al., *State Long Term Care Ombudsman Programs: Factors Associated With Perceived Effectiveness*, 44 Gerontologist 104 (2004); F. Ellen Netting, et al., *The Long-Term Care Ombudsman Program: What does the complaint reporting system tell us*, 32 Gerontologist 843 (1992). The vast majority of LTCO complaints investigated are related to an issue between the resident and the facility (92%) as opposed to issues related to the government or other persons/entities outside the facility (8%).
[86] Estes et al., *supra* note 45, at 113. In Estes's study, the respondents to the survey were ombudsmen themselves, rather than recipients of the ombudsmen's services. The perceived effectiveness findings, therefore, refer to how the ombudsmen see their own program.

the program for different reasons, varies across states, the National Ombudsman Resource Center does provide a recommended certification training curriculum to all LTC ombudsmen.

Confidentiality.

"Confidentiality," as Thacker explains, "is the heart of the organizational ombuds practice. Without confidentiality, individuals would not feel safe coming forward to express their conflicts, problems or concerns."[87] When considering the role of confidentiality in the LTCOP, the "hybrid" model of the LTCOP is important to bear in mind and confidentiality must be evaluated through this particular prism.[88] An anecdote shared by Gadlin and Levine captures this tension:

> While preparing this article, the senior author received a phone call from a lawyer in the federal Department of Health and Human Services' (HHS) Office of general counsel. The attorney was charged with defending the agency in an equal employment Opportunity (EEO) suit and, as part of discovery, was asked by the plaintiff's counsel for documentation of all complaints about the manager at the center of the case. The HHS attorney contacted the senior author because it was revealed that an agency employee had come to the author's office, the national institutes of health (NIH) Office of the Ombudsman, for help in addressing some issues with this manager. The lawyer wanted access to records about these meetings. The author explained, however, that people approach his office as an alternative to filing a complaint or a grievance, often with the hope of resolving a conflict. Not only are such inquiries not complaints, the author said, but they are confidential under the parameters of ombudsman practice. The lawyer countered that the concept of a complaint was construed more broadly in the EEO framework, and that he still wanted information on the ombudsman office's interactions involving this manager. The discussion continued for some time. Ultimately, the attorney was persuaded to back off and the confidentiality of the individual who visited the ombudsman office was upheld. [89]

It is clear from the above that there is an important but subtle distinction between complaints and inquiries that bears on confidentiality, and that in addressing both, the

[87] Sara Thacker, *Good Intentions Gone Astray: How the ABA Standards Affect Ombudsmen*, 2 J. Int'l Ombudsman Ass'n 65, 74 (2009).
[88] Institute of Medicine *supra* note 17, at 42.
[89] Gadlin and Levine, *supra* note 9, at 18.

ombudsman does not merely receive and act on complaints, but rather receives various types of inquiries and can guide people as to the proper course of action. As such, the confidentiality of relations between long-term care ombudsmen and the people they serve has a unique dynamic. The existence of such confidentiality plays an important role in distinguishing ombudsmen from other figures in the institution and helps define their mission. The ombudsman role would serve little purpose if "the same information could have flowed through traditional channels."[90] It should be noted also that the OAA and its implementing regulations contain very strict provisions limiting disclosure of LTCO information without resident/complainant consent.[91]

Final Observation.

Prior to looking at the LTCOP as it operates in California, Florida, and Massachusetts, it is worth noting that the program is largely considered to have been a success and has made important impacts on the lives of many residents of long-term care facilities. Estes et al. in their survey of ombudsmen across the country found that when asked to rate the overall effectiveness of their LTCOP at the state level, the response was generally positive: almost one-third rated their programs as "very effective" (30.8 percent), nearly two-thirds (63.5 percent) rated their programs as "somewhat effective" and no state ombudsmen rated their programs as "very ineffective."[92] For a program that operates differently in different states these are positive results.

[90] *Cf.* William L Kandel & Sheri L. Frumer, *The Corporate Ombudsman and Employment Law: Maintaining the Confidentiality of Communications*, 19 Emp. Relations L. J. 587, 588 (1994) (suggesting that confidentiality among ombudsmen in a corporate context would encourage exchange of information outside of normal communication channels).
[91] *See* 42 U.S.C. § 712(d)(2)(c) (2012); 45 C.F.R. § 1324.11(e)(3) (2015).
[92] Estes, et al., *supra* note 45, at 107–108.

2.3.2.1 LTCOP Case Study 1: California

Introduction

The California State Long-Term Care Ombudsman is authorized under the Older Americans Act and the Older Californians Act.[93] The Older Californians Act is the controlling statute in California that implements the Older Americans Act.[94]

Structure of the Program

The California State Long-Term Care Ombudsman Program is located within the California Department of Aging.[95] Staff of the State Office:

> provide technical assistance to and monitoring of local programs; conduct semi-annual statewide training conferences; act as liaisons to licensing and regulatory agencies; work to influence public policy through legislative bill analyses and commenting on legislation that affects residents; promulgate policies and regulations; act as a clearinghouse for information and data related to LTC issues; compile statewide data on the Ombudsman Program; and provide a 24-hour CRISISline telephone service to receive complaints by and on behalf of LTC residents.[96]

Outside of the state office itself, there are 35 local ombudsman program coordinators who are responsible for recruiting, training and supervising volunteer ombudsmen.[97] Staff and volunteers of the local programs:

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[93] A long-term care facility is "[any] nursing or skilled nursing facility…including distinct parts of facilities that are required to comply with licensure requirements for skilled nursing facilities…[and] [a]ny residential care facility for the elderly. The Ombudsman coordinator is the "individual selected by the governing board or executive director of the approved organization to manage the day-to-day operation of the ombudsman program, including the implementation of federal and state requirements governing the office. The approved organization is the "public agency…that has been designated by the department to hear, investigate, and resolve complaints made by or on behalf of patients, residents, or clients of long-term care facilities relating to matters that may affect the health, safety, welfare, and rights of these patients, residents, or clients. Cal. Welf. & Inst. Code § 9701 (West 2013).

[94] *See Long Term Care Ombudsman Program*, California Dept. of Aging (Nov. 2015), http://www.aging.ca.gov/programs/ltcop/; Sara S. Hunt, *Equipping California Long-Term Care Ombudsman Representatives for Effective Advocacy: A Basic Curriculum,* 14 (Aug. 2007), http://ltcombudsman.org/uploads/files/support/Chapter_1_History__Roles(1).pdf.

[95] *See id*.

[96] *See Long-Term Care Ombudsman Program Narrative,* California Dept. of Aging, (March 2015), http://www.aging.ca.gov/Data_and_Statistics/Docs/2015/Long-Term_Care_Ombudsman.pdf.

[97] California Dept. of Aging, *supra* note 54.

> receive, investigate, and resolve complaints made by or on behalf of, residents of LTC facilities; receive and investigate reports of suspected abuse of elders and dependent adults occurring in LTC and some community care facilities; work with licensing agencies and law enforcement in the investigation of abuse in facilities; provide community education; maintain a regular presence in facilities; advocate to influence public policy related to long-term care; serve as members of interdisciplinary teams within their counties; witness advance health care directives for residents in nursing facilities; [and] address quality-of-care practices in facilities.[98]

Volunteerism, Training, and Retention

To become a volunteer ombudsman in California, individuals have to undergo a criminal offender record clearance, and must receive a minimum of 36 hours of classroom training approved by the office with an additional 12 hours required annually.[99] There were nearly 1,200 state-certified ombudsmen in California in 2004,[100] and nearly 90 percent were volunteers.[101] Of the volunteers, nearly 70 percent spent 10 to 30 hours per month volunteering as an ombudsman.[102]

Despite these high numbers, California experienced issues with volunteer retention in years past with a decline of 300 ombudsmen volunteers or 20 percent of the total volunteer ombudsman base in five years, 2001 through 2006.[103] The typical turnover rate for ombudsman volunteers is 30 percent, and certification training completion rates can be as low as 50 percent.[104] In a study conducted in 2006 to examine the problem, many volunteers expressed a

[98] *See* California Dept. of Aging, *supra* note 56, at 1.
[99] Cal. Welf. & Inst. Code § 9719 (West 2014).
[100]*See* Cheryl Wold, *California's Long Term Care Ombudsman Program: Assessing the Volunteer Experience* (March 2007), http://www.chcf.org/~/media/MEDIA%20LIBRARY%20Files/PDF/PDF%20O/PDF%20OmbudsmanExperienceSurvey.pdf.
[101]*See id.* at 3–6.
[102]*See id*. at 6.
[103] *See id*. at 3.
[104] *See id*.

desire for greater preparation for their role as an ombudsman.[105] Volunteers' concerns with training open up additional questions to consider, including whether more training could address potential issues with credibility and decision-making authority. Unfortunately, volunteer retention is still a problem. As of March 2015, there were only 787 volunteer certified ombudsman representatives in California.[106]

Confidentiality

Two specific sections within the Older Californians Act reference confidentiality in some way. Section 9715 provides that:

> All communications by a representative of the office, if reasonably related to the requirements of that individual's responsibilities under this chapter and done in good faith, shall be privileged, and that privilege shall serve as a defense to any action in libel or slander . . . . Any representative of the office shall be exempt from being required to testify in court as to any confidential matters, except as the court may deem necessary to enforce the provisions of this chapter.[107]

Section 9725 provides that:

> All records and files of the office relating to any complaint or investigation made pursuant to this chapter and the identities of complainants, witnesses, patients, or residents shall remain confidential, unless disclosure is authorized by the patient or resident or his or her conservator of the person or legal representative, required by court order, or release of the information is to a law enforcement agency, public protective service agency, licensing or certification agency in a manner consistent with federal laws and regulations.[108]

Therefore, between the two sections, there exists a statutorily protected privilege between the ombudsmen and patients of long-term care facilities that protects the confidentiality of their

[105] *See id*. at 15.
[106] *See* California Dept. of Aging, *supra* note 56, at 1. This is a decrease from 856 volunteer ombudsmen as of March 2014. *See* California Dept. of Aging. *Long-Term Care Ombudsman Program Narrative,* 1 (March 2014), http://www.aging.ca.gov/Data_and_Statistics/Docs/2014/Long-Term_Care_Ombudsman_Program_Narrative_%28March_2014%29.pdf.
[107] *See* Cal. Welf. & Inst. Code § 9715.
[108] *See* Cal. Welf. & Inst. Code § 9725.

interactions and the records of those interactions. The privilege extends to all files in the office of the ombudsperson, though with the notable exceptions articulated in Section 9725.

Independence

The statutory language also includes some information pertaining to the independence of the State Long-Term Care Ombudsman. The Older Californians Act contains certain qualifications the legislature enumerated that should be considered when recruiting and hiring for the position of the State Ombudsman;[109] it also provides that the State Long-Term Care Ombudsman is an appointed position, reporting directly to the Director of the California Department of Aging.[110] The independence of the California Long-Term Care Ombudsman has been the focus of legislative action in terms of how to ensure that the Ombudsman is both independent and empowered.[111] California recently passed additional new legislation towards this end intended to give further independence to the State Ombudsman's Office, and to encourage further advocacy for individuals in long-term care facilities by establishing an independent account located in the State Treasury to house any gifts, funds, or contributions raised for the Long-Term Care Ombudsman Program.[112]

Impartiality, Neutrality, and Advocacy

Despite the traditional focus on neutrality within the ombuds role, much of the literature about California's LTCOP echoes the call for advocacy articulated in national ABA guidance.

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[109] *See* Cal. Welf. & Inst. Code § 9710.5 (West 2013) ("The position of State Ombudsman requires both an extensive background in social or health services programs, and an ability to manage and motivate individuals and groups").
[110] *See* Cal. Welf. & Inst. Code § 9711.
[111] *See* Lois Wolk, *Wolk bill strengthens independence, accountability of CA Long-term Care Ombudsman program*, May 1, 2012, http://sd03.senate.ca.gov/news/2012-05-01-wolk-bill-strengthens-independence-accountability-ca-long-term-care-ombudsman-progra (describing Senator Wolk's bill, which has since been approved, that would require ombudsmen to write annual reports, revive advisory councils, and ensure the maintenance of a website for consumers).
[112] *See* Cal. Welfare and Inst. Code § 9714 (West 2014) (specifically linking funds, gifts, and contributions to the potential for loss in independence).

One of the goals of the California State Long-Term Care Ombudsman Program is "to advocate for the rights of all residents of long-term care facilities."[113] Ombudsmen first "receive and resolve individual complaints and issues by, or on behalf of . . . residents" and also are responsible for pursuing "resident advocacy in the long-term care system, its laws, policies, regulations, and administration through public education and consensus building."[114] As mentioned earlier, new legislation was passed in 2012 seeking to increase the independence of ombudsmen while encouraging further advocacy.[115] This bill requires that the office prepare an annual advocacy report that describes the activities carried out by the office.[116] According to the Fiscal Year 2013 Advocacy Report, the Office of the State Long Term Care Ombudsman hosted a conference where LTCOP representatives met with legislators to discuss the program and raise concerns on behalf of long-term care constituents.[117] This type of activity suggests that ombudsmen in California's LTCOP may engage in a lobbying role in accordance with their obligation to advocate change on a systemic level.

Other Themes: Credible Review, Decision-making Power, and Fairness

There are numerous privileges enumerated in the statute that confer credibility on the Office of the State Ombudsman as well as the state-certified volunteer ombudsmen themselves. By statute, "[r]epresentatives of the office shall have the right of entry to long-term care facilities . . . at any time deemed necessary and reasonable by the State Ombudsman to effectively carry

[113] *See* California Dept. of Aging, *supra* note 56.
[114] *See id.*
[115] *See* Wolk, *supra* note 71.
[116] *See id.* Note that an annual report (with specific requirements) is required by the OAA and 45 C.F.R. pt. 1327 (2016), so all states are required to file an annual advocacy report.
[117] *FFY 2013 Annual Report of the California Long-Term Care Ombudsman Program: Advocacy, Education, and Empowerment for Californians Living in Long-Term Care Facilities*, Office of the State Long-Term Care Ombudsman, 6 (May 2015), available at https://www.aging.ca.gov/ProgramsProviders/LTCOP/Docs/Annual_Report_FFY_2013.pdf. ("Systemic advocacy is a vital LTCOP function.")

out this chapter."[118] Furthermore, "[t]he State Ombudsman shall have access to any record of a state or local government agency that is necessary to carry out his or her responsibilities under this chapter, including any record rendered confidential under Section 1094 of the Unemployment Insurance Code or Section 10850."[119] While these authorities and privileges do provide credibility, the ability to enforce could perhaps be limited. According to the same statute, the interference with these privileges results only in "refer[ral] to the appropriate licensing authority,"[120] and the potential for "a civil penalty of no more than . . . $2,500.[121] There have been a number of incidents in California in recent years where ombudsmen were barred from entering long-term care facilities or prevented from accessing patients.[122]

In initial research, there was little information regarding the issue of fairness or decision making authority of ombudsmen in California per se, though many aspects of the credible review determination bear on ombudsmen's authority.

[118] Cal. Welf. & Inst. Code § 9722 (West 2013).
[119] Cal. Welf. & Inst. Code § 9723.
[120] Cal. Welf. & Inst. Code § 9730.
[121] Cal. Welf. & Inst. Code § 9732 (West 2014).
[122] *See* Sharon Lee, *SB 609 (Wolk) Office of the State Long-Term Care Ombudsman (Fact Sheet)*, Elder Law & Advocacy (Aug. 24, 2013), http://seniorlaw-sd.org/fact-sheet-sb-345-wolk-office-of-the-state-long-term-care-ombudsman/.

2.3.2.2 LTCOP Case Study 2: Florida

Introduction

The Florida State Long-Term Care Ombudsman Program (LTCOP) was founded in 1975 in accordance with the Older Americans Act.[123]

Structure of the Program

The Florida State LTCOP is part of Florida's Department of Elderly Affairs.[124] It consists of a State Long-Term Care ombudsman, appointed by the Secretary of Elderly Affairs,[125] and a State Long-Term Care Ombudsman Council. The Council serves as an advisory board to the State LTC Ombudsman as well, and helps regions and local councils reach consensus among districts and local councils on issues affecting residents and impacting program operation.[126] The state is divided into Northern, Eastern, and Western regions, and has thirteen (13) local district offices.[127] The State Council is composed of one active certified ombudsman from each of Florida's local units, and three at-large members appointed by the governor.[128] Council members serve three-year terms, with no more than two consecutive terms.[129] The Council serves as an appellate body for complaints from districts or local councils,[130] assists the state ombudsman in preparing an annual report, meets at least quarterly, and identifies statewide issues affecting long-term care facility residents and coordinates voluntary organizational

[123] *See* Florida Ombudsman Program, *Florida Ombudsman Program Annual Report 2013-14*, 6 http://ombudsman.myflorida.com/publications/ar/LTCOP_2013_2014_Annual_Report.pdf.
[124] Fla. Stat. §400.0063 (2015).
[125] *Id*.
[126] Fla. Stat. §400.0067 (2015).
[127] *See* Florida Ombudsman Program, *supra* note 83, at 26.
[128] Florida Dept. of Elder Affairs, *State Long-Term Care Ombudsman Council*, http://elderaffairs.state.fl.us/doea/ltcop_council.php (last visited Nov. 2015).
[129] *Id*.
[130] Fla. Stat. §400.0067 (2015).

assistance to improve resident care.[131] Regional managers oversee the city councils, which are composed of volunteer ombudsmen.[132]

The state also established a position of legal advocate, filled by a lawyer and selected by the State Ombudsman, who must assist both the State Ombudsman and State Council in carrying out legal duties, and pursue administrative and legal remedies on behalf of residents.[133]

Volunteerism, Training, and Retention

All local ombudsmen are volunteers,[134] who are offered in-class and certification training. Prior to in-class training, volunteers must take a certification training consisting of seven modules: Introduction, Residents' Rights, Culture Change, Aging Process and Long-Term Care, Communicating Effectively with Residents, Administrative Assessments and Resident Visitations, and Complaint Investigation and Resolution.[135] Each year, ombudsmen must also take ten (10) hours of continuing education, available online.[136] These continuing education sessions cover topics like medication and mental health.[137]

Each year, to honor the efforts of volunteers, each local council picks one of their volunteers to be the District Ombudsman of the Year.[138] Out of these honorees, the State Council selects one individual as the Statewide Ombudsman of the Year. These services are meant to recognize the volunteers' invaluable services as advocates.[139]

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[131] *See* Florida Dept. of Elder Affairs, *supra* note 88.
[132] *See* Florida Ombudsman Program, *supra* note 83, at 28.
[133] *See* Fla. Stat. §400.0063(3) (2015).
[134] Florida Dept. of Elder Affairs, *Long Term Care Ombudsman Program*, http://elderaffairs.state.fl.us/doea/ombudsman_program.php (last visited Nov. 2015).
[135] *See* Florida Long-Term Care Ombudsman Training Portal, *Ombudsman Certification Training*, https://sites.google.com/site/ombtraining/?pageDeleted=%2Fwelcome (last visited Nov. 2015),
[136] *See* Florida Long-Term Care Ombudsman Training Portal, *Continuing Education Training Resources*, https://sites.google.com/site/ombtraining/?pageDeleted=%2Fwelcome (last visited Nov. 2015),
[137] *See id.*
[138] *See* Florida Ombudsman Program, *supra* note 83, at 13.
[139] *See id.* at 13-17.

Based on data from the AoA, the Florida State LTC Ombudsman program had 366 certified volunteer ombudsmen in 2013.[140] The program closed 2,926 cases, consisting of 6,480 complaints (or, separate issues) during 2013.[141] A critical aspect of effectiveness of LTCOPs may include program funding and its effect on routine visits to facilities, community education, and complaint investigation.[142] In particular, Florida has a high number of bed-to-staff ratios, at 7,087 LTC facility beds per paid program staff (as opposed to 2,637 in California and 1,332 in Massachusetts).[143] This could explain why only about 25 percent of nursing facilities and 11 percent of board and care facilities were visited quarterly.[144]

Confidentiality

Florida protects confidentiality of resident requests by state statute, which holds that the following are confidential and exempted from the ordinary allowances of copying and inspecting that apply to other public records:

(a) Resident records held by the ombudsman or by the state or a local ombudsman council.
(b) The names or identities of the complainants or residents involved in a complaint, including any problem identified by an ombudsman council as a result of an investigation, unless:
  i. The complainant or resident, or the legal representative of the complainant or resident, consents to the disclosure in writing;
  ii. The complainant or resident consents orally and the consent is documented contemporaneously in writing by the ombudsman council requesting such consent; or
  iii. The disclosure is required by court order.
(c) Any other information about a complaint, including any problem identified by an ombudsman council as a result of an investigation, unless an ombudsman council determines that the information does not meet any of

[140] *See* Florida Ombudsman Program, *Florida Ombudsman Program Annual Report 2012-13*, 4 http://ombudsman.myflorida.com/publications/ar/LTCOP%20ANNUAL%20REPORT.pdf.
[141] *See Table A-1: Selected Information by States and Region for FY 2013 as of 08/2014, 2013 National Ombudsman Reporting System Data Tables*, Administration on Aging (AoA) (Aug. 2014), available at http://www.aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2013/Index.aspx [hereinafter *Table A-1]*. Compiled data from this source are also available in the Appendix of this document.
[142] *See* Estes et al., *supra* note 45, at 109.
[143] *See* Table A-1, *supra* note 101.
[144] *See id.*

> the criteria specified in [1]s. 119.14(4)(b); or unless the information is to collect data for submission to those entities specified in s. 712(c) of the federal Older Americans Act for the purpose of identifying and resolving significant problems.[145]

In addition, all activities of the ombudsman State Council meetings are open to the public, except when the council discusses the confidential matters listed above.[146]

Independence

A challenge commonly cited by state LTCOP directors in effectiveness of programs is insufficient autonomy caused by LTCOP's organizational placement under State Units on Aging.[147] The Florida LTCOP is placed within the Department of Elderly Affairs, and the state ombudsman is appointed by the Secretary of Elderly Affairs. According to Estes et al.:

> Close to one-third (29.7 percent) of state ombudsmen in SUAs reported that their program's placement limits their freedom to speak with legislators, the media, or both. In contrast, only 6.7 percent of state ombudsmen in nonprofit agencies, legal agencies, or non-SUA state agencies reported experiencing limitations on autonomy caused by the placement of their program.[148]

The question of independence was highlighted during a controversy in 2011, when State Long-Term Care Ombudsman Brian Lee was told to resign or be fired by Governor Rick Scott.[149] The Florida Assisted Living Association, representing 700 assisted-living facilities, had sent a letter to Governor Scott supporting the appointment of a new ombudsman.[150] Though the ombudsman office does not have the power to fine facilities, it can refer matters to other agencies and thus holds much influence by reporting and investigating long term care

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[145] Fla. Stat. §400.0077 (2015).
[146] *See id*.
[147] Estes et al, *supra* note 45 at 105, 111.
[148] *Id*. at 111.
[149] Kate Santich, *Scott broke law ousting state's long-term-care ombudsman, watchdogs say*, Orlando Sentinel, Feb. 26, 2011, http://articles.orlandosentinel.com/2011-02-26/health/os-state-ombudsman-firing-20110226_1_ombudsman-nursing-home-kate-ricks.
[150] *Id*.

facilities.[151] The media reported that Lee, an experienced ombudsman of 7 years, was "ouste[d]" despite his experience.[152] Instances such as these raise critical questions about an ombudsman's ability to be independent, particularly when that role is filled by appointment. However, HHS' Administration on Community Living (ACL)/AoA conducted a compliance review in this matter and required corrective action as a result. This review was part of the impetus for ACL promulgating its first ever federal regulations of the LTCOP.

Impartiality, Neutrality, and Advocacy

Although ombudsmen are usually impartial, the ABA recognizes that advocate ombuds play a unique role in that they are asked to evaluate claims objectively but are also "authorized or required to advocate on behalf of individuals or groups found to be aggrieved."[153] The Florida state legislature specifically recognized that the role of LTC ombudsmen was to advocate on behalf of residents for their safety. It acknowledged that "concerned citizens are often more effective advocates for the rights of others than governmental agencies."[154] The purpose of the State Long-Term Care Ombudsman program is therefore to identify and resolve complaints made by or on behalf of residents of long-term care facilities to ensure and provide services that protect the health, safety, welfare, and rights of residents.[155]

LTCOPs occasionally pursue this purpose through lobbying legislatures, suing city governments, or participating in the rulemaking process or intervening in the implementation of rules.[156] As in California, Florida's statute specifically creates a position of a "legal advocate" to assist the LTCOP in carrying out responsibilities through administrative, legal, and other

[151] *See id*.
[152] *Id*.
[153] *Standards for the Establishment and Operation of Ombuds Offices,* American Bar Association, 10 (revised Feb. 2004), http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf
[154] Fla. Stat. §400.0061(2) (2015).
[155] Fla. Stat. §400.0065(1) (2015).
[156] *See* Institute of Medicine, *supra* note 17, at 72-73.

remedies on behalf of residents and to serve as legal counsel to the representatives of the LTCOP in any suit of legal action connected to the program's work.[157]

The top five complaints that advocates represented in adult family-care homes during the 2013-2014 year were: (1) Menu, (2) Medication Administration and Organization, (3) Dignity, Respect – Staff Attitudes, (4) Cleanliness, Pests, General Housekeeping, and (5) Equipment/Buildings. In nursing homes, the top complaints were: (1) Dignity, Respect—Staff Attitudes, (2) Medication Administration, Organization, (3) Discharge/Eviction, (4) Personal Hygiene, and (5) Failure to Respond to Requests for Assistance.[158]

Other Themes: Credible Review, Decision-making Power, and Fairness

Florida statute vests substantial authority in the LTCOP through both immunity and access to facilities. Representatives of the Florida LTCOP are "immune from any liability, civil or criminal, that otherwise might be incurred or imposed during the good faith performance of official duties."[159] Long term care facilities must also provide representatives of the LTCOP with access to the facility, as well as medical and social records (with the consent of the resident), as necessary to investigate a complaint.[160] The state statute gives the ombudsman relatively wide latitude and broad authority to access records, providing that they may review them during their investigation if:

1. A legal representative or guardian of the resident refuses to give permission;
2. The representative of the State Long-Term Care Ombudsman Program has reasonable cause to believe that the legal representative or guardian is not acting in the best interests of the resident; and
3. The representative of the State Long-Term Care Ombudsman Program obtains the approval of the state ombudsman.[161]

[157] Fla. Stat. §400.0063 (2015); *id*. at 73.
[158] *See* Florida Ombudsman Program, *supra* note 83, at 8.
[159] Fla. Stat. §400.0079 (2015)
[160] *See* Fla. Stat. §400.0081 (2015)
[161] *Id*. Note: This requirement reflects the OAA provisions regarding records access; all states are required to provide for this level of access, not just Florida.

Furthermore, if a person or facility interferes with or retaliates against long term care ombudsman duties, they will be "liable for damages and equitable relief as determined by law, [and will have committed] a misdemeanor of the second degree."[162]

Complaints can be considered closed when they are assigned a particular status based on the resident's perspective: resolution, partial resolution, no action needed, withdrawal, no resolution, or referral to another agency.[163] In 2013-2014, state ombudsmen resolved 29 percent of their complaints, withdrew 16 percent, needed no action on 36 percent, and referred 4 percent of their cases.[164] The Florida LTCOP's work is recognized by the public for its effectiveness and authority. During the controversy over Brian Lee's resignation, Karen Mummey of St. Cloud, FL, whose 71-year-old mother fell and broke her hip in a nursing home after being left unattended in a bathroom, said, "The nursing home wouldn't even return our calls until we got the ombudsman involved. . . . When the ombudsman comes in there, they all stand up and pay attention. It's the only advocate we have."[165]

[162] Fla. Stat. §400.0083 (2015)
[163] *See* Florida Ombudsman Program, *supra* note 83, at 9.
[164] *Id*.
[165] Santich, *supra* note 109.

2.3.2.3 LTCOP Case Study 3: Massachusetts

Introduction

The Massachusetts state long term care ombudsman program (LTCOP) began in 1973 as one of the first ombudsman programs of its kind in the United States.[166]

Structure of the Program

Today, the program continues to operate within the State Unit on Aging (SUA), the Executive Office of Elder Affairs.[167] In 2013, the Massachusetts LTCOP included 28 paid full-time program staff, 308 certified volunteers, and 37 other volunteers.[168] This amounts to approximately 1,332 long term care facility beds per paid ombudsman program staff,[169] well within the recommended staffing ratio prescribed by the 1995 Institute of Medicine assessment of national long term care ombudsman programs.[170] Unique, however, to Massachusetts is that it does not provide LTC Ombudsman services to individuals living in assisted living, thus its LTC number of LTC facility beds is fewer as compared to its older population than in other states. Program staff members are spread across twenty-four (24) local ombudsman entities—a number almost double the national average—and those entities address over six thousand complaints per year.[171] The majority of complaints investigated and resolved by ombudsmen in Massachusetts come from residents of long term care facilities or their relatives, or are raised by ombudsmen

[166] *Effective Ombudsman Programs: Six Case Studies*, Department of Health and Human Services Office of the Inspector General, 7 (June 1991), http://oig.hhs.gov/oei/reports/oei-02-90-02122.pdf.
[167] *See generally Long-Term Care Ombudsman*, Executive Office of Elder Affairs (2015), http://www.mass.gov/elders/service-orgs-advocates/ltc-ombudsman/ (describing the Office's administration of the LTCOP).
[168] *See Table A-8: Staff and Volunteers for FY 2013 as of 08/2014*, *2013 National Ombudsman Reporting System Data Tables*, Administration on Aging (AoA) (Aug. 2014), available at http://www.aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2013/Index.aspx.
[169] *See* Table A-1, *supra* note 101.
[170] *See* Institute of Medicine, *supra* note 17, at 194 (suggesting that a minimum ratio for an adequate program would be one staff member per 2,000 beds).
[171] *See* Table A-1, *supra* note 101.

themselves.[172] The Massachusetts ombudsman program is relatively large compared with other state programs across the nation,[173] with a 2013 expenditure of $2,843,793 according to AoA National Ombudsman Reporting System data for that fiscal year.[174]

Independence

According to standards set forth by the American Bar Association (ABA) for successful ombudsman programs, independence of the state program is a crucial element of its success. "The instrument used to establish independence should be the strongest available and should guarantee the independence of the ombuds from control by any other person."[175] Massachusetts statutes governing the statewide ombudsman program solidify the ombudsman program's independence from the administration of the long term care facilities in which they serve by providing them free access to facilities and residents within prescribed circumstances. By law, ombudsmen in the course of their duties are granted access to any consenting resident in any long term care facility between the hours of ten o'clock a.m. and eight o'clock p.m.[176] and access to any facility at "any time considered necessary and reasonable . . . .[177] Thus, ombudsmen are not required to obtain permission from administrators of long term care facilities or structure their interactions around facility schedules. Independence is reinforced through regulations specifying that any ombudsman visiting a long term care facility need not obtain an escort by facility personnel in order to speak with residents (provided the residents consent to the

[172] *See Table A-2: Cases Closed Numbers and Percents of Complainants by Setting for FY 2013 as of 08/2014, 2013 National Ombudsman Reporting System Data Tables*, Administration on Aging (AoA) (Aug. 2014), available at http://www.aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2013/Index.aspx [hereinafter *Table A-2*].
[173] *See* Table A-1, *supra* note 101.
[174] *See id*.
[175] American Bar Association, *supra* note 113, at 9.
[176] *See* Mass. Gen. Laws Ann. ch. 19A, § 29.
[177] Mass. Gen. Laws Ann. ch. 19A, § 30.

interaction).[178] The regulations also outline procedures for legally compelling facility administration to allow an ombudsman's access to a facility in compliance with state law in the event an ombudsman is met with resistance or a denial of entry.[179]

The extensive facility access and independence provided by Massachusetts law has allowed for the promulgation of an extremely efficient program. In 2013, Massachusetts ombudsmen visited 100 percent of nursing and board and care facilities in Massachusetts at least quarterly.[180] Such routine presence in long term care facilities is essential to the maintenance of a strong ombudsman program since ombudsmen's presence both provides opportunities for residents to initiate complaints and also allows ombudsmen to establish personal relationships with potential complainants.[181] As mentioned above, the vast majority of complaints addressed and closed by ombudsmen in those visits were raised by residents of long term care facilities and their family or friends.[182] Compared with national data the number of complaints closed originating from long term care facility administration and staff in Massachusetts makes up a notably small percentage of total complaints (only 2 percent of complaints in Massachusetts compared with 18 percent nationally in 2013).[183]

Materials made publicly available by the ombudsman program on the official state ombudsman website also indicate a degree of independence from the long term care facilities in which ombudsmen operate by offering advice and recommendations for evaluation of these facilities. Not only does the website provide practical information such as contact information for the ombuds offices by township, but it also provides tools for assisting potential complainants

[178] *See* 651 Mass. Code Regs. 6.09(3).
[179] *See* 651 Mass. Code Regs. 6.09(4), (5).
[180] *See* Table A-1, *supra* note 101.
[181] *See Long Term Care Ombudsman Program: Overall Capacity*, Department of Health and Human Services, Office of Inspector General, 1-2 (1999), http://oig.hhs.gov/oei/reports/oei-02-98-00351.pdf.
[182] *See* Table A-2, *supra* note 132.
[183] *See id*.

in choosing and evaluating long term care facilities.[184] One checklist, for instance, suggests that residents determine whether a facility provides ramps for access before applying. Another page details how to access Department of Public Health (DPH) certification survey results detailing whether a facility meets national regulations.[185] These materials draw a clear line between the ombudsmen as advocates for residents and long term care facilities as potential care providers. Ombudsmen are placed firmly on the "side" of the resident, underscoring the ombudsmen's independence from the organizational infrastructure of the facilities they serve (but perhaps with accompanying implications for the ombudsmen's neutrality and impartiality).

Confidentiality

Confidentiality is another essential component in sustaining any ombudsman program as an alternative complaint resolution system; the assurance of confidentiality not only removes barriers to parties wishing to issue complaints but also provides those parties protection throughout the complaint process.[186] Because ABA standards place a priority on ombudsmen being allowed access to all information within an organization that may be relevant to their function in complaint resolution,[187] successful ombudsman programs must address practical concerns of complainant and resident confidentiality to protect the rights of the parties for whom they aim to advocate. Massachusetts laws and regulations place a great deal of importance on confidentiality surrounding ombudsman-resident communications. The Massachusetts Code of Regulations for the Statewide Program list "conforming to confidentiality requirements" as one

[184] *See Assessing Long-Term Care Facilities*, Executive Office of Elder Affairs (Nov. 2015), http://www.mass.gov/elders/service-orgs-advocates/ltc-ombudsman/ltc-assess/; *Choosing a Long-Term Care Facility*, Executive Office of Elder Affairs (Nov. 2015), http://www.mass.gov/elders/service-orgs-advocates/ltc-ombudsman/choosing-a-long-term-care-facility.html.
[185] *See Review the Facility*, Executive Office of Elder Affairs (Nov. 2015), http://www.mass.gov/elders/service-orgs-advocates/ltc-ombudsman/ltc-assess/review-the-facility.html.
[186] *See* American Bar Association, *supra* note 113, at 14.
[187] *See id*. at 13–14.

of the primary functions of local ombudsmen.[188] Interestingly, while reflecting a similar interest in maintaining confidentiality of resident information, statutory law in Massachusetts (and required of all states under the OAA and LTCO Rule) provides an ombudsman access to medical records of a resident without the resident's written authorization in certain circumstances in which the resident may not be able to fully give informed consent.[189] Though this legal permission initially appears to pose a potential threat to confidentiality, the statute provides further protections of confidentiality of ombudsmen's records, and knowledge acquired through their investigations offer some protection from the concerns of constituent confidentiality that the broad permission in the complaint creation phase creates.[190]

Impartiality, Neutrality, and Advocacy

Massachusetts state law reinforces the long-term care ombudsmen's advocacy function, defining the state's long term care ombudsman program as one created, in part, "for the purpose of advocating on behalf of long term care facility residents and of . . . resolving through administrative action complaints filed by residents."[191] Such advocacy may even extend beyond individual, direct ombudsman-client interactions. For example, Massachusetts statutes allow an ombudsman discretion to launch investigations and confront systematic problems he or she identifies within an organization by advocating for change surrounding those problems even without a complaint.[192] A 1991 assessment of the Massachusetts ombudsman program by the

[188] *See* 651 Mass. Code Regs. 6.04.
[189] *See* Mass. Gen. Laws Ann. ch. 19A, § 30.
[190] *See, e.g.*, Mass. Gen. Laws Ann. ch. 19A, § 31 (describing the specific requirements that confidentiality procedures must meet).
[191] *See* Mass. Gen. Laws Ann. ch. 19A, § 28.
[192] *See* Mass. Gen. Laws Ann. ch. 19A, § 31. NORS instructions also provide for "ombudsman generated complaints" on the LTCO observations of facility operations. This is the practice in all states, not only MA.

Department of Health and Human Services even credited the state ombudsman program for its instrumental role in getting legislation passed that required training for nurses' aides.[193]

While resident visitation and complaint resolution are still the primary functions of ombudsmen in Massachusetts, local ombudsman programs also devote significant time to consulting with facilities and participating in facility surveys.[194] Paid ombudsmen supplement that work by working on government policy surrounding long term care in the state.[195] But this work outside the long term care facility does not seem to undermine the program's strength or sustainability. It may even contribute to its strength. The Department of Health and Human Services assessment cited the program's close affiliation with the Massachusetts state Office of Elder Affairs as an integral component of its success.[196] The study determined that, through its connection with the State Unit on Aging, the Massachusetts ombudsman program is made capable of addressing public policy issues which may affect its constituents with assistance from the Office.[197]

Ombudsmen also appear to engage in advocacy at a more basic level. For instance, one document prominently provided on the state program website aims to make any long term care facility residents accessing the site aware of their "resident rights."[198] The document is framed in such a way to indicate it is meant to be posted in long term care facilities to proactively make residents cognizant of their rights and opportunities to protect those rights (the document begins

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[193] *See* Department of Health and Human Services, *supra* note 126, at 8.
[194] *See Table A-10: Other Ombudsman Activities for FY 2013 as of 08/2014, 2013 National Ombudsman Reporting System Data Tables*, Administration on Aging (AoA) (Aug. 2014), available at http://www.aoa.gov/aoa_programs/elder_rights/Ombudsman/National_State_Data/2013/Index.aspx [hereinafter *Table A-10]*.
[195] *Id*.
[196] *See* Department of Health and Human Services, *supra* note 126, at 8.
[197] *See id*. at 7–8.
[198]*See LTC Ombudsman Resident Rights*, Executive Office of Elder Affairs (Nov. 2015), available at http://www.mass.gov/elders/service-orgs-advocates/ltc-ombudsman.

in large type-face: "As a resident of this facility, you have the right to a dignified existence, and to communicate with individuals and representatives of choice . . . .").[199] While such advocacy for resident rights is consistent with the aim of the program to ensure residents are afforded proper treatment and respect by facility staff, it may undermine the sense of the ombudsman as a completely neutral third party. By proactively informing patients, these materials may run the risk of shaping an image of the ombudsman as more of an advocate for the patient than purely an unbiased complaint-resolver.[200]

Adopting an advocacy role for all of the LTCOPs, not just Massachusetts, is due to the OAA program design and vulnerable population served. It may be necessary in the face of concerns that, despite the large size of the state's program relative to other states' programs, the number of ombudsmen existing to serve residents of long term care facilities is still likely inadequate. State officials in the Office of Elder Affairs have recently expressed concern with the growing number of complaints the office receives from residents of nursing homes in particular.[201] As of September 2014, the Office received reports of over 100 complaints of accidents, falls, neglect, or abuse in state long term care establishments per week, and had only a small number of ombudsmen to assist with resolving those complaints.[202] To compound concerns with limited resources, the number of elderly individuals in the state is expected to significantly increase in the next five to ten years.[203] Advocating broadly for populations of potential constituents may overcome some of the present resource constraints the state ombudsman program currently faces and those it will face in the future.

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[199] *Id*.
[200] The rights document itself, however, does not mention or identify the ombudsman.
[201] *See* Kay Lazar, *Elder advocates raise concerns on assisted living*, The Boston Globe, Sept. 21, 2014, https://www.bostonglobe.com/metro/massachusetts/2014/09/20/assisted/Z1dzkfCG8MGydRPmpBr4kI/story.html.
[202] *See id*.
[203] *See Massachusetts Elderly 60+ Projections by Town and AAA, 2010-2020*, Executive Office of Elder Affairs (Nov. 2015), available at http://www.mass.gov/elders/regs-stats/elder-population/.

Other themes: Credible Review, Decision-making power, and Fairness

While the Massachusetts laws and regulations defining the state ombuds program do not explicitly draw bounds around the ombudsmen's specific decision-making powers in every circumstance, the Massachusetts Long Term Care Ombudsman Program is careful to detail what it is *not* in its own description of the program function. The state ombudsman website clarifies that the program "Is NOT able to provide direct care to residents" and "Is NOT the regulatory agency overseeing Nursing and Rest Homes."[204]

Massachusetts statewide LTCOP regulations also do not explicitly refer to "credible review" or "credibility" of ombudsmen, though they do provide operational guidelines which help to establish credibility of the ombudsman program. Training is a major component of that credibility. In 2013, Massachusetts conducted over 450 training sessions on state and local levels amounting to more than 1,000 hours of training for a total of 2,846 ombudsman staff and volunteers.[205] State law mandates any staff or volunteer ombudsmen on state and local levels "who perform[s] the duties and responsibilities enumerated" by the statute regarding complaint investigation and resolution to be trained and certified through a training program established by the director of the ombudsman program as appointed by the secretary.[206] The Massachusetts statute goes further to say that training and certification is also intended for any "persons employed by or associated with a community group offering free advocacy assistance to residents of long term care facilities."[207] These legal regulations maintain the credibility created by certification of ombudsmen by requiring continued training and regular "Local Ombudsman Program Director training meetings," called by the Office of the State Long Term Care

[204] *See Long-Term Care Ombudsman Overview*, Executive Office of Elder Affairs (Nov. 2015), http://www.mass.gov/elders/service-orgs-advocates/ltc-ombudsman/ltc-ombudsman-overview.html.
[205] *See Table A-10*, *supra* note 154.
[206] *See* Mass. Gen. Laws Ann. ch. 19A, § 33.
[207] *Id*.

Ombudsman, at which local ombudsman program directors are considered to be recertified and their programs re-designated.[208] Such requirements, coupled with shared procedures across local programs, likely ensure that the state level program has the ability to monitor local ombudsman activities and provide a sense of cohesiveness among local programs which contributes to credibility.[209]

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[208] 651 Mass. Code Regs. 6.19.
[209] *See* Department of Health and Human Services, *supra* note 141, at 8.

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LTCOP Appendix

Administration on Aging (AoA) 2013 National Ombudsman Reporting System Data Tables[210]

Table A-1 Selected Information by States and Region for FY 2013 as of 08/2014

State	Cases opened	Cases Closed/ Complain-ants	Complaints	Licensed Nursing Facilities		Licensed Board & Care & Similar Facilities[1]		Local Ombuds-man Entities	Paid Pro-gram Staff	Certified Volunteer Ombuds-men	Total Program Expen-ditures
	Number	Number	Number	Number	Beds	Number	Beds	Programs	(FTE's)	Number	($000's)
Total 2013	124,958	123,666	190,592	16,516	1,716,787	53,376	1,272,804	575	1,233	8,290	$92,502
2012	127,896	126,398	193,650	16,528	1,723,433	52,928	1,248,785	573	1,180	8,712	$90,777
2011	134,830	132,387	204,144	16,602	1,733,444	52,550	1,233,786	575	1,187	9,065	87,577
2010	143,062	139,296	211,937	16,639	1,736,645	52,681	1,212,015	578	1,166	8,813	87,840
2009	161,222	157,617	233,025	16,653	1,737,301	52,371	1,163,008	573	1,203	8,661	84,946
2008	184,591	182,506	271,650	16,749	1,740,115	50,116	1,130,863	572	1,293	8,771	86,867
CA	30,592	30,964	39,661	1,271	121,188	7,571	174,814	35	112.2	856	$9,642
FL	2,752	2,926	6,480	682	83,342	3,397	86,751	17	24.0	366	$2,959
MA	4,360	4,376	6,036	431	48,503	80	2,475	24	38.3	308	$2,844
STATE AVG*	2,403	2,378	3,665	318	33,015	1,026	24,477	11	24	159	$1,779
*"State Average" added to published AoA data; calculated average across all 50 states plus Puerto Rico and Washington D.C.											

State	Number of LTC Facility Beds per Paid Program Staff (FTEs)	Nursing Facilities Visited at least quarterly [2]	Board & Care Facilities Visited at least quarterly [2]	LTC Facilities Visited at least quarterly [2]	Nursing Facilities Visited at least quarterly [2,3]	Board & Care Facilities Visited at least quarterly [2,3]
	(Beds)	Total	Total	Total	Percentage	Percentage
Total 2013	2,424	11,589	15,710	27,299	70.2%	29.4%
2012	2,518	11,173	13,470	24,643	67.6%	25.4%
2011	2,501	11,069	14,482	25,551	66.7%	27.6%
2010	2,529	12,231	20,262	32,493	73.5%	38.5%
2009	2,411	12,949	23,593	36,542	77.8%	45.0%
2008	2,220	13,357	22,957	36,314	79.7%	45.8%
CA	2,637	853	2,220	3,073	67%	29%
FL	7,087	168	371	539	25%	11%
MA	1,332	431	80	511	100%	100%
STATE AVG*	2,556	223	302	525	74%	47%
*"State Average" added to published AoA data; calculated average across all 50 states plus Puerto Rico and Washington D.C.						

[210] All tables available at http://www.aoa.gov/aoa_programs/elder_rights/Ombudsman/National_State_Data/2013/Index.aspx

Table A-2 Cases Closed Numbers and Percent of Complainants by Setting for FY 2013 as of 08/2014

	All Settings: Number of Cases Closed by Type of Complainant									
State	Total	Resident	Relative/ Friend	Non-Relative Guardian, Legal Representative	Ombudsman, Ombudsman Volunteer	Facility Administration, Staff	Other Medical: Physician/ Staff	Other Agency Representative	Unknown/ Anonymous	Other[1]
Total 2013	**123,666**	**45,987**	**24,352**	**1,131**	**16,241**	**22,809**	**2,385**	**4,579**	**4,763**	**1,419**
2012	**126,398**	**46,735**	**24,537**	**1,316**	**16,446**	**23,525**	**2,559**	**4,550**	**4,750**	**1,980**
2011	**132,387**	**50,505**	**25,807**	**1,244**	**16,937**	**23,006**	**3,318**	**4,466**	**4,793**	**2,311**
2010	**139,296**	**50,815**	**27,651**	**1,284**	**20,506**	**24,457**	**3,340**	**5,003**	**4,879**	**1,361**
2009	**157,617**	**57,768**	**31,485**	**1,423**	**27,677**	**24,129**	**3,623**	**4,970**	**4,979**	**1,563**
2008	**182,506**	**67,522**	**33,939**	**1,304**	**35,526**	**26,691**	**4,211**	**5,449**	**6,307**	**1,557**
CA	30,964	5,690	3,674	112	5,242	11,928	1,337	1,519	1,008	454
FL	2,926	975	1,140	47	82	65	23	68	346	180
MA	4,376	2,946	571	10	574	103	5	71	82	14
STATE AVG*	2,378	884	468	22	312	439	46	88	92	27

[1] For both nursing and board and care facilities, "Other" complainants included bankers, clergy, law enforcement, public officials, etc.

*"State Average" *"State Average" added to published AoA data; calculated average across all 50 states plus Puerto Rico and Washington D.C.

Table A-8 Staff and Volunteers for FY 2013 as of 08/2014

Table A-8: Staff and Volunteers for FY 2013

	State Level						Regional/Local Level						Total for State					
State	Paid Program Staff	Full Time Staff[1]	Paid Clerical Staff	Certified Volunteer Ombudsmen		Other Volunteers	Paid Program Staff	Full Time Staff[1]	Paid Clerical Staff	Certified Volunteer Ombudsmen		Other Volunteers	Paid Program Staff	Full Time Staff[1]	Paid Clerical Staff	Certified Volunteer Ombudsmen		Other Volunteers
	(FTE's)	(Number)	(FTE's)	(Number)	(Hours[2])		(FTE's)	(Number)	(FTE's)	(Number)	(Hours[2])		(FTE's)	(Number)	(FTE's)	(Number)	(Hours[2])	
Total 2013	229.33	201	44.05	461	60,686	52	1,004.13	717	56.63	7,829	843,910	3,940	1,233.46	918	100.68	8,290	904,596	3,992
2012	209.18	186	36.60	482	60,563	31	971.11	710	64.71	8,230	706,170	3,226	1,180.29	896	101.31	8,712	766,733	3,257
2011	207.94	186	36.05	508	64,605	39	978.68	727	68.32	8,557	670,450	3,281	1,186.62	913	104.37	9,065	735,055	3,320
2010	210.11	194	41.31	308	28,564	33	955.89	741	97.46	8,505	666,831	2,517	1,166.00	935	138.77	8,813	695,395	2,550
2009	208.05	187	39.48	291	21,944	29	995.12	724	103.57	8,370	747,195	2,293	1,203.17	911	143.05	8,661	769,139	2,322
2008	208.81	187	46.84	288	19,310	34	1,084.22	882	101.87	8,483	800,949	3,231	1,293.03	1,069	148.71	8,771	820,259	3,265
CA	7.00	7	2.00				105.24	48	10.73	856	127,556	3	112.24	55	12.73	856	127,556	3
FL	7.00	7	1.00				17.00	17	15.00	366	87,840		24.00	24	16.00	366	87,840	
MA	4.00	4					34.28	24		308	18,184	37	38.28	28		308	18,184	37
STATE AVG*	4.41	3.87	0.85	8.87	1,167	1.00	19.31	13.79	1.09	151	16,229	75.77	23.72	17.65	1.94	159.42	17,396	76.77

[1] Individuals working full-time on Ombudsman Program

[2] New data as of FFY 2007

*"State Average" added to published AoA data; calculated average across all 50 states plus Puerto Rico and Washington D.C.

Table A-10 Other Ombudsman Activities for FY2013 as of 08/2014

State	Resident Visitation (Facilities visited on a regular basis not in response to a complaint. State counts and local counts are internally unduplicated, but the same site may be counted as both a state and a local visit.)									Participation in Facility Surveys		Work with Resident Councils		Work with Family Councils	
	Total LTC Facilities Visited at least quarterly			No. of Nursing Facilities Visited at least quarterly			No. of Board & Care & Similar Facilities Visited at least quarterly[1]			No. of Surveys		No. of council meetings attended		No. of council meetings attended	
	State	Local	Total	State	Local	Total	State	Local	Total	State	Local	State	Local	State	Local
Total 2013	1,935	25,850	27,785	862	10,971	11,833	1,073	14,879	15,952	726	15,511	1,022	20,790	136	2,235
2012	1,896	23,366	25,262	863	10,647	11,510	1,033	12,719	13,752	590	20,248	1,060	20,305	266	2,592
2011	1,945	24,206	26,151	904	10,527	11,431	1,041	13,679	14,720	1,611	21,030	1,067	19,891	306	3,015
2010	1,854	31,537	33,391	968	11,871	12,839	886	19,666	20,552	1,864	21,721	684	20,210	258	3,154
2009	1,767	35,435	37,202	766	12,640	13,406	1,001	22,795	23,796	646	17,210	472	20,801	221	3,721
2008	2,459	35,247	37,706	929	13,050	13,979	1,530	22,197	23,727	414	17,210	458	20,622	254	4,666
CA		3,073	3,073		853	853		2,220	2,220		447		2,535		244
FL		539	539		168	168		371	371		452		201		27
MA		511	511		431	431		80	80		969		218		30
STATE AVG*	37	497	534	17	211	228	21	286	307	14	298	20	400	3	43

*"State Average" added to published AoA data; calculated average across all 50 states plus Puerto Rico and Washington D.C.

[1]Some states, such as OR, have many facilities with few beds, making it difficult to provide a continued presence in those facilities

State	Community Education		Training for Ombudsman Staff & Volunteers						Training for Facility Staff		Consul-tations to Facilities		Information and Consul-tation to Individuals		Work with Media				Monitoring/ Work on Laws, Regulations, Government Policies & Actions	
	No. of Sessions		No. of Sessions		No. of Hours		Total No. of trainees		No. of Sessions		No. of consultations		No. of Consultations		No. of interviews/ discussions		No. of press releases		% of total paid staff time	
	State	Local	State	Local	State	Local	State	Local	State	Local	State	Local	State	Local	State	Local	State	Local	State	Local
Total 2013	1,589	9,917	1,386	9,395	7,281	32,700	12,716	67,076	486	4,931	19,539	110,179	54,616	280,472	293	686	175	822	n/a	n/a
2012	1,346	9,418	1,574	10,419	7,728	37,470	15,215	65,071	654	4,395	20,626	90,727	62,122	247,301	279	702	198	798	n/a	n/a
2011	1,066	11,381	1,812	10,803	7,706	35,600	15,204	68,358	623	4,521	19,860	95,971	51,011	238,747	202	867	293	1,555	n/a	n/a
2010	1,144	11,853	2,103	12,148	7,350	39,317	15,431	74,044	517	5,145	16,532	86,663	45,859	232,245	273	764	293	1,267	n/a	n/a
2009	1,221	11,948	1,646	12,420	7,157	38,875	13,154	55,403	385	5,678	17,736	122,527	74,481	268,562	357	1,029	228	1,907	n/a	n/a
2008	1,133	11,362	1,685	11,070	7,629	41,778	12,246	47,587	533	6,725	13,979	114,488	59,231	267,797	493	986	1,180	1,910	n/a	n/a
CA	8	681	31	1,053	202	4,957	469	12,303	5	475	179	11,059	9,366	35,063	4	48		9	13%	15%
FL		292	1	459	24	1,330	22	2,561		132		3,389		14,500	2	34	5	17	39%	16%
MA		167	30	437	365	773	366	2,480	2	63	4	1,357	128	2,944	2	10		23	25%	15%
STATE AVG*	31	191	27	181	140	629	245	1,290	9	95	376	2,119	1,050	5,394	6	13	3	16	22%	7%

*"State Average" added to published AoA data; calculated average across all 50 states plus Puerto Rico and Washington D.C.

2.3.3 Profile: The Navy Family Ombudsman Program

The Navy Family Ombudsman Program: Abstract.

The Navy Family Ombudsman Program was developed as a result of a military directive in 1970, and since then has evolved into a robust and structured system. Various statutes bear on the operation and organization of the program, but it has primarily been defined by a series of military instructions that have been issued over the years. The primary purpose of the ombudsman program is to act as a source of information, both to Navy families on resources and services available, and to commanders regarding issues facing Navy families. In this sense, the role of the Navy family ombudsman differs from that of the traditional ombudsman and even the advocate ombudsman. The role of the Navy family ombudsman challenges the traditional principles of independence and impartiality, particularly given the program's mandate to support the existing chain of command. The principle of confidentiality is also a complex one, given the ombudsman's dual requirements to keep sensitive information confidential and also to report certain issues to commanding officers. This report examines the program's founding and evolution, its basic operations and structure, and various key principles traditionally incorporated into ombuds work. It concludes by suggesting remaining questions for future research.

Origins.

Founding and Legal Framework.

The Navy Family Ombuds program originated and evolved from a mix of military directives and statutory guidance and authorizations. The existence of an ombudsman program for Navy families was first mentioned on Sept. 14, 1970, in a policy directive known as "Z-gram" issued

by Admiral E.R. Zumwalt, then Chief of Naval Operations.[211] The Z-gram mandated that shore based commanders establish procedures to allow the wives of Navy service members to "express their views" by sharing complaints, viewpoints, and suggestions with their commanding officers through an official representative.[212] Although the Z-gram alludes to other similar efforts already taking place among wives of service members, Zumwalt's directive formalized these activities as the "Navy Wives Ombudsman concept."[213]

The framework for the program was further formalized in Congress in 1983. Public Law 98-94, passed on September 24 of that year, amended the United States Code to authorize the Secretaries of military departments to accept voluntary services for service members and their families.[214] The statute specifically mentions family support programs as well as morale, welfare, and recreational programs, and authorizes the recruitment and training of volunteers for these initiatives.[215] It restricts the Secretary, however, from placing volunteers in policy-making positions.[216]

The federal statute generally described some of the basic organization and structure to be put in place for volunteer programs.[217] An Instruction issued by the Department of Defense

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[211] E.R. Zumwalt, *Z-Gram #24: (Wives Ombudsman); 14 Sept. 1970*, Sept. 14, 1970, available at http://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/z/z-grams-list-policy-directives-issued-admiral-zumwalt/z-gram-24.html [hereinafter *Z-Gram*]. September 14 has since been dedicated in the military as Ombudsman Appreciation Day. *See* Office of the Chief of Naval Operations, *Instruction 1750.1G : Navy Family Ombudsman Program*, 3, Sept. 2, 2014, available at http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1750.1G%20W%20CH-2.PDF [hereinafter OPNAVINST 1750.1G].

[212] *See* Zumwalt, *supra* note 170. "We have each been getting good advice from our own wives. Let's listen to an official representative." *Id*.

[213] *Id*.

[214] Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, 97 Stat. 614, § 1266; 10 U.S. Code § 1588.

[215] 10 U.S. Code §§ 1588(a)(3), (c).

[216] *See id*. at § (b)(3)(a)

[217] *See, e.g., id*. at § (b)(2)(a) (instructing the Secretary to supervise the volunteers as they would compensate employees providing similar services).

(DoD) in 2002 spoke more specifically to the programs' implementation and operation.[218] The Instruction provided that the Secretaries of military departments would create and establish regulations and procedures to implement volunteer programs, and that the "components" of DoD programs would actively supervise the volunteers, including providing training programs.[219] Indeed, a 2005 Instruction from the Secretary of the Navy explicitly asks staff of the Navy's family support programs to provide training and support to members of the Navy's ombudsman program.[220]

The Navy Family Ombudsman Program is described and shaped programmatically by an Instruction released by the Chief of Navy Operations, OPNAVINST 1750.1G CH-2.[221] This Instruction states the overall purpose of the program — "to improve military readiness through family readiness" — and articulates the requirement that each command was required to appoint an ombudsman.[222] This document, along with the training materials discussed below, continues to provide the most specific guidance on the mandate of the program and its primary purposes.

This report focuses solely on the Navy ombudsman program. However, other branches of the military have similar programs. The Marine Corps offers Family Readiness officers, who support the needs of military families; the Coast Guard Ombudsman serves as a liaison between command and families; the Air Force houses a Key Spouse Program to build community; and the Army's Family Readiness Support Assistants provide administrative support to Family

[218] Department of Defense, *Instruction: Voluntary Services in the Department of Defense*, March 11, 2002, available at http://www.dtic.mil/whs/directives/corres/pdf/110021p.pdf.
[219] *Id*. at 3.
[220] Secretary of the Navy, *Department of the Navy Family Support Programs*, 8, Sept. 27, 2005, available at http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1754.1B%20(SECNAV).pdf.
[221] OPNAVINST 1750.1G, *supra* note 170. Version 1G-CH2 represents the latest iteration of an Instruction that was first modified in 1986 and has been altered six additional times since then. *See Standard: NAVY - OPNAV 1750.1G CH-2*, http://standards.globalspec.com/std/9868349/navy-opnav-1750-1g-ch-2 (last visited Dec. 8, 2015).
[222] OPNAVINST 1750.1G, *supra* note 170, at 2.

Readiness Groups, which in turn provide families with information and help them resolve problems.[223]

Legal framework for mandatory reporting.

OPNAVINST 1750.1G specifies that ombudsmen are required to report to the appropriate official, organization, or commanding officer "when reportable issues or life endangering situations come to their attention."[224] These reportable issues include child abuse and neglect, domestic abuse, suspected or potential life-threatening violence, sexual assaults, and other issues that the commanding officer might identify as reportable.[225] The role of ombudsman as mandatory reporter was reinforced by an Instruction released by the Navy in March 2014, which clarified that the ombudsmen, as official representatives of Navy commands, may not accept restricted reports of sexual assaults.[226] In other words, the ombudsman is bound to report any sexual assault to commanding officers.

The ombudsmen's obligations to report abuse also stem from a variety of sources in addition to OPNAVINST 1750.1G. Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) in 1974, which provided for funding, programming, and research to identify and prevent child sexual abuse.[227] The Department of Defense followed suit in May 1981 by issuing a policy directive mandating that the military branches establish a "Family Advocacy Program," which would be a broad-based effort to serve members of the military involved in all domestic

[223] *See* Naval Services FamilyLine, *Guidelines for the Spouses of Command Master Chiefs and Chiefs of the Boat,* 13, available at file:///C:/Users/sdelnido/Downloads/FamilyLineCMCCOBSpouse.pdf (last visited Dec. 10, 2015).
[224] OPNAVINST 1750.1G, *supra* note 170, at 12.
[225] *Id*.
[226] *Ombudsman Reporting Requirements for Sexual Assaults*, March 2014, http://www.public.navy.mil/bupers-npc/reference/messages/Documents/NAVADMINS/NAV2014/NAV14065.txt [hereinafter NAVADMIN 065/14] ("When a sexual assault is reported to an Ombudsman, the Ombudsman will report the incident to the Commanding Officer and the command's Sexual Assault Response Coordinator"). Those who wish to make a restricted report may go to a clinician, victim advocate, or health care provider. Military OneSource, *Domestic Abuse Military Reporting Options*, available at http://www.militaryonesource.mil/abuse?content_id=266707 (last visited Dec. 10, 2015).
[227] Child Abuse Prevention and Treatment Act, Pub. L. 93–247, 88 Stat. 4 (1974).

abuse situations or allegations.[228] DoD Instruction 6400.2, issued in 1987, laid out the specific procedures governing the reporting of child and spousal abuse.[229] In addition, ombudsmen's record-keeping and reporting activities are governed by the Privacy Act,[230] which will be discussed below in the context of confidentiality.

Operation of the program.

Staffing levels.

As of June 2010, there were more than 5,000 ombudsmen volunteering 10 or more hours per week to support the commanding officers in the Navy.[231] The service is entirely constituted of volunteers.[232] The 2005 version of OPNAVINST 1750.1 set forth recommended staffing levels for "maximum effectiveness of a command Family Ombudsman Program" as follows:[233]

# of Command personnel	# of Assigned Ombudsmen
1-250	1
251-1,000	2-3
1,000+	4 or more

[228] See Department of Defense, *Family Advocacy Program*, *Instruction 6400.01*, Feb. 13, 2015, http://www.dtic.mil/whs/directives/corres/pdf/640001p.pdf (re-issuing original Directive 6400.1); Joann Grayson, *The Military's Response to Family Violence,* 86 Va. Child Protection Newsletter (Suppl. Articles), 1 (Summer 2009), http://psychweb.cisat.jmu.edu/graysojh/pdfs/Volume086-militaryresponse.pdf. *See also* Commander, Navy Installations Command, *Family Advocacy Program*, http://www.cnic.navy.mil/ffr/family_readiness/fleet_and_family_support_program/family_advocacy.html (last visited Dec. 10, 2015).

[229] *See* Department of Defense, *Child and Spouse Abuse Report*, *Instruction 6400.2*, July 10, 1987, http://biotech.law.lsu.edu/blaw/dodd/corres/pdf/i64002_071087/i64002p.pdf.

[230] Privacy Act of 1974, 5 U.S.C. § 552a (West 2014).

[231] *See* Commander, Navy Installations Command, *Navy Family Ombudsman Program Manual*, 2 (2010), available at http://www.cnic.navy.mil/content/dam/cnic/hq/pdfs/n91_fleet_and_family_support_program/ombudsman_program/OmbudsmanTrainingMaterialsProgramManual.pdf.

[232] In fact, the Navy saved over $40 million in 2009 by retaining the ombudsmen as volunteers as opposed to paid staff members. *Id*.

[233] Office of the Chief of Naval Operations, *Navy Family Ombudsman Program: Instruction 1750.1E, Encl. (2)*, 3 (June 27, 2005), available at http://www.marforres.marines.mil/Portals/116/Docs/Chaplain/instruction/NAVY%20FAMILY%20OMBUDSMAN%20PROGRAM%201750_1e.pdf.

The ombudsmen serving the Navy may not be evenly distributed across the Navy's individual units, however. A 2006 study by the Navy Inspector General's office found that "the vast majority of deployable units have an Ombudsman Program in place, but that a significantly lower percentage of non-deploying (e.g., shore based, staff, Reserve, Recruit) units had a program."[234] The review also noted that resources for program management and unit-level execution are strained.[235]

Ombudsmen are expected to register in a new, confidential database for the military community. The database, www.ombudsmanregistry.org, was created in response to Hurricane Katrina by the Task Force Navy Family, an entity whose mission is to coordinate and augment operations to provide relief and stability to military families impacted by crises.[236] The purpose of the database is to improve efficiency in communications between commanding officers and ombudsmen, and to house "worksheets" submitted periodically by ombudsmen themselves regarding their activities.[237]

Regardless of the number of ombudsmen available, it is unclear how many members of the Navy community take advantage of the ombudsmen's services. The 2010 Training Manual for ombudsmen stated that less than 20 percent of service and family members said they had sought the assistance of their ombudsman.[238] The training manual suggests ways to raise awareness of the program, including general communication about the availability of the

[234] Thomas F. Gimble, *Semiannual Report to the Congress*, 28 (2006), available at http://www.dodig.mil/sar/sarmarch06_body.pdf. Although the Inspector General's report itself is not publicly available, Gimble reported to Congress on the study's general findings.
[235] *See id*.
[236] *See Ombudsman Registry*, www.ombudsmanregistry.org (last visited Nov. 15, 2015); Kristin Fitzsimmons, *Navy Establishes Task Force to Help Sailors, Families Affected by Hurricane Katrina*, Navy News, Sept. 22, 2005, http://www.military.com/NewsContent/0,13319,77530,00.html.
[237] *See Ombudsman Registry*, *supra* note 195.
[238] *See* Navy Family Ombudsman Program Manual *supra* note 190, at 28.

program, and seems to provide ombudsmen with a great deal of autonomy in shaping their publicity efforts.[239]

Program Structure.

The two main central managers of the Navy family ombudsman program are the ombudsman-at-large and the ombudsman program manager. The ombudsman-at-large, appointed by and reporting to the Chief of Naval Operations (CNO), is typically the spouse of either the Master Chief Petty Officer of the Navy or the senior flag officer.[240] His or her responsibilities center on being a conduit of information to the CNO, in that he or she also seems expected to adopt a role as a form of ombudsman as well (for instance, by serving as a resource to ombudsmen and Navy families, and advocating for the ombudsman program itself).[241] The ombudsman program manager role, also known as the program coordinator, is a representative of the Commander, Navy Installations Command (CNIC), and works in conjunction with the Fleet and Family Support Program,[242] a component of CNIC that shares the mission of supporting military and family readiness.[243] The program manager organizes trainings, maintains a roster of ombudsman, and helps members of the community connect with their local ombudsman.[244]

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[239] *See id*. at 28-31 (suggesting various media by which to distribute material about the program, as well as criteria for how to choose a marketing strategy).
[240] *See* OPNAVINST 1750.1G, *supra* note 170, at Enclosure (6). A new version of the Instruction, OPNAVINST 1750.1H, is currently under review, and would remove the stipulation for the spouse of the Master Chief Petty Officer, allowing for more flexibility in selecting ombudsmen-at-large. Commander, Navy Installations Command, *Ombudsman Program Advisory Group Meeting Minutes,* Aug. 27, 2015, available at http://www.cnic.navy.mil/content/dam/cnic/hq/pdfs/n91_fleet_and_family_support_program/ombudsman_program/OmbudsmanOPAGMinutes27Aug15.pdf.
[241] *See* OPNAVINST 1750.1G, *supra* note 170, at Enclosure (6).
[242] *See* Navy Family Ombudsman Program Manual, *supra* note 190, at 4.
[243] Commander, Navy Installations Command, *Fleet & Family Support Program*, http://www.cnic.navy.mil/ffr/family_readiness/fleet_and_family_support_program.html (last visited Dec. 10, 2015).
[244] Commander, Navy Installations Command, *Ombudsman Coordinator Desk Guide, 10, http://www.cnic.navy.mil/content/dam/cnic/hq/pdfs/n91_fleet_and_family_support_program/ombudsman_program/*

Various layers of additional institutional structures support the on-the-ground work of Navy ombudsmen and connect them with other service providers in the Navy. One of the most important sources of connection for local ombudsmen is the local ombudsman assemblies. The assemblies, which include all appointed ombudsmen in a given command, act as a mechanism for information-sharing amongst local ombudsmen and help to provide additional support and resources, such as advanced trainings, peer mentoring systems, or resource handbooks.[245] Although these assemblies are not appointed for the purpose of policymaking, they are entitled to develop and provide recommendations to the command about issues impacting the well-being of the community.[246] Interestingly, although the assemblies are expected to abide by the confidentiality norms applying to ombudsmen, other members of the community—including senior leadership, spouses, and chaplains—are encouraged to attend the meetings, as are representatives from other military or civilian service groups.[247] Given this, it seems likely that the primary purpose of the assemblies is to facilitate information-sharing about challenges facing the community, rather than to discuss individual cases.

Local assemblies are supported and advised by a Regional Ombudsman Advisory Board (ROAB).[248] The ROAB is convened and appointed by the region's commander or designee, and is meant to review the region's ombudsman program.[249] In the Board's semi-annual meetings, this review can take the form of feedback on policy or implementation and general support of

OmbudsmanCoordinatorDeskGuide.pdf (last visited Dec. 10, 2015) [hereinafter *Ombudsman Coordinator Desk Guide*].
[245] *See* OPNAVINST 1750.1G, *supra* note 170, at Enclosure (6).
[246] *See id*.
[247] *See id*.
[248] *See* Navy Family Ombudsman Program Manual *supra* note 190, at 5.
[249] *See* OPNAVINST 1750.1G, *supra* note 170, at Enclosure (5).

ombudsman programs, but is not intended to interfere with the day-to-day operation of the programs.[250]

Finally, the Ombudsman Program Advisory Group (OPAG) attempts to bring together the input, feedback, and information gathered by ombudsmen. The OPAG is a working group, convened at the discretion of CNIC, that meets several times each year to discuss programmatic issues or changes, and synthesizes ROAB feedback in order to develop recommendations on policy, special projects, or curriculum development.[251] Ombudsmen-at-large and ombudsman program coordinators are encouraged to serve as members of OPAG, as are representatives of other activities who may be helpful in discussing issues facing the community.[252]

Program Funding.

Commanding officers appointing local ombudsmen are responsible for their funding, meaning that they must provide them with sufficient resources to carry out their day-to-day operations.[253] Commanding officers also determine budget allocations, and are entitled to use either appropriated or non-appropriate funds to support the ombudsman program.[254] Ombudsmen themselves are entitled to receive reimbursement for some of the expenses they incur in the course of their duties, including childcare (if Navy-operated childcare is unavailable), some travel expenses, their computer and cell phone, administrative supplies, and the cost of assembling a newsletter.[255] Ombudsmen may travel frequently in order to attend

[250] *See id.*
[251] Commander, Navy Installations Command, *Ombudsman Program (overview)*, http://www.cnic.navy.mil/ffr/family_readiness/fleet_and_family_support_program/ombudsman_program/ombudsman_program_overview.html (last visited Dec. 10, 2015).
[252] *See* Navy Family Ombudsman Program manual, *supra* note 190, at 5.
[253] *See* Commander, Navy Installations Command, *Financial Fact Sheet*, Oct. 15, 2012, http://www.cnic.navy.mil/content/dam/cnic/hq/pdfs/n91_fleet_and_family_support_program/ombudsman_program/CommandLeadershipToolkit/FinancialFactSheetOCT2012.pdf.
[254] *See* OPNAVINST 1750.1G, *supra* note 170, at Enclosure (7).
[255] *See id*. at 1–3.

meetings or conferences, or to conduct focus groups with Navy families about issues impacting their lives.[256]

While it is difficult to discern the exact funding needs and requirements of ombudsmen, the Inspector General's 2006 report suggested that ombudsman programs face challenges in acquiring the necessary resources for managing and executing their activities.[257]

Core Principles of the Program.

Introduction: A Unique Function.

The Navy family ombudsman serves a relatively unique function that represents a departure from the traditional ombudsman role. The Navy family ombudsman is charged with a number of mandates all intended to provide commanding officers with information about the morale and welfare of service members' families.[258] They are tasked with achieving this mission in multiple ways, including acting as a resource to families on military life, as a liaison between families and other support services in the Navy, as a source of information in a crisis or emergency situation, and as a coordinator for families when they are apart.[259] While their role may involve some resolution of complaints, taken as a whole, the information provided about the ombudsman program suggests that the purpose of the program is the organization and distribution of information in two directions: up the chain of command, and down to individuals and military families.[260] In contrast to other ombudsman program contexts, the Navy family ombudsman role does not seem to center on the impartial handling of particular disputes or grievances. This

[256] *See* Commander, Navy Installations Command, *Just for Ombudsmen*, http://www.cnic.navy.mil/ffr/family_readiness/fleet_and_family_support_program/ombudsman_program/just_for_ombudsman.html (last visited Dec. 10, 2015).
[257] *See* Gimble, *supra* note 193, at 28.
[258] *See* OPNAVINST 1750.1G, *supra* note 170, at 2.
[259] *See* Navy Family Ombudsman Program Manual, *supra* note 190, at 3. However, the training manual is careful to note certain functions that ombudsmen are *not* meant to engage in, including lending money, providing child care, and "doing for others what they must learn to do for themselves." *Id*. at 3–4.
[260] *See also id*. at 101 ("Information and referral (I&A) service is the backbone of the Ombudsman Program").

distinct set of purposes may in part explain why the program incorporates some, but not all, of the traditional core principles of ombuds work, and includes other additional principles that typically would not be found in an ombudsman program.

The Navy Family Ombudsman Code of Ethics is built around four pillars that contain elements of a traditional ombudsman's obligations, but do not map perfectly onto these core principles. The Code of Ethics asks ombudsmen to maintain confidentiality, support the command's mission, work within the chain of command as directed, and maintain the highest standard of professionalism.[261] While confidentiality and some interpretation of professionalism are not unusual in an ombudsman's set of guiding standards, the Navy Family Ombudsman program has adopted unique principles, likely due to the sensitive nature of the Navy's mission and the importance placed on a strictly structured chain of command. This aspect of the program bears on its independence and impartiality.

Confidentiality & Privacy.

Confidential information is defined in the Navy family ombudsman program training manual as "sensitive information about a service member or family member."[262] It is likely that this definition is intentionally broad; the manual specifically links confidentiality to the credibility of the ombudsman program.[263] The manual lists a variety of issues and behaviors as confidential, from marital problems to violations of law to child abuse.

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[261] Commander, Navy Installations Command, *Command Leadership Need-to-Knows*, http://www.cnic.navy.mil/ffr/family_readiness/fleet_and_family_support_program/ombudsman_program/command_leadership_toolkit/command_leadership_need_to_knows.html (last visited Nov. 15, 2015) [hereinafter *Command Leadership Need-to-Knows*]. The pillar of "professionalism" is articulated in the Training Manual as basic requirements stemming from the ombudsman's role as a representative of the command and the commanding officer (itself an indicator of the ombudsman's real or perceived independence), such as professional dress and calling members of the command by their official titles. *See* Navy Family Ombudsman Program Manual, *supra* note 190, at 52–53.

[262] *See* Navy Family Ombudsman Program Manual, *supra* note 190, at 47.

[263] *Id*. at 48.

Examples in the Training Manual make clear that a breach of confidentiality would include revealing names or identifying information to outside entities.[264] However, an inherent tension exists for ombudsmen attempting to navigate confidentiality because of the reporting requirements that govern the program. It is made clear to ombudsmen that "the safety and well-being of an individual takes precedence over one's right to confidentiality."[265] The Secretary of Defense issued guidance in 2007 articulating the DoD's "privacy program," which implements the requirements of the Privacy Act.[266] The guidance requires that DoD components create and maintain systems to safeguard personal and confidential information to avoid "substantial harm, embarrassment, inconvenience, or unfairness to any individual about whom information is kept."[267]

In addition to this and the legal requirements discussed above, information is shared with other officials on a need-to know-basis.[268] The network of those who have a need to know about a particular issue is at the discretion of the commanding officer, and may include other members of the leadership team and the chaplain, as well as particular specialists depending on the situation (such as the drug and alcohol program advisor or the sexual assault response program victim advocate).[269] In turn, ombudsmen are expected to inform those they serve of these reporting requirements.[270]

Ombudsmen are trained to maintain records under privacy regulations during Ombudsman Basic Training. In accordance with the Privacy Act and the DoD privacy program,

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[264] *Id*. at 48-49.
[265] *See* Command Leadership Need to Knows, *supra* note 220.
[266] Office of the Director, Administration and Management, *Department of Defense Privacy Program, DoD 5400.11R*, May 14, 2007, available at http://www.dtic.mil/whs/directives/corres/pdf/540011r.pdf.
[267] *Id.* at 15.
[268] *See* Command Leadership Need to Knows, *supra* note 220.
[269] *See* Navy Family Ombudsman Program Manual, *supra* note 190, at 48.
[270] *See id*. at 18.

ombudsmen must store records in secure areas, refrain from providing their own family members with access to personal information, and store information electronically on a disc that can be safeguarded.[271] As discussed above, ombudsmen periodically submit a report of their activities to the Ombudsman Registry.[272]

Impartiality and Independence.

An important principle in the Code of Ethics is that Navy Family Ombudsmen must be supportive of the Navy's mission.[273] Most likely because of this overarching principle, references to impartiality are noticeably absent from family ombudsmen's training materials and OPNAV instructions.[274] While the role of a traditional ombudsman is generally intended to further the organization's mission by offering support to employees or constituents, the Navy places additional and unique requirements on its volunteer ombudsmen. The Code of Ethics instructs ombudsmen to never reveal any negative feelings related to service members, their mission, or command to families, even if they feel a lack of support from command, or feel that command is placing undue burdens on the active duty members.[275] This requirement may be interpreted as limiting the openness and neutrality that is typically associated with ombudsmen, but is deemed to be necessary to the Navy's goals and morale. The Training Manual also instructs ombudsmen to demonstrate support for command by:

- Maintaining a positive tone on the Careline[276] or in e-mail messages.

[271] *See id*.
[272] *Id*. at 21–24.
[273] *See* Command Leadership Need to Knows, *supra* note 220.
[274] A mention of impartiality appears only once in the Ombudsman Coordinator Desk Guide, which states that if family members have a complaint about the ombudsman they spoke with, the coordinator should be "non-judgmental and impartial" in their listening and follow-up. Ombudsman Coordinator Desk Guide, *supra* note 203, at 38.
[275] *See* Navy Family Ombudsman Program Manual, *supra* note 190, at 50–51.
[276] The Careline is a hotline operated by volunteer Navy Family Ombudsmen. *See Ombudsman Communication Tools*, http://www.cnic.navy.mil/content/dam/cnic/hq/pdfs/n91_fleet_and_family_support_program/ombudsman_program/CommandLeadershipToolkit/OngoingSupportCommunicationTools.pdf (last visited Dec. 10, 2015).

- Focusing on positive events in the newsletter.[277]
- Making timely referrals. Responding to calls and messages in a timely manner and giving the caller the ombudsman's full attention.
- Explaining situations in a positive manner.
- Controlling rumors.
- Seeking the correct information.
- Keeping disagreements with command leadership private.
- Attending command functions.[278]

Unique to the Navy Family Ombudsman program is the emphasis on chain of command, which is a hierarchical structure for management and reporting.[279] In some respects, a deep familiarity with the chain of command would likely assist the ombudsman in performing his or her role, in that it would provide information about the variety of services and remedies available.[280] But the Code of Ethics also places additional requirements on ombudsmen's communications in terms of respecting the chain of command. For instance, when contacting the Commanding Officer, Navy Family Ombudsmen must also copy their Executive Officer and Command Master Chief on the communication; in addition, they must "back-brief" these two officers about any decisions made during their meetings with the Commanding Officer.[281]

This requirement reflects an important potential limitation on the ombudsmen's independence (as well as, of course, their ability to maintain confidentiality). Grievances that ombudsmen are permitted to address are limited to Navy services and facilities. Notably, they are not permitted to work with service members on problems that arise between the service member and her chain of command.[282] Additionally, the Code of Ethics makes a point of

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[277] *See also* Fleet and Family Support Centers of Hampton Roads, *The Art of Producing Ombudsman Newsletters*, available at http://www.public.navy.mil/necc/hq/Documents/Family/Art%20of%20Producing%20Ombudsman%20Newsletters%20Handout.pdf (last visited Nov. 2015) (providing tips on writing, formatting, and content of newsletters).
[278] *See* Navy Family Ombudsman Program Manual, *supra* note 190, at 51.
[279] *See id*. at 51.
[280] *See id*. ("Knowing the chain of command allows an ombudsman to use the systems in place to assist Navy families").
[281] *See id*.
[282] *See id*.

establishing that should ombudsmen have grievances of their own with command or its policies, that there is no procedure in place to resolve them. The Code states that "they should make their views known to the commanding officer, but if the grievance remains, then the ombudsman should choose to resign."[283]

No clear evidence or data is available on the perception of the Navy Family Ombudsman program by those it serves. However, given the prominence in its mission to support commanders and operate according to existing hierarchies, the program raises questions about whether it is seen as an independent and neutral entity, or an extension of command. The Inspector General's report found that the program is generally successful in terms of serving the purpose of "family and mission readiness."[284] However, given the relatively low proportion of stakeholders who take advantage of the program,[285] it is worth inquiring further into how the program is viewed. Future research could gain insight into this question through qualitative methods, such as a survey or interviews.

Secondary principles: Decision-making authority, credible review, and fairness.

The ombudsman's role of serving as a liaison between the command families and the command, as discussed above, heavily impacts his or her authority to make decisions. It is important to note that there is no hierarchy within the ombudsman program itself; ombudsmen are only supervised by their Commanding Officer.[286] Given this structure, the ombudsman needs to obtain command approval for a range of day-to-day aspects of her role; for instance, she must obtain approval on all official correspondence before printing, distributing, or mailing.[287] Even

[283] *Id*.
[284] *See* Gimble, *supra* note 193, at 28.
[285] *See* Navy Family Ombudsman Program Manual, *supra* note 190, at 28.
[286] OPNAVINST 1750.1G, *supra* note 170, at 2.
[287] *See id*. at 12.

in case of life-threatening situations, their decision-making powers are limited to reporting to the appropriate official or organization and to the commanding officer. That said, ombudsmen are expected to "resolv[e] family issues before they require extensive command attention,"[288] suggesting that the ombudsman has some degree of autonomy and power to manage issues without needing to request assistance from the Commanding Officer.

Fairness and credible review are also implicated by the structure of the program described above. The robust Training Manual speaks to the organization of the ombudsman program and the measures organizers take to ensure that ombudsmen are informed, capable, and prepared for their role. On the other hand, certain factors detract from credible review, given that particular matters are not under the jurisdiction of the family ombudsman. In addition, although the Inspector General of the Navy conducted an external report, the results of this report are not publicly available and the report to Congress only included broad findings, as opposed to detailed data, making it difficult to evaluate or even review the ombudsman's program's achievements. It is also not clear that ombudsmen conduct their activities with fairness as their guiding standard, or even that application of this standard would be necessarily appropriate, given that their primary function is information-sharing. The constant shadow of the chain of command also seems to bear on whether fairness is a principle fully incorporated into the Navy family ombudsman program. Indeed, the concept of fairness as a principle is not at all mentioned in the Training Manual.

[288] Navy Family Ombudsman Program Manual, *supra* note 190, at 2.

Questions for future research.

1. How much of the ombudsman's time is spent acting as a conduit for information from command to families, and how much of it is spent addressing families' concerns?
2. How much have ombudsman demographics changed since the program was called the "Navy Wives Ombudsmen"?
3. What family issues do ombudsmen address most often in their position?
4. Is there a place for a more traditional ombudsman role in the Navy? What would be the advantages? What would be the concerns?
5. Given the military context, what constraints would be present on a more traditional ombudsman role?
6. How do constituents view the ombudsman in terms of neutrality? What explains the relatively low reported percentage families who have used the ombudsman's services?
7. How does the Navy ombudsman's role compare to those of ombudsmen in other branches of the military? How much or little do they interact with one another?
8. How does information-sharing about issues facing families occur across branches of the military, if at all?

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2.3.4 Profile: The Coalition of Federal Ombudsman

Introduction.

The Administrative Conference (ACUS) has requested identification of promising best practices in the federal government ombudsman profession. The Coalition of Federal Ombudsman **(**COFO) is the only professional association dedicated exclusively to federal ombuds; it has provided many promising best practices within the federal ombuds community and provided considerable support to these ombuds in their work.

During the course of this study, COFO was mentioned repeatedly as an essential source of inspiration, innovation, best practices, tough-minded guidance, and reliable support, as well as a forum to which federal ombuds bring their professional concerns. Many ombuds spoke of having received skilled support—and a sustained fostering of integrity in the profession—from past and present Chairs and officers of COFO. Several ombuds called for a major enhancement of the services provided by COFO.

What had this professional association done—with respect to the interests of ombuds professionals over the past twenty years—that would provoke such positive feedback? In an effort to illuminate some specific promising practices, as well as what an enhanced professional association or "center" might look like, below is an edited compilation of email and phone interviews with the present COFO chair, Scott Deyo, specifically about the contributions of COFO. In addition, two past chairs were contacted. Deyo also provided highlights of the monthly meetings "Executive Highlights of Monthly Meetings (2005 – 2015)," which have been included at the end of the interview to provide examples of the accomplishments and value added by COFO and its members over the past decade.

2.3.4.1 The Federal Ombuds and the Role of Coalition of Federal Ombudsman.
An aggregated "Interview" with Scott Deyo, COFO Chair, conducted by Mary P. Rowe, Ph.D.

Disclaimer: The opinions expressed in this interview are solely those of the interviewee and do not represent the opinions or policies of any department or agency of the U.S. government or COFO itself.

Q: Thank you, Scott Deyo, Chair of COFO, for your help. May I begin by asking, what is the Coalition of Federal Ombudsman?

A: COFO is an informal community of federal ombuds, who essentially get together to help each other. We serve as a resource for existing federal ombuds, new ombuds, and for agencies and departments who are thinking about starting a new program. We share information about our policies, operations, challenges, hot topics, possible solutions, and training opportunities.

Q: What does it mean to be a COFO member?

A: Membership includes federal employees serving as ombudsmen for a federal agency, who practice to our values of independence, neutrality and impartiality, and confidentiality. However, the meetings are open to interested conflict management professionals from the federal government.

Q: How long has COFO been around and how has it grown?

A: The first meeting in July 1996 had 11 members. In 2016 there were 105 ombuds from 47 departments and agencies who self-identified as a COFO member.

The COFO Chairs (from seven different offices) have been:

1996 — Walter Corley, U.S. Customs Service
1998 — Arleas Upton Kea, Federal Deposit Insurance Corporation
1999 — Howard Gadlin, National Institutes of Health
2005 — Joseph Ganci, Department of Labor
2007 — Mike Turpenoff, Department of Education
2009 — Wendy Kamenshine, Homeland Security; Consumer Financial Protection Bureau
2014 — Scott Deyo, National Geospatial-Intelligence Agency

Q: What would you say are COFO's most notable accomplishments?

A: I think one of COFO's most significant, ongoing accomplishments is its role in helping ombudsman programs get started. This work has spun into a number of initiatives and products. We first published "*A Model for Developing an Ombudsman Program*" developed by Mike Turpenoff in 2007. We continue to try to improve and develop helpful resources.

On the front end of service to the Federal government—call it Phase One—COFO provides point

papers for senior leaders anywhere in government.[289] These papers explain the role, standards, and potential benefits of an ombudsman. For example, in late 2015 COFO helped craft a thorough point paper to senior leadership at the U.S. Patent and Trademark Office (USPTO). This initiative proved to be persuasive, as USPTO opened the doors to a pilot organizational ombudsman in early 2016.

Also in 2016, we learned that an Intelligence Community (IC) element was exploring the possibility of starting an ombudsman office. The COFO Chair successfully recommended that this agency consider using the IC Joint Duty Assignment program, whereby they could have an experienced ombuds in the IC go on a detail assignment for a year or two to build the program.[290]

What would be considered Phase Two support includes program development checklists, sample policies, position descriptions, and other advisory support. For example, IC Directive 203 required every IC element with an analytic mission to have an ombudsman that addresses analytic issues raised by analysts, to help ensure intelligence products are not manipulated, changed, or suppressed contrary to analytic integrity standards. The Office of the Director of National Intelligence welcomed input from the COFO Chair, who reviewed the draft advisory document and provided specific recommendations for a guide for establishing analytic ombuds aligned with generally accepted ombudsman practices.[291]

In 2016, another agency decided to implement a new ombudsman program, and the contractor assigned to write the policy asked COFO to review their draft charter. COFO provided thorough input, and all recommended changes were accepted.

COFO supports existing ombudsman programs through our collaborative network of ombuds throughout government. We also have monthly meetings and an annual conference where we engage to discuss successes, challenges, and share ideas to address problems.

Q: What would COFO recommend for a new ombuds about what should be in an Ombuds Office Charter?

A. While the ombudsman must stay committed to the Standards of Practice, there is incredible value in having an inclusive, transparent policy development process. In my hat as COFO Chair, gleaning from my experience and dozens of other ombuds, I would highly recommend having thorough discussions with agency counsel, IG, EEO, HR and other relevant stakeholders, which might be pretty much everyone in the organization. Although time-consuming and sometimes painstaking, this openness and transparency is well worth the investment. You're able to connect with specific offices, brainstorm how the ombudsman could help them in new and creative ways, provide examples, and work through their questions and concerns. Having such robust discussions up front allows the ombudsman, and the agency, to be better prepared. To reiterate though, the ombudsman must be supported when she or he strongly advocates for the program and policy document to align with core ombudsman ethics and

[289] For more information, please visit the COFO website to contact the COFO officers directly.
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[291] For more information, please visit the COFO website to contact the COFO officers directly.

professional standards. To that end, I would highly encourage agencies thinking about new programs to seek input from ombudsman communities of practice outside their agency to ensure they obtain independent advice on program structure.

Q: What would you say is now COFO's most significant challenge?

A: I think Howard Gadlin and Samantha Levine-Finley (2008) said it best:

> The seemingly easy acceptance of divergent ombudsman practices by ombudsman in the U.S. federal sector may be among the obstacles preventing the elevation of the impact and status of the field in this country. [We must] rigorously pursue unambiguous and consistent definitions of [the ombuds] role and standards of practice. These unequivocal meanings will provide clear boundaries between the work of ombudsmen and the other officials and programs responsible for the effective functioning of government agencies.

There are a number of federal roles with the title "ombudsman," but with functions and structures that are inconsistent with generally accepted professional ombudsman standards. Many ombuds were concerned about how the Whistleblower Protection Enhancement Act (WPEA) Ombudsman role was written in the law, which was more of a training and education role and not reflective of prominent ombudsman policy.

COFO reached out to the Whistleblower Protection (WB) Ombuds community for cross-sharing, and there was some acknowledgment of the stark differences in their role. To paraphrase, one WB ombuds stated that the 2006 ABA *Guide for Federal Employee Ombuds* document "has little or no relevance to what most of us do as WB Ombuds." Another upheld that "ombudsman" as defined in the WPEA "was a misnomer because the law narrowly defines what a WB Ombudsman's duties/powers are. Agency ombuds have much broader charters and responsibilities."

Since the WB Ombuds are solely housed within Offices of Inspectors General, we used an analogy of how the Council for Inspectors General for Integrity and Efficiency committees (audit, investigations, and inspections and evaluation) developed and maintained professional quality standards. Similarly, COFO members work hard to accomplish standards and frameworks for professionalism, quality, integrity, and effectiveness.

Q: What has COFO done to address the challenge of defining Standards??

A: Initially, COFO leaned on the values from our charter and the language in our Unified Model document to assert federal standards. Recently, members of our executive committee including internally- and externally-facing ombuds have been working together to develop a draft set of Unified Federal Ombudsman Standards. Our hope is that this will allow us to communicate about standards in succinct, unambiguous and consistent terms.

Q: What other ways has COFO provided advice and counsel?

A: In 2016 the COFO Executive Committee submitted comments in the Federal Register regarding another agency's proposed records schedule. Many of our comments were accepted for the records schedule that was ultimately approved by the U.S. Archivist.

When the COFO Executive Committee receives questions and concerns from its members about difficult challenges, we will share how other members addressed it (without attribution) or personally share a letter of concern, as needed. In one situation, COFO provided an *advisory* opinion on a notional proposal to add "investigations" to an ombuds office suite of services. In another situation, a federal ombudsman's sanitized response to agency counsel's challenge to their confidentiality was shared with COFO members.

We also recently developed a framework for federal ombudsman peer reviews.

Q: Tell me more about the peer review. What is it? How does it work?

A: Peer review is based on the concept that an evaluation by an impartial, independent professional team (with experience and subject matter expertise) can help identify exemplary practice, weaknesses, errors, and potential improvements to the group responsible for creating the work or performance.

A COFO Peer Review team can, upon request, go into a federal ombudsman program to review whether it is meeting its own goals. It is an informal evaluation method to improve quality and provide reasonable assurance of conformity with professional standards. Improvements made through a peer review are intended to elevate the quality of the profession, its credibility, and ultimately contribute to the public's confidence in the profession.

Q: Have you done a peer review, and if so, what results are you able to share?

A: We actually just finished our first in July 2016. In good ombudsman form, we cannot share the identity of the agency that requested the peer review, but I can provide a broad overview.

The COFO peer review team found that the ombudsman team demonstrated the highest levels of integrity and a working knowledge of the standards of practice for the ombudsman profession. However, there were a number of structural concerns related to the standards of *independence* and *neutrality*. We identified one potential concern related to *confidentiality* and full alignment with the standard of *informality*. The peer review team provided recommendations to reinforce independence, neutrality, and confidentiality, and other general observations and recommendations to increase general awareness and visibility of the program, consistency, increased use, and agency responsiveness to ombudsman concerns.

Q: It seems as if COFO has been productive. How do and your colleagues find the time?

A: This is a serious issue for us now. Serving on the COFO Executive Committee is a distinct honor—and an additional duty. On the other hand, speaking just as one example, in my current job we've seen an exponential increase in ombuds activity…from an average of 80 cases a year to 800 in 2015. I think many federal ombuds are similarly overloaded, so unfortunately it is difficult for all of us to dedicate the time that COFO deserves. COFO is an enormously helpful resource, but its usefulness is limited by the restricted availability of its volunteer leaders. We could be doing much more training, outreach, and in-depth consultation.

Q: Our Research Team heard numerous requests for an expansion of the COFO role. What else could a professional association or "center" do if it was a designated, staffed, and funded federal entity, or if in some other way such an entity could receive federal funding?

A: COFO's role could be much bigger and have a greater impact on improving the federal government. This is not an exhaustive list, but members have offered that a professional "center" could:

- Serve as a government-wide resource to address certain issues of common concern that transcend organizational boundaries, for example identifying exemplary behavior and unacceptable behavior;

- Continually identify, review, and discuss opportunities for new ombudsman programs with agency leaders;

- Develop, maintain, and implement standards for upholding the quality and effectiveness of federal ombudsmen. This could include a required central review on all proposals for new ombudsman programs within the federal government to ensure that the proposal meets generally accepted ombudsman standards;

- Develop, a credible professional system for credentialing federal ombudsman programs;

- Provide ombudsman support for issues that exceed the capability or jurisdiction of an individual agency or entity. For example, ombuds could provide temporary assistance to small agencies without the ability to fund full time ombuds, or serve as a central hub to fund an interagency contract vehicle;

- Develop policies that will help foster and maintain a highly skilled and well-trained corps of federal ombudsmen;

- Establish in the U.S. Treasury a revolving fund entitled something like the "Coalition of Federal Ombudsman Fund" or enter into an arrangement with a department or agency to use an existing revolving fund. Any amounts in the fund could remain available to the "center" until expended, without any fiscal year limitation;

- Maintain internet and intranet websites to maximize information-sharing and collaboration for all federal ombudsmen and federal conflict management professionals;

- Provide a platform for shared services and independent counsel for all federal ombudsmen; and

- Provide for an office of professional responsibility or other alternatives such as protocols, to address any complaints that may arise against federal ombudsmen.

Additional Comments from former COFO Chairs and from ombuds about COFO

- Two federal ombuds mentioned Mike Turpenoff, former COFO Chair, who, with other ombuds, pioneered the use of video skits for training and developed the Model Guide.

- Wendy Kamenshine was mentioned as a leader for external ombuds as well as internal ombuds. When we asked her about her work as Chair, she mentioned that some of the highlights were: "(1) connecting ombuds across the government so that we could know more about each office's role/work and could learn from each other. For example, we had a series called "What Does the Ombudsman Do At..." where at each monthly meeting a different person would briefly share about his/her office and then people would ask questions; (2) bringing together the leaderships of USOA and IOA on some items with COFO as the bridge; and (3) ensuring that our topics of discussion usually were applicable to both internal and external ombuds so that everyone could find something of interest in each meeting."

  About suggestions for ACUS about COFO, Kamenshine shared: "In terms of recommendations to ACUS on COFO, I suggest agencies should encourage their ombuds/ombuds offices to participate in COFO meetings and conferences. It's free—and a great way to learn from colleagues in the field."

- Howard Gadlin was frequently mentioned as an influential Chair of COFO. Gadlin has said, "When I was a leader in COFO I think the best thing I did was push for an annual all-day meeting with ombuds-related presentations and discussions. We didn't have that before. And while it took a while for the annual meeting to draw lots of people and become something substantive, it is now a very worthwhile gathering." He also led the effort to foster self-assessments and assessments of program effectiveness.

  As for what ACUS might recommend regarding COFO, Howard Gadlin wrote: "I think the strength of COFO is that anyone with an interest in federal Ombuds can participate—this openness has contributed to its growth…during my time as COFO Chair, I responded to innumerable individual requests for professional guidance—especially about issues of standards of practice and ethical practice". On the other hand, Howard Gadlin felt that the open structure of COFO might not lend itself to being able to be a credible body for credentialing Federal ombuds offices.

In summary, COFO's contributions to the federal ombuds community can be summarized into three main categories:

- **Access and Support**. There are constant individual responses by COFO officers to phone calls and emails from COFO members and from many other government officials.

- **Community Spaces/Forums**. There are monthly meetings packed with member-suggested topics, annual conferences and a well-utilized community listserv.

- **Policy.** There are major initiatives from the Chair, COFO officers and COFO

Committees—about Standards of Practice, setting up new programs, sharing sample documents, reviewing and helping to improve existing programs, and many other professional concerns.

COFO Appendix

COALITION OF FEDERAL OMBUDSMAN

Executive Highlights of Monthly Meetings (2005 – 2015)

2005

- Worked jointly with IOA and USOA on the "Standards for the Establishment and Operation of Federal Ombuds Offices" document.[292]
- Provided input to the ABA regarding ombudsman standards.
- Survey to formalize the COFO, develop a charter, have officers and be recognized as the official Federal Ombudsman organization.
- Discussed ombudsman office reviews and surveys to employees.
- Discussed proposed Texas law on confidential communications with ombudsman, which contained important safeguards for Ombudsman and those who use ombudsman services.
- Collaborated with IOA on uniform reporting categories task force.
- Provided advisory support to GAO, which was reviewing a new United States Postal Service (USPS) FAR Ombudsman position, which did not meet the standards of independence, or confidentiality and seemed more like binding arbitration instead of an ombudsman.
- Provided advisory support to GAO, which reached out to COFO to discuss a "farmer settlement" that included an Ombudsman Program at USDA.

2006

- Discussed public comments received about "A Guide for Federal Employee Ombudsmen," which was later finalized. This new document established standards which will help with the huge influx of interest in the role, and provide recognized standards to follow when setting up new programs.

[292] Retrieved online at https://www.gpo.gov/fdsys/pkg/FR-2005-11-09/pdf/05-22349.pdf

2007

- Mike Turpenoff created a draft guide "A Model for Developing an Ombudsman Program."
- Discussions continued about developing and publicizing ombudsman activities to highlight the value of the function and its contribution to agency missions.
- Website established through Department of Education.
- Discussed need for greater presence and outreach within and outside the ombudsman arena, including a recommendation for widespread notification to federal agencies in an effort to increase participation and assist in the development of ombudsman.
- Discussed developing federal ombudsman position descriptions and classification series. This effort eventually passed due to the widely varied functions of federal ombuds.
- COFO membership list included approximately 70 ombudsman offices.
- Issues: working with unions and record-keeping.

2008

- Discussed deficiencies with ADRA as applied to federal ombudsman.
- Nina Olson, the Taxpayer Advocate served as keynote speaker at the COFO annual meeting. She described the value of a statute in a developing ombudsman office. As a resource for taxpayers who claim government treats them unfairly, Ms. Olson described some reluctance to describe the Taxpayer Advocate as an "ombudsman", but that, in its operations they serve the traditional ombudsman function of providing an agent of government to protect taxpayers from the alleged abuses of that government.
- Discussed possibility of Federal Ombudsman Chapter at USOA.
- Issue: wearing multiple hats (e.g. ombudsman and EEO advisor) threatens independence and causes conflicts of interest.
- Continued to explore a unique classification series with COFO members.

2009

- The Honorable John Berry, Director, Office of Personnel Management (OPM) served as keynote speaker at annual conference. Consequently, Mr. Berry requested COFO consultation in establishing an ombudsman office within OPM.
- It was noted that all contact with agencies interested in starting new programs should flow through the COFO Executive Committee, not individual members.

- Considered establishing an ombudsman office start up team subcommittee for new offices.

- Draft "Federal Ombudsman Act" discussed:

    - As written would have required establishment of Ombudsman Offices in Federal agencies.

    - Impetus included threats to independence and the arbitrary elimination of organizational ombudsman positions in federal agencies.

    - There may be benefits in having some legislated standards.

    - Strong views against requiring agencies to have an ombudsman function.

    - Anything legislated at the Federal level would have ramifications for ombudsman functions at state and local levels of government.

    - Members voted against proceeding with that initiative.

- The Patent Office Ombudsman Pilot Program described in Federal Register did not appear to be that of an ombudsman function, but rather an intake and case tracker. COFO reached out to the designated POCs to describe the ombudsman function and offer assistance.

- Defense agencies were required to establish Procurement Integrity Ombudsman positions to assist employees, management, or customers in resolving procurement integrity issues of the type cited in 42 U.S.C. §423. [293]

2010

- USPTO Ombudsman shadowed COFO Chair; discussed Federal Register concerns about confidentiality and independence; agreed to use COFO as an advisory resource.

- New OPM Ombudsman was chartered January 10, 2010.

2011

- Members discussed how they report to their leadership and others, receive feedback, and interface with the unions, interactions with General Counsel, how they demonstrate value aside from using visitor surveys, and how to evaluate the work of an ombudsman.

- Formalized a "Standing Up New Ombuds Office" subcommittee, which started an advisory checklist/document to assist with establishing a new office. The group compiled charters and

[293] *See* memo at http://www.acq.osd.mil/dpap/policy/policyvault/USA004579-09-DPAP.pdf

authorizing documents, MOUs with unions, position descriptions, performance elements and standards, etc.

- IOA President briefed their vision, plans and goals to COFO.

- Learned about new ombudsman programs at State, International Broadcasting Bureau, IRS, and the new ombuds element to Interior's Bureau of Land Management (BLM) dispute resolution role.

- Discussed reporting chains: IOA and USOA (and COFO) recommend that ombuds report to the highest level person possible in the organization.

2012

- Learned about new ombudsman programs at the Office of the Director of National Intelligence and Department of Energy. We also learned more about existing programs at the Small Business Administration, Federal Bureau of Prisons, National Geospatial-Intelligence Agency, Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Labor > Education and Training Bureau > Office of Foreign Labor Certification, Federal Housing Finance Agency, Federal Bureau of Investigation, National Credit Union Administration.

- Ombudsman position description: Most are GS-15s, a few are SES (however, the latter can be transferred out). Very few are political appointees. The grade level and PD should ensure the independence of the office.

- Discussed the following with regard to requests for ombudsman case information from oversight bodies and how to give appropriate responses:

  > This could be a challenging situation particularly given the ombuds tenet of confidentiality. Requests that ombudsmen may answer in full include those addressing systemic issues, statistical information, and policy issues that do not breach confidentiality of any individuals. In some cases, ombudsmen will contact an individual to inquire whether they authorize the release of information related to their case. It's also important for the ombuds professional to have the full backing of the relevant agency Director and GC. Should a subpoena be issued, the ADR Act can be cited in an attempt to uphold confidentiality.

- Discussed the following with regard to reporting structures:

  > Most ombudsmen report to as high a level as is functional in their organization. High level reporting sends a message to the agency and public that the ombuds program is well-supported, listened to, and respected. Access to upper management is critical for an effective ombuds program. However, upper management's availability on a day to day basis may be limited. Also, there may be an errant expectation that the ombudsman will always take issues directly to upper management even though the case should be handled on a lower level. An ombudsman program that is not

structurally separate should also report to the highest level official in the agency rather than the highest level official within their immediate department in order to ensure independence.

- Discussed the following with regard to work experiences and trainings which are good preparation for the ombuds profession:

  Using ombudsman professional groups as a resource (e.g. COFO and IOA); facilitation and mediation courses; teaching high school; crisis situation training; mediator experience; leadership training; presentation skills course; continuing education on subject matter relevant to the agency/organization—this is necessary to keep abreast of current laws and programs to know what is affecting constituents; seminars on topics related to ombuds work, e.g. diversity, conflict resolution, generational differences.

- Discussed "good customer service" for an ombudsman, which includes: going above and beyond and give complainants some sort of positive, tangible outcome they can pursue on their own; making sure questions or complaints were answered fully; providing a timely response; and listening well, since people want to feel heard or have a chance to "vent."

- Discussed the new requirement for an Inspector General (IG) Whistleblower Ombudsman, which was established by statute to "educate agency employees about prohibitions on retaliation for protected disclosures and…about the rights and remedies against retaliation for protected disclosures." There were questions about how the whistleblower ombudsman role itself was defined and its lack of consistency with the joint COFO, IADRWG, and ABA publication, "*A Guide for Federal Employee Ombuds: A Supplement To and Annotation of the Standards for the Establishment and Operations of Ombuds Offices"* and how the role will be best able to be an independent, neutral, informal, and confidential resource, particularly within an IG structure.

- Recurring discussion on confidentiality. Many noted that advertising confidentiality broadly, widely, and consistently, i.e., in charters, brochures, email disclosures, is an important step in protecting confidential ombudsman communications.

2013

- Learned about ombudsman programs at the Consumer Financial Protection Bureau, Department of the Interior Office of the Special Trustee for American Indians, Department of Defense Office of the Inspector General, Federal Reserve, Transportation Security Administration, Federal Deposit Insurance Corporation, and DHS National Cybersecurity and Communications Integration Center.

- Discussion topics included: mediation, frequent visitors (setting expectations and how to count cases if issues are similar), raising issues to upper management, writing skills, setting expectations with employees and the public, using interpreters, office space requirements, using academia for short-term research projects (Federal ombuds and other ADR professionals who have hosted students from Harvard, Pepperdine, George Mason, Eastern

Mennonite and others generally found the experience helpful and rewarding), conveying bad news, tips for successful group interventions (which included talking with participants individually beforehand, preparing an agenda, putting agreements in writing, and following up), working with unions, ombudsman performance elements, climate surveys.

- The IADRWG and COFO collaborated on a joint panel discussion about how ombudsman offices contribute to agency success. Scott Deyo moderated with panel members Rita Franklin, Wendy Kamenshine and Chuck Howard.

2014

- Discussed how to improve interagency collaboration among ombudsman offices, which included improving/expanding web presence, compiling sample case scenarios, new ombudsman mentoring/shadowing, sponsoring interns, and developing a research agenda that could support multiple agencies.

- Continue outreach with oversight entities, academic institutions, ADR programs, IADRWG, GC EEO, and HR communities, ABA etc.

- COFO launched the "Ombuds Value Project." The goal was to obtain stories that described the positive value in our collective work and impact. Unfortunately, despite many follow-ups, only a couple COFO members participated.

- The annual conference featured an O.M.B.U.D.S. program evaluation model, which involved focused discussion on **O**pportunities, **M**easuring, **B**arriers, **U**ncertainties, **D**evelopment, and **S**trategies. See the full description and notes after May 2014 minutes. COFO discussed the top items in the October 2014 minutes.

- Received a briefing from the DOJ OIG on the new Whistleblower Ombudsperson Program, implemented as a result of the Whistleblower Protection Enhancement Act of 2012, which serves as an educational resource about the OIG's role and the nature of protected disclosures.

- Discussed OMB MAX as a better platform for sharing information, but we were quoted $50K to set up a collaboration page. This is not feasible for Federal Ombuds offices.

- Discussed requests to testify. Most ombuds resist formal testimony. Sources of support to justify this position can include Administrative Dispute Resolution Act (ADRA) and an agency's General Counsel, if the latter supports the principle of ombuds confidentiality.

- Federal Ombudsman Peer Review was proposed. The goal is to help programs assess whether they are doing what they set out to do and strengthen the professionalism of federal government ombuds programs.

- Dr. Mary Rowe shared her work on bystanders. The discussion revolved around the two working draft papers she wrote on this topic and shared with the group. The first paper addressed barriers to responsible bystander action and ideas for fostering effective

"receptivity" (when it is perceived that an organization doesn't want to hear bad news). The second paper addressed the ways that bystanders can help build a climate for high productivity and fewer occasions of unacceptable behavior—as well as a climate in which bystanders are more likely to take responsible action. Ombudsman can play a critical role in this context in helping bystanders overcome concerns about coming forward (safety, resources and options) and possibly lead them to take action.

2015

- To meet expressed needs of many members, the COFO Executive Committee proposed expanding upon the "Standing Up A New Ombuds Office" subcommittee's work in particular to document common standards.

- Discussed COFO's outreach role when proposed ombudsman legislation arises, especially in cases where the proposed role raises questions about the nature of the role.

- Announced that chiResolutions was selected to perform the Administrative Conference of the United States study on Federal Ombuds.

- Learned about a new ombudsman program at the Army's National Ground Intelligence Center. The incumbent shared experience in building and promoting awareness of the newly founded program, working with stakeholders, establishing policy, and drafting a charter and mission statement. Also discussed traditional issues and questions of concern when establishing a new office, i.e., evaluating effectiveness, obtaining training, developing relationships of trust, etc.

- The President of the United States Ombudsman Association and Vice President of the International Ombudsman Association briefed COFO.

Annual Conference Themes of the Coalition of Federal Ombudsmen

COFO has usually held annual conferences with a variety of functions. These conferences foster networking, advertise new initiatives and new jobs, consider the by-laws and organization of COFO itself, and bring in outside speakers. This list includes just a few topics and discussions.

Year	Conference Theme and Topics
2002	Ombudsman Performance, Practices and Role (e.g. reflective practice)
2003	The Role of Federal Ombudsmen in changing times (e.g. increased national security)
2004	Federal Ombudsman Practice— the Evolving Role (e.g. standards of practice; effectiveness)
2005	Ombudsmen in the Federal Environment (e.g. Virtual ADR; COFO Comments on ABA Standards; Federal Records Act)

2006	Federal Ombudsman Practice—a Reality (e.g. Guide for Confidentiality and Guide for Developing Ombuds in Federal Agencies)
2007	Selling the Ombudsman Concept (e.g. working with OIG, EEO, unions)
2008	Developing Ombudsmen Positions (e.g. discussion of ADRA, the Taxpayer Advocate, Differing Approaches, Conflict Resolution Systems, A Model for Developing an Ombudsman Function)
2009	Federal Ombudsmen in the 21st Century (e.g. Ombudsman Program Diversity, FOIA and other legal topics, a COFO Charter)
2011	Federal Ombuds: Enabling Innovative Public Service and Improved Government (e.g. Confidentiality, Recordkeeping and Privilege)
2012	A Legal Guide for Ombudsmen, Healthy Work Environments, Ethical Dilemmas
2013	The Road Ahead, a Legal Guide, Ethical Dilemmas, and a Roundtable
2014	The Activist Ombudsman, External Ombuds, Coaching, Mental Health Issues, and Hot Topics
2015	The New Ombuds, Ombuds Research, and Challenging Constituents

2.4 Summary of Insights and Promising Best Practices

Upon completing the quantitative and qualitative surveys, case study interviews, and profiles research, many key insights and promising best practices surfaced from the Research Team's analysis of the data and in-person observations. Below, we have identified the most prominent.

2.4.1 Summary of Insights

1) Critical leaders of the agencies selected for our case studies cited tangible benefits of ombuds services including reduction of legal costs, enhancement of employee morale, increase in employee engagement, and improved products and/or services that ultimately advance the agency mission.
2) Ombuds reinforce a positive view that the agency cares about its employees and its external stakeholders, and wants to help them with challenges they face. The ombuds become important ambassadors for the organization while also cultivating staff and leaders to become ambassadors for the ombuds program.
3) Key personal characteristics include a passion for helping people in need, a non-judgmental and welcoming attitude, and a willingness to both give and receive feedback. Ombuds work is challenging, sometimes stressful and not for everybody. High levels of emotional intelligence, communication and problem-solving skills, diplomatic competencies, and a "tool-box" of conflict resolution methods are all necessary. Further, ombuds must be able to work as a close-knit team. Basically, there is high correlation between what ombuds are required to do, the skills they must have, and the character traits they should possess.

4) Ombuds and ombuds offices need to be influencers as well as being influenced by the larger organizational culture of the federal agency. A culture congruent with the work of ombuds is one in which continuous learning and improvement for self and the institution is a priority; one in which creative forms of conflict resolution are desirable and applauded; and one is which employees and external visitors are treated with respect and support. The ombuds office can be an important symbolic and actual representation of this culture.
5) Ombuds offices are a powerful representation of government institutions being accessible and responsive to the needs and concerns of both external and internal stakeholders. In many ways, they serve as "your voice" both to and within government institutions. Among the key ways they do this is by "humanizing government" (especially important in today's political climate); helping folks "navigate through the agency, fellow employees, industry, and the public", and being involved in continuous system and policy reviews (this might be the function that gives the greatest "return on investment").
6) There are successful ombuds programs that rely heavily on volunteer assistance, thereby increasing their apparent cost-effectiveness. The Navy Family Program with over 500 volunteers offers extraordinary service to families, although it does not adhere closely to core standards of practice. The Long Term Care Ombudsman (with thousands of volunteers) offers a long-lived and well-regarded model much closer to the three core standards of practice. There are other programs that have or are considering various forms of collateral ombuds, local "workplace advisers," and local personnel with mediation training—some are considered ombuds and some function as ombuds adjuncts.

7) The National Taxpayer Advocate is among the federal ombuds offices designated as advocates. The NTA, mandated by Congress, is structured very carefully to ensure strict adherence to the three core standards of practice.

8) The Coalition of Federal Ombudsmen has provided a much needed and valuable service in "professionalizing the role and status of ombuds in the federal government." COFO has been very responsive to questions from agencies and federal ombuds— offering critical information through forums and conferences; extending consultation services to start-up programs; working for adherence to commonly accepted standards of practice and providing many other forms of assistance. Many of the interviewees in our case studies and surveys asked for a central office or organization such as COFO that would provide an even more active role in the future, spearheading initiatives such as outreach about the ombuds profession and the three core standards of practice, training, credentialing, apprenticeships, mentoring, and assessment.

2.4.2 Summary of Promising Best Practices

1) Starting a New Office.

- *Immediate priorities.* Work with relevant senior managers and ombuds colleagues to establish an office consonant with standards of practice for the particular type of practice. At the same time, listen to and build relationships with all stakeholders.
    - Consult with professional groups, other federal ombuds, and with all relevant managers.
    - Work with the Inspector General who has jurisdiction over the agency, agency counsel, and other senior managers when drafting the charter. Spell out the safeguards for confidentiality for the office.

- Consult with top leaders and support them in setting the tone and preparing the agency for an ombuds function. For example, ensure that the ombuds reports to the top-most level of the agency.
- Seek support from leaders to get a records schedule approved by the National Archives and Records Administration (NARA) providing that confidential ombuds records may be destroyed soon after an issue is resolved.
- Craft an "ombuds elevator speech," for use wherever appropriate, and use the organizational chart as a road map, to begin meeting with everyone.

2) Developing Intra-Agency Support.

- *Build trust throughout the agency.* Ombuds must be seen as safe, accessible, and credible to all stakeholders to earn sustainable and public support from top leaders in the organization.
  - Help stakeholders to understand how the ombuds' work in surfacing and helping to resolve issues serves their needs. This is an important element of developing support.
  - Communicate with all stakeholders, constituents, and agency employees, an absolute commitment to uphold the core professional standards of independence, confidentiality, and impartiality/neutrality as the anchor of ombuds practice.
  - It is critical that the ombuds office handle its mandate, independence and confidentiality in ways that inspire the trust and confidence of agency leadership, management and all other stakeholders, rather than undermine it. Ongoing discreet communication, as appropriate, about problems as they surface, and strong, collaborative relationships perceived by stakeholders as

impartial and supportive will help dispel any impression that the ombuds is, when holding focus groups or otherwise serving callers, actually creating discontent or encouraging complaints that would not otherwise need to be dealt with.

- *Collaborate with other offices.* Utilize every opportunity to reach out to offices that might be concerned about territorial issues.
    - Recognize that this may well be the first time individuals are working with an ombuds; many may not even know what one is. Explain the ombuds role, figure out how the offices can collaborate, and discuss referrals from and to the ombuds office. Prepare to do this over and over as personnel changes occur.
    - Adopt a permanent and consistent, "we can't do this without you" constructive approach with all line and staff managers who have conflict management responsibilities. Establish an on-going dialogue with each and schedule regular check-in meetings with the divisions, offices, and others with whom the ombuds office works closely.
    - Learn everything you can from other managers about issues facing the agency and constituents. Share knowledge generously (consistent with confidentiality commitments.)

3) Outreach and Promotion of Services.

- *Communicate creatively.* Outreach demonstrates value through visibility and providing immediately useful information, and works to address misconceptions about the office.

- Develop attractive and catchy informational "business cards," infomercials, videos, posters.
- Make sure the ombuds office is accessible to all stakeholders; (be mindful of disabilities, language groups, etc.).
- Include specific plans for connecting with specific stakeholders, as part of the office's strategic plan. Implement annual "in-reach" and outreach plans as part of the office's strategic plan with objectives to ensure intentionality in how the office engages with their internal/external stakeholders.
- Make use of available technology—for example, to offer webinars, pre-taped content, and an online interface (if appropriate to the type of office) to contact or submit questions to the ombuds, and post FAQs, Self-Help tools, etc.
- Make presentations at new employee or new customer orientations and provide updates during leadership meetings, all hands meetings, etc.
- Utilize trainings and workshops as an opportunity to provide specialized information appropriate to the agency mission, the purposes of the office, and the interests of constituents—for conflict prevention, and relationship building with stakeholders.
- Host stakeholder forums to get critical input from constituents about the challenges they face and how the office might more effectively meet their needs. These meetings should be expertly facilitated, and structured to provide for candid discussion. Follow-up afterward with stakeholders; see if getting back to them raises more concerns.

4) **The Multi-Person Ombuds Office: Nimble by Design**.

- *Complementary blend of skills.* If possible, seek ombuds and other office personnel with a variety of work and educational experience. This will permit the office to offer a wider understanding of different cultures and to offer a broader menu of skills.
    - Seek skills in areas such as human services, organizational development, law, public administration, multi-cultural workshop design and development, data analysis and report writing.
    - Continuity of Service. If appropriate to the type of office, all ombuds should be able to step in for one another—with appropriate means to be kept up to date about one another's cases.
    - Provide an "ombuds of the day" or other means to handle walk-ins.
- *Sustainability.* Continue to develop new talent.
    - Bring in detailees who will gain valuable experience and might become permanent staff or share the ombuds experiences when they return to their former position.
    - Provide opportunities for newer ombuds to "shadow" more experienced ombuds; create a mentoring program and informal mentoring channels.
    - Engage in explicit individual career development and succession planning.
    - When requesting additional staff, make the "business case" for more ombuds by comparing the sizes and levels of activity in similar offices, and highlighting the need for succession and career planning that would ensure long-term success, stability, and sustainability for the agency's ombuds' capability.

- *Supportive environment.* Given the stressful and somewhat isolating nature of ombuds work, foster positive, supportive relationships that are important for effectiveness and well-being—among all members of an ombuds office, and with other ombuds colleagues.
    - Encourage colleagues to protect their health, understand and deal with compassion fatigue, and affirm the accomplishments of other ombuds (consonant with the standards of practice).
    - Implement appropriate office and working group discussions of the welfare of ombuds professionals.

5) Assessments and Accountability.

- *Encourage structured "accountability" practices*, such as:
    - Regular, facilitated self-assessments at the individual and office levels
    - Review data collection and data analysis methods on a yearly basis
    - Implement and monitor appropriate time frames for acknowledging contacts to the office and starting on problem resolution.
    - Encourage intra-office and working group professional discussions of the goals of the specific ombuds office, new issues, patterns of issues, the specific functions being performed, cohorts being served, referrals to and from other offices and outside constituents.
    - Consider tracking innovative metrics such as "repeat consultation requests from top managers," a decline in formal grievances after training programs, numbers of visits from bystanders communicating about concerns or exemplary practices, numbers of referrals to and from other elements in the

conflict management system, or invitations to facilitate senior management meetings.

- Provide mid-year reports in addition to annual reports.

6) Promoting a Conflict Competent Culture.

- *Agency-wide skill development.* Consider that one of the key functions of internally-facing ombuds office is to develop "core conflict competencies" of employees. This may be done in one-on-one coaching, group and team facilitations, workshops and trainings, brown-bag lunches, and leading by example.
- *"Complaints can be a compass."* Keep reviewing the interests of constituents. Review the breadth and depth of initiatives, (as relevant to the type of ombuds office), that are now being performed by ombuds, and consider adding to the portfolio of services provided if consistent with the skills sets in the ombuds office. Consider proactive functions such as teaching team audits, facilitated self-assessment in a given work unit, monthly forums, conducting anonymous focus groups at the request of senior managers, specialized coaching for abrasive senior professional and managers.
- *Examine who is accessing the ombuds office*, and consider reaching out to those who are thought to have concerns but are not contacting the office: bystanders, anonymous callers, and different language groups.
- *Link to performance measures.* Support making conflict competencies part of performance evaluation for managers and supervisors at the agency, and then, over time, installing these as performance measures for all employees.

- *Supporting coordination of an integrated conflict management system.* Structure and develop the ombuds as an independent office that is one component of a larger conflict management system (which may be called by another name).
    - In some agencies the ombuds may help develop and support programs with "unit mediators," "responsible workplace advisors," collateral duty ombuds, or volunteers who are not federal employees.
    - In some agencies the ombuds office may explicitly or informally help to coordinate various conflict management functions. In some agencies ombuds will participate in regular meetings with the heads of other conflict management offices.

2.5 Possibilities for Further Research

The unit of study for this report was federal ombuds *offices*. It includes self-reported survey data from a quarter, or perhaps a third, of a still unknown (but now much better understood) universe of all federal ombuds offices. The present report, a foundational study, will bring to mind many ideas for new research about ombuds offices. One obvious question for the ombuds community and others interested in the profession as it exists in the federal context, will be how to collect data that do not rely solely on self-reports.

For further research in this area, federal ombuds themselves, and perhaps others, might wish to send individual anonymous surveys to all known, federal ombuds *practitioners*. This second universe—of ombuds professionals—would be a much larger number. It would include all the practitioners in large offices, and it might include volunteers. Research about those who have become professionals could tell us more about their demographics, skills, work experience, special expertise, most important cases, 'success' cases, difficult cases, etc. It could also find ways to study how individual professionals do their work, and the effects of different conflict management methods.

Research about actual ombuds practice ("in the office") is famously difficult for methodological reasons. Ombuds generally do not seek publicity and are not accustomed to touting their own accomplishments. (A significant number of ombuds graciously spoke with us, and at length, but off the record—declining to be on any list.) Inasmuch as the ombuds profession as a whole is dedicated to preventing and resolving concerns *discreetly and privately,* most ombuds are reluctant to discuss successes or to associate processes with specific outcomes. In addition, ombuds themselves find it hard to evaluate their work. They may offer information and options to constituents, mediate, and support the work of others, but *may not know the*

outcomes of their work in many cases. Finally, for various methodological reasons, cost-effectiveness studies have—with some happy exceptions focused on new offices, "worst cases" and the like—been found very difficult.

Nonetheless, such research is important both to support the growth of the profession in the federal government and to enable the rigor and accountability applicable to all federal occupations. Federal ombuds themselves may be able to surmount some of the research challenges.

The involvement of peers in research and evaluation would provide a level of expertise and especially trust with respect to the handling of confidential information. Groups such as COFO and other informal working groups have the capacity to expand the numbers by diminishing the reluctance to participate, as well as expanding the scope by delving beyond self-reports. These groups may, in continuation of their present work, be able to help the whole profession, in a systematic fashion. As an example, working groups could organize facilitated self-assessments and peer reviews, and gather more data. Additionally, such groups might foster more case studies. Several federal ombuds have written excellent reports about their own work and about various aspects of the federal ombuds map. This by itself is a "promising practice" in the field.

The above suggestions are made with full knowledge that COFO and other working groups are challenged by lack of funding and participants who generally offer their time as volunteers above and beyond their assigned duties. Assistance from the Department of Justice Office of Dispute Resolution or other sources may be necessary to see some of these suggestions to fruition.

2.6 Suggested Evaluation Methods for Proposed Recommendation

Federal agency use of ombuds offices is broad and varied, and many different types of ombuds offices offer private or confidential services. Confidentiality poses challenges, but not barriers to evaluating how this report's recommendations will achieve policy objectives. We can, for example, easily measure the number of offices configured in accordance with the recommendations in this report.

An institutional-level, *quantitative* measure is the number of federal agency ombuds offices in operation at a given point. A related *qualitative* measure would be the number of offices operating with a charter reflecting the three core standards of practice: independence, impartiality and confidentiality, and the three common characteristics of ombuds offices: ombuds do not make decisions binding on the agency or offer formal rights-based processes for redress; ombuds have a commitment to fairness; and ombuds provide credible processes for receiving, reviewing, and assisting in the resolution of issues.

Assessment at the office level should be grounded in each office's functional role. The typology of federal ombuds offices distinguishes among six main categories—organizational, whistleblower, analytic, programmatic external, subject matter agency-wide, and advocate. Available evaluation measures and methods flow from the nature of each office's work, and relate to the office's impact on governmental and/or taxpayers' interests.

Methods appropriate to these contexts include surveying, assessing costs or time through records review, and documentation of organizational or operational changes. In the chart below, *surveying constituents* encapsulates online or paper-based questionnaires, telephone or in-person interviews, an occasional focus group or town meeting. *Assessing timeliness and cost* involves

records review of records maintained by offices other than the ombuds. *Documentation of changes* represents reports of revisions to operations or processes.

Organizational Ombuds Offices

Purposes:

- Managing conflict constructively and informally; providing information to constituents about all formal and informal options
- Building constituent and organizational capacity to manage conflict
- Providing upward feedback to support earlier identification and engagement with problems/concerns
- Recommending and supporting systems improvements

Evaluation measures:

- Constituent perceptions of climate/culture/integrity
- Diminution of costs attributable to poorly managed conflict, poor communications, and unethical behavior
- Demonstrable, measurable benefits from mitigation/remediation of several, specific, complex and challenging issues
- Description of "new" problems identified for the agency; number of improvements to systems or operations supported by the ombuds office

Evaluation methods:

- Surveying constituents
- Assessing costs and changes in costs; describing improvements achieved in part from ombuds office initiatives
- Documentation of office operations including cases and cohorts served

Impacts:

- Informal confidential support for compliance with Federal rules and regulations
- Transparency
- Improved public understanding of Federal rules or regulations
- Improved communication with constituents
- Reduction in government and/or taxpayer costs

Whistleblower Ombuds Offices

Purposes:

- Ensuring constituent knowledge of WPEA
- Monitoring complaint handling

Evaluation measures:

- Constituent knowledge of WPEA
- Lowered costs in terms of timeliness and fewer complaints

Evaluation methods:

- Surveying constituents, where possible
- Assessing timeliness and cost of conflict handling through review of complaints records

Impacts:

- Informal confidential support for compliance with Federal rules and regulations
- Transparency
- Public understandings of rules and regulations
- Improved communication with constituents
- Reduction in government and/or taxpayer costs

Analytic Ombuds Offices

Purposes:

- Dealing safely and credibly with analysts' concerns about intelligence reports with respect to analytic rigor, excellence and integrity

Evaluation measures:

- Constituent (analysts) perceptions of appropriate handling of concerns
- Lowered costs in terms of timeliness and fewer complaints

Evaluation methods:

- Surveying constituents
- Assessing timeliness and costs of concern handling

Impacts:

- Informal confidential support for compliance with Federal rules and regulations
- Improved communication with constituents
- Reduction in government and/or taxpayer costs

Programmatic External Ombuds Offices

Purposes:

- Facilitating informal resolution of external constituent concerns about agency actions or inactions

Evaluation measures:

- Constituent perceptions of appropriate handling of concerns
- Lowered costs in terms of timeliness and fewer complaints

Evaluation methods:

- Surveying constituents
- Assessing costs of conflict handling through review of complaints

Impacts:

- Support for compliance with Federal rules and regulations
- Greater transparency
- Public understanding of federal rules or regulations
- Reduction in constituent, government, and taxpayer costs

Subject Matter Agency-Wide External Ombuds Offices

Purposes:

- Responding to external constituents' concerns about tasks/delivery orders/procurement

Evaluation measures:

- Constituent perceptions of appropriate handling of concerns

Evaluation methods:

- Surveying constituents
- Assessing timeliness and cost of resolving concerns

Impacts:

- Support for compliance with existing laws and regulations
- Greater transparency
- Public understanding of federal rules or regulations
- Reduction in constituents, taxpayer and government costs

Advocate Ombuds Offices

Purposes:

- Evaluating claims of, and advocating on behalf of designated populations

Evaluation measures:

- Constituent perceptions of appropriate handling of concerns
- Diminution of costs attributable to poorly managed conflict and unethical behavior
- Demonstrable, measurable benefits from mitigation/remediation of several, specific complex and challenging issues or cases
- Tracking of systems changes

Evaluation methods:

- Surveying constituents
- Assessing timeliness and cost of resolving concerns
- Documentation of operational changes

Impacts:

- Better compliance with existing laws and regulations
- Better communication
- Reduction in constituents, taxpayer and government costs

2.7 Ombuds Standards of Practice – Policy Considerations

The ombudsman profession has long been considered an essential means of protecting the people of a country from violations of rights, abuse, and unfairness — and therefore an essential element of good government (The International Ombudsman Institute [IOI], "About the IOI", n.d.). With similar reasoning, in 1990, the Administrative Conference of the U.S. (ACUS) put forth a recommendation that the President and Congress support federal agency initiatives to create and fund an external ombudsman in agencies with significant interaction with the public. Recommendation 90-2 articulated the value of federal ombuds and helped inspire the explosive growth of the field over the past 26 years. Our research not only confirms ACUS' original assessment, but expands it to include internally-facing ombuds as well.

In 2016 we discovered that the roles of federal government ombudsmen in the United States have developed, broadened and deepened remarkably over nearly fifty years. The present-day ombuds role is unusual, yet widely constructive in performing many informal dispute resolution tasks while also making referrals to the formal conflict management functions in an agency. As a result, it is now widely considered a vital component of an agency's conflict management system.

One way to understand the present breadth of value of federal ombudsmen is to glance at the comprehensive list of functions being performed by ombuds professionals, as well as the accomplishments they report.[294] Another is to listen to constituents, visitors, stakeholders, and senior leaders speak about the value their agency's ombuds have added — as we did in dozens of interviews and in our case studies.

[294] See Section 1.6 for the list of functions and accomplishments reported in Phase 1 of the Report.

We discovered many ways that federal ombuds add value—to the agencies they serve, to federal government employees, contractors, various industries and communities—and for the public at large. If the nation is to fully benefit from federal ombuds, we must understand the support ombuds need to be successful. They—and we—believe that the unique, complementary combination of professional standards and characteristics that define the ombuds role—differentiating it so from existing functions—should be recognized. Our research affirms what ACUS recommended in 90-2, and what the ombuds community in both the private and public sectors, domestically and abroad, has understood for many years: the value of the ombuds is predicated on appropriate professional standards of practice and definitional characteristics.

2.7.1 Standards of Practice

Some ombuds in the federal government have formal standards of practice and ethical codes; some have terms of reference and guidelines derived from statutes, original charters, and professional associations; some use a combination thereof. Different types of ombuds define their relevant standards of practice with some variation, depending on whether they are internally or externally facing, whether they are designated as neutrals, or whether they serve an advocacy function.[295] However, although they may look and operate somewhat differently in accordance with their own agency's mission and needs, federal ombuds share many commonalities.

If one looks across all types of federal ombuds, three core standards define the professional practice of nearly all of them: *independence*, *neutrality or impartiality*, and *confidentiality*. These core standards have reasonably similar definitions across the different types of ombuds. Where there are some differences, for example with the type of confidentiality offered to constituents, they are mostly consistent with the articulation in at least one of the three

[295] See Section 1.4 for a layout of the standards and characteristics of each type of federal ombuds identified in this report.

sets of professional standards (IOA, ABA, and USOA),[296] and it has appeared relatively easy for each type of ombuds to make their distinctions clear. In addition, most ombuds share three common characteristics: adherence to the concept of providing *credible review* of the issues that come to the office, a commitment to *fairness*, and assistance in the resolution of issues without making *binding agency decisions*. Below we provide two examples of how standards and characteristics are portrayed in descriptions of ombuds. The standards and characteristics are then discussed in more detail.

As an example, the *Analytic Ombuds* is distinct in many ways from other ombuds and yet manifests all three core standards, as well as three common characteristics. Analytic ombuds are described in the Analytic Ombuds Guide (2015) as independent and supporting the integrity of intelligence analysis by "providing an informal, neutral, and confidential forum to hear concerns regarding politicization of analysis, lack of objectivity in intelligence analysis, or other problems of analytic tradecraft" (p.3). The document proceeds to mention that the ombudsman must be fair, and have credible experience in intelligence analysis. If the description of the analytic ombuds sounds similar to the organizational ombuds and some externally-facing ombuds, it is because the analytic ombuds definition was derived from materials from COFO, IOA, OPM, IADRWG, ABA, and more—although with sui generis confidentiality practices, because analytic ombuds deal with matters of national security.

As another example, the *Procurement* or *Acquisition Ombuds* offers a confidential and impartial outlet for the business community to hear concerns about an agency's procurement program. These ombuds also provide extensive education for constituents. Differences are resolved through an informal, impartial administrative review. Corrective actions recommended

[296] See discussion of standards in Section 1.3

by the office contribute to the perception of fairness and credibility of the agency. Such actions foster good business processes, and support the government's commitment to accountability for, and transparency in, its operations. Procurement ombuds promote meaningful communications between government and industry (Office of the Attorney General, 2007).

The core standards encourage all parties to a dispute or problem to work with the ombuds office, especially those who are reluctant to approach the government with an issue or may be afraid of management,[297] or those within the agency who are wary of complainants. They encourage constituents to explore effective options. By creating a safe space, ombuds receive unvarnished feedback about an agency's programs and processes. This feedback informs the recommendations ombuds make to the agency as to how to better serve their internal and external constituents—a benefit to all taxpayers[298] (Office of the Attorney General, 2007).

The standards of practice of an ombuds define a unique profession. To fully understand the importance of standards to the effectiveness of the ombuds function, we look at them individually although, in fact, they are mutually dependent.

Independence is required so that constituents can trust that the ombuds office can and will treat them fairly and without conflict of interest. That is, an ombuds must be able to work free of coercion and undue influence from any stakeholder, including senior leadership, in order to be seen as trusted and fair. This may be especially true for ombuds who were created by executive action, as their existence is dependent upon agency leadership support.

Without independence, ombuds may feel pressure to modify their reviews of issues. For the ombuds, independence is essential, as well as to be perceived as neutral or impartial. For

[297] For example, we heard from two Department of Energy employees who were hesitant to bring concerns to the unions, labor relations, and human resources because of the potential negative impact it might have their reputation. See Section 2.2.2 for more information.
[298] See Quantitative Survey Summary Findings Section 1.6, Qualitative Survey Summary Findings: Thematic Analysis Section 1.7 and Case Studies Section 2.1, for specific examples

example, all ombuds who advocate for fair processes may be critiquing the very agency in which they are housed; they must be insulated from political interference, agency pressure, and retaliation for them to truly do their job. In addition, ombuds must have access throughout the agency in order gather sufficient information about an issue (Thacker, 2009). Independence gives an ombuds the platform to be forthright.

Ombuds provide a wide variety of services for constituents. Their functions in each case may vary according to the needs of constituents and stakeholders, including the needs of the agency. Independence enables ombuds to be flexible and rely on their own expertise and ability to gather facts.

Ombuds independence is often defined in terms of reporting relationships and decision-making power. Typically, an ombuds reports in a manner outside ordinary line and staff structures and makes no management decisions. The traditional language about the power of ombuds—quoted to our Research Team by Professor Gellhorn at the ACUS Roundtable in 1990—is: "An ombudsman may not make or change or set aside a law, or regulation, or management decision; theirs is the power of reason and of persuasion" (Personal communication, 1990). These two attributes permit the ombuds to offer confidentiality and support their neutrality—since the ombuds is not an agent of management and therefore is not appearing attached to a particular management decision. In unique cases, such as the Taxpayer Advocate, where a federal ombuds has some decision-making power, independence is generally established by structure and mandate, statutory or otherwise.[299]

As indicated above, *neutrality* and *impartiality* are required so that all stakeholders, including complainants, responders, decision-makers, and stakeholders at large, are able to trust

[299] See Taxpayer Advocate case study in Section 2.2.4 for more information about the office's structure and standards of practice.

ombuds professionals to deal with matters fairly, objectively, and free from bias or outside influence. All stakeholders must be able to trust that the ombuds professional will be in a position to approach all issues impartially and treat all parties to a dispute fairly, while protecting the ombuds' commitment to confidentiality.

As with the other standards, neutrality and impartiality may vary in practice. For some ombuds this standard means that they are not advocating for any party in a dispute, although they may be advocating for a fair process. Some externally-facing ombuds, such as those who receive concerns about their agency's programs or policies, may promote particular policies and procedures that are included in required public reports to Congress and/or the agency. They may also work for a given policy to be implemented in a fair manner.

In addition, ombuds impartiality refers primarily to professional conduct during review and evaluation of a complainant's claim, but does not prohibit them from ultimately opining about what is or is not fair. In this way, ombuds may not remain "neutral," after review of an issue, about what should happen next. Impartiality is a critical standard of practice because without trust in ombuds impartiality, complainants may not seek the ombuds' assistance—and, any criticism or recommendation made by the ombuds may not be viewed as credible. (Thacker, 2009).

Confidentiality is often thought to be the most important standard of practice to constituents. Research and experience suggest that people hesitate to come forward, with a problem of unacceptable behavior and/or to make suggestions. Many don't seek advice, unless they can do so without fear of negative consequences. The importance of confidentiality in support of people raising sensitive issues, is deeply embedded in American culture, customs, laws and executive actions, and often cited by scholars. Consider, for example, the religious custom of making a confidential confession; the protections offered to patients so they can be

forthcoming with their health care practitioners; and the ubiquitous provision of anonymous hot lines and tip lines for law enforcement.

Confidentiality as a core standard for ombuds offices has been widely recognized throughout the government. In the early 2000's senior attorneys in the Department of Justice (DOJ) worked with senior ombuds consultants for two years, including a member of our Research Team, and found a balance between ombuds confidentiality and other important interests protecting ombuds confidentiality to the fullest extent appropriate under the law. In 2016, our case studies and profile discussions revealed that similar agreements about confidentiality between an agency ombuds, counsel, and/or the Inspector General have been established by a number of agencies. For example, the ombuds charter at both the Department of Energy and the National Geospatial-Intelligence Agency (NGA) reflect such understandings. Notably, both charters provide an explicit description and examples of the expectations with respect to confidentiality.[300]

Ombuds confidentiality has been widely affirmed in the dispute resolution and conflict management literature. In the *International Handbook of the Ombudsman*, prominent experts Caiden, MacDermot, and Sandler (1983), wrote "Confidentiality is observed by most ombudsmen…in order that individuals may complain without fear of reprisal and public servants can learn from their errors without being victimized" (p. 14). David W. Ewing—then Editor of the *Harvard Business Review*—wrote several comprehensive books on modern grievance systems. In 1989 he mentioned ombudsmen as a positive example in discussing his view that one critical test for effective grievance systems should be "Is Confidentiality Preserved?" (p. 45-47). Sixteen years later, Chuck Howard (1996) described confidentiality as:

[300] The NGA Charter can be found at https://www.nga.mil/About/Pages/ombudsman.aspx. The Department of Energy is currently revising their charter. More information can be found at http://energy.gov/office-ombudsman

> The bedrock on which virtually all ombuds programs are built... an ombuds' failure to make or uphold a promise of confidentiality not only hampers the discussion of delicate issues and undermines the effectiveness of the ombuds individually, it also defeats the very purpose of an ombuds program, which is to encourage the airing and resolution of issues and disputes (p.1).

If confidentiality is a requirement for participation by most constituents, then it is imperative that an ombuds be able to offer and protect confidentiality.

It is worth noting that confidentiality does not prevent an ombuds from providing valuable feedback to management. Ombuds will often use non-identifiable data to report on new issues and patterns or find other means, without breaching confidentiality, of alerting those in the organization with a need to know of critical information. Many ombuds shared that, depending on the situation, they may work with a constituent to raise the issue directly, through other channels, in a way that is responsible and compatible with their concerns. Confidentiality simply allows the ombuds to create a safe space for visitors to speak freely and honestly and to pursue options for resolution with someone who is both impartial and skilled. At the same time, an ombuds office affords management the opportunity to make proactive changes, specific or systemic, within an organization before a problem escalates.

Virtually all ombuds recognize that there may be exceptions to confidentiality,[301] as when there appears to be imminent risk of serious harm or regarding matters of national security, as mentioned earlier. There are also times, as we found throughout our research, when the ombuds will need to ask permission to use a constituent's name in order to address an issue—for

[301] The exceptions to confidentiality applicable to ombudsmen in the federal sector are discussed at length in the legal analysis, which can be found in Part 3 this Report.

example, when shuttling back and forth between parties in dispute.[302] In such cases, the ombuds will explain the situation to the constituent and allow them to decide if they are comfortable moving forward. Otherwise, an ombuds professional must be able to protect confidentiality, if asked, under almost all circumstances.

2.7.2 Definitional Characteristics

In addition to the core standards, three characteristics are often considered definitional descriptions of nearly all ombudsmen. Most ombuds professionals function without formal management decision-making power. Many are expected or required to be able to conduct a credible review of issues raised by constituents, and many function with an explicit commitment to fairness. These key characteristics serve as a platform on which to practice the core standards.

Informality or working without formal management decision-making power is a definitional characteristic for almost all ombudsmen and a recognized standard of practice of the organizational ombudsman. Informality reinforces the perception of the ombuds office as a safe, confidential resource. Constituents may be more likely to speak with the ombuds "off the record" about allegations of unfairness, maladministration, abuse of power, and other sensitive subjects—topics that elicit fears of retaliation and loss of relationships. Ombuds can then help their constituents identify their options and determine how to proceed. As noted earlier, the ombuds function is intended to supplement, rather than replace, formal procedures (ABA, 2004).

A credible review process as defined by the USOA means that the ombuds has the status, qualifications, authority, and resources to conduct a proper inquiry and that the ombuds office has fair processes for access, inquiry, reporting, and whatever else the ombuds does to facilitate recognition and resolution of issues that are brought to the office's attention (USOA, 2003).

[302] See case studies Section 2.2 and survey results Section 1.6 and Section 1.7.

The concept of needing a high degree of expertise and training, and of appropriate status and authorization for reviewing and dealing with conflicts and disputes, is one that most ombuds view as critical to their effectiveness. By bringing concerns directly to government officials through a credible review process, ombuds are able to increase public trust in the federal government (Adcock, 2013). Moreover, the need for credibility is part of the reason that, throughout our research, ombuds emphasized the need for a federal ombuds job description and classification at senior levels.[303]

Fairness is the raison d'être for many ombuds professionals, both as a quality that ombuds should exemplify and one that they foster for their agencies. The concept of fairness was raised repeatedly throughout interviews, as a mission requirement of ombuds and a source of pride in professional achievement. Ombuds frequently cited the provision of fairness for a given constituent or group as an important accomplishment.[304] Fairness is also a necessary guiding principle for neutrality and impartiality because ombuds are frequently subjected to self-interest and prejudice. Fairness as a professional requirement reinforces equitable treatment and respect by the ombuds, as well as his/her attention to process. One could posit that the total sum of the core standards of practice plus informality and a credible review process enables fairness.

Major professions—for example, physicians, lawyers, engineers, scientists, and accountants—have standards of practice, as well as various kinds of defining characteristics, codes of ethics, and guidelines. These principles define professionalism. They help create a community *of* practice and consistency *in* practice. These principles provide a platform to design new offices as well as to support education and training. They raise awareness about excellence in practice, inform the citizenry, and help manage constituent expectations.

[303] See survey result in Section 1.6 and Section 1.7, and case studies in Section 2.2
[304] See survey results, Section 1.6 and Section 1.7

As the value of the federal ombuds continues to be recognized, we expect the profession to grow. The standards and characteristics discussed herein provide essential guidance for the structure and operation of federal ombuds offices to build trust and to serve the federal government and all constituents. Ombuds can help to foster trust in and within government through their professional practice model.

3.0 References

Note: Legal (bibliographic) references reside at the end of each of the sections to which they pertain, while other references in the document set are noted here.

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4.0 Appendices

Appendix A:

chiResolutions, LLC and the Federal Ombuds Research Team

chiResolutions, LLC, (CHI) a highly rated and experienced woman-owned small business federal government contractor, assists organizations in the design, implementation and evaluation of integrated conflict management systems (ICMS). CHI provides a full range of conflict management services through its roster of over 200 conflict management professionals located throughout North America, to include negotiation, mediation, facilitation, ombuds practice, curricula design, training, 'train-the-trainer' delivery, ICMS and dispute systems design, conflict coaching, executive and leadership coaching, strategic planning, climate assessments, change management and organization development efforts. CHI was a principal consultant and external roster manager to the Transportation Security Administration's Office of Collaborative Strategies from 2004-2009, and has been the Department of the Interior's Office of Collaborative Action and Dispute Resolution's principal consultant and service provider since 2002, supporting the design, implementation and evaluation of their department-wide ICMS. In 2012-13, CHI supported the Air Force General Counsel's Office in the design and delivery of their conflict coaching program, and conducted an extensive analysis of the Air Force's ICMS.

The Research Team

CHI has convened a uniquely qualified team to conduct this research project. The team is comprised of leading conflict management professionals who have decades of experience in the design, implementation and evaluation of federal and private-sector ombuds offices; expertise in the legal and policy contexts of federal conflict management programs; content knowledge and academic scholarship in ombuds and conflict management fields; and experience with comparative assessments and applied research methodology in conflict management.

Our team has a complementary blend of academic credentials and hands-on, professional experience; is a mix of insider and outsider perspectives on federal ombuds work; and offers an interdisciplinary approach that includes legal, social psychological, economic, conflict management, political science, and business perspectives. Critically, the team has a long involvement with both federal and private sector ombuds and cares deeply about the future of ombuds generally, and with all the challenges and economic constraints now faced by federal agencies, programs and employees, about ombuds in the federal service in particular.

Carole Houk, JD, LLM, CEO of CHI, is an attorney, consultant, ombudsperson, and internationally known conflict management systems designer. From 1997 through 2001, Carole was Counsel for the U.S. Department of the Navy's Alternative Dispute Resolution Office,

where she developed multiple programs that managed conflict in the procurement, environmental, healthcare, and workplace arenas. In 2001, Carole served on a panel of experts tasked with reviewing the GAO Report on *Human Capital: The Role of Ombudsmen in Dispute Resolution.* After leaving federal service, Carole developed the innovative Medical Ombudsman/Mediator Program to resolve patient-provider disputes at the point of care, operational at 29 Kaiser Permanente Medical Centers and throughout DOD Medicine. She has been an Adjunct Professor of Negotiation and Conflict Management at Georgetown University Law Center, and has taught at Hamline University School of Law's Dispute Resolution Institute, and Pepperdine University's Straus Institute for Dispute Resolution. Carole consults with public and private sector organizations in the design, implementation and evaluation of their integrated conflict management systems.

Mary Rowe, Ph.D., is a pioneer and recognized leader in the field of ombuds work. For more than 40 years, Mary served as an Ombudsperson at the Massachusetts Institute of Technology (MIT) where she is now an Adjunct Professor of Negotiation and Conflict Management, studying the organizational ombuds profession. Her contributions to ombuds practice include: a leading role in the former UCOA; co-founding the COA— precursor to TOA and of the present IOA; assisting in the creation of the TOA/IOA Standards of Practice; serving as a member of the 2001 ABA committee on ombuds; and co-authoring five surveys of ombuds associations. She has written extensively about ombuds practice, including identifying major challenges in evaluating ombuds work,[305] and ways to deal with those challenges. Mary has consulted to many hundreds of ombuds programs in the U.S. and globally, including work over 30 years with multiple federal programs.

Deborah Katz, JD is a conflict management specialist who works with organizations that want to achieve a proactive, strategic systems approach to conflict by building skills, institutions, internal support, and strategies for conflict management quality assessment. Recently, she was part of a CHI team that completed an extensive evaluation of the conflict management system in place at the United States Air Force. Deborah is a lawyer who has led labor and employee relations initiatives and developed innovative national conflict management programs, most recently at the U.S. Transportation Security Administration and the U.S. Equal Employment Opportunity Commission. She has also been chief counsel to the Chairman of the U.S. Occupational Safety & Health Review Commission and, prior to that, served as counsel to a board member at the National Labor Relations Board. Her academic qualifications include a B.A. in Japanese Studies from Yale University, a J.D. from the University of Michigan, Ombudsman 101 from the International Ombudsman Association, and both basic and advanced mediation training.

[305] For a collection of Mary Rowe's publications see http://mrowe.scripts.mit.edu/Publications.html

Neil Katz, Ph.D., is the author of over 40 books, articles and book chapters on conflict resolution, negotiation, mediation emotional intelligence and nonviolent action, and is a board member of national organizations. Since receiving his doctorate from the University of Maryland in 1974, Dr. Katz has distinguished himself as an innovator, leader, teacher, scholar and highly successful practitioner in academia and in organizational consulting. He is a Danforth Teaching Fellow, a mediator, a process consultant, a facilitator, and a trainer/consultant in organizational leadership, alternative dispute resolution skills, and emotional intelligence for numerous prestigious business, government, education, and community groups. He currently serves both as Professor and recent Chair of the 400-member graduate Department of Conflict Resolution Studies at Nova Southeastern University in Ft. Lauderdale, FL and as a professor emeritus and faculty/training associate for the nationally renowned Maxwell School of Citizenship and Public Affairs at Syracuse University. Neil's academic career at the Maxwell School included service as founder and director of the Program in Nonviolent Conflict and Change, founder and director of the Annual Summer Institute on Creative Conflict Resolution, co-founder and faculty supervisor for the Campus Mediation Center and the Conflict Resolution Consulting Group, and co-founder and associate director of the Program on the Analysis and Resolution of Conflicts. In addition, Neil is on the faculty of the Newhouse School of Public Communications at Syracuse, McMaster University in Hamilton, Ontario, and is President of his own consulting firm, *Dr. Neil Katz & Associates.*

Timothy Hedeen, Ph.D., is a Professor of Conflict Management and serves as University Ombudsman at Kennesaw State University (KSU). He provides mediation services through court and private programs, delivers trainings in the areas of conflict resolution and communication, facilitates group and public policy decision making and planning, and conducts research and evaluation on dispute resolution and justice policy. He serves on the editorial boards of *Conflict Resolution Quarterly* and *Family Court Review*, and is appointed to the Commission on Dispute Resolution of the Georgia Supreme Court. He is a senior consultant to the Consortium for Appropriate Dispute Resolution in Special Education, a former member of the Section Council of the American Bar Association's Section of Dispute Resolution, and a past chair of the Board of Directors of the National Association for Community Mediation. At KSU he serves as program faculty in the Master of Science in Conflict Management program and the International Conflict Management doctoral program, and as coordinator of the undergraduate certificate in Alternative Dispute Resolution.

Lauren Marx, M.S. is the Deputy Program Manager at Carole Houk International, where she wears many different hats. She provides strategic support in the areas of project management, roster development, and communications, as well as conflict management services such as conflict coaching, mediation, curriculum design, facilitation, and conducting assessments for the Department of the Interior. In addition, Lauren actively mediates for the District of Columbia's Superior Court, and the Center for Dispute Settlement. Prior to joining CHI, Lauren supported various organizational and conflict management initiatives for the U.S. Transportation Security

Administration, the National Archives and Records Administration, the Environmental Protection Agency, Virginia Commonwealth University, and the District's Department of Transportation. In 2012, she had the privilege of interning in the American Red Cross's Office of the Corporate Ombudsman and publishing an article on Virtual Teams for the International Ombudsman Association. Lauren received a M.S. in Conflict Analysis and Resolution from Nova Southeastern University and a B.S. in Business Administration, Marketing from the University of Florida.

Kathleen Watkins-Richardson, B.A., M.B.A., is currently earning her Ph.D. in Conflict Resolution Studies at Nova Southeastern University, Fort Lauderdale, FL. Kathy's educational background includes a BA in Communications/Art from Mississippi University for Women and an MBA in Market Management/Operations from Pace University, NY. Prior to beginning her full-time Ph.D., Kathy established a broad 25-year career in industry, non-profit, and government organizations in the sectors of publishing, conference development, web and electronic commerce, quality and environmental systems, aeronautics, space and defense technology. Key positions included Director of Strategic Planning, Communications, and Research for the American Institute of Aeronautics and Astronautics (AIAA) in Washington, D.C., Strategic Management Counsel and Coach for the leadership and staff of thirteen directorates at the U.S. Army Garrison-Redstone Arsenal in Huntsville, AL, and Program Manager for a $56M contract serving NASA Marshall Space Flight Center's 200-person Office of Strategic Analysis and Communication. Kathy has been a catalyst for team engagement, customer relationship management, workforce revitalization, process improvement, change management, and strategic communication on key programs such as Army Business Transformation, Lean Six Sigma, Standard Garrison Organization, Army Communities of Excellence (ACOE)/Baldrige Award, and the U.S. Army Installation Management Campaign (Strategic) Plan. She seeks to make a contribution to the conflict field through enhanced research, analytical, and strategic skills.

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McGreal, Amanda Lee & Rebecca Schwarz drafted the Long Term Care Ombudsman Program profile, and Crina Gealatu, Andrei Ignat, Andre Lee, Nick Maietta & Briana Williams, wrote the Navy Family Ombudsmen profile. Both groups were supervised by student Ben Goldman and Sara del Nido Budish, Clinical Fellow and Associate at the Harvard Negotiation and Mediation Clinical Program.

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Appendix B:

Overview of Federal Ombuds Types

INTERNALS Ombuds who serve internal, or primarily internal constituents, including agency employees, contractors and subcontractors						
Type	**Definition**	**Authorizing Action**	**Constituent Groups**	**Standards of Practice**	**Purpose/Mission**	**Examples**
Organizational Ombuds	A designated neutral who provides confidential, informal, independent and impartial assistance to individuals through dispute resolution and problem-solving methods such as conflict coaching, mediation, facilitation, and shuttle diplomacy. The Organizational Ombudsman responds to concerns and disputes brought by visitors to the office and may report new issues, trends, systemic problems, and organizational issues to senior leaders, and work collaboratively to foster systems change.	Varies by agency to fit diverse cultures and missions though they are typically created by one of the following: agency directive, head of agency, agency or congressional mandate, and sometimes explicitly as part of a conflict management system.	Primarily agency employees, with some agencies including contractors, grantees, subcontractors, and external visitors	• Independence • Neutrality • Confidentiality • Informality	Provide constituents with safe, informal opportunities to be heard; assistance in identifying and pursuing options for managing or resolving concerns; facilitation of communication between or among conflicting parties; conflict resolution skills training; and upward feedback and recommendations and collaborative support to management about patterns of conflicts, hot-button issues or other matters of import to organizational leaders. Help organizations reduce costs related to conflict by resolving disputes informally, reducing the need for resources, time and energy spent by disputants in formal grievance processes and litigation. He or she does not advocate for individuals, groups or entities, but rather for the principles of fairness and equity. The Organizational Ombudsman does not play a formal role in conflict management, formally investigate problems brought to the office's attention, or represent any side in a dispute. When appropriate, he or she will refer individuals toward appropriate informal resources and formal processes within the organization.	NIH, Office of the Ombudsman, Center for Cooperative Resolution, NSA, NGA, DOJ BOP, Dept of State, Defense Intelligence Agency (DIA), Navy's Naval Criminal Investigative Service, Dept of Energy, US Secret Service, Dept of Interior
Whistleblower Ombuds	A designated individual or office whose role is to educate employees, contractors and grantees about prohibitions on retaliation for protected disclosures and their rights and remedies if they have been retaliated against for making protected disclosures. The law does not permit the Whistleblower Protection Ombudsman to act as a legal representative, agent, or advocate for employees, contractors and grantees.	Pursuant to the Whistleblower Protection Enhancement Act of 2012 (WPEA), each Inspector General (IG) shall, in accordance with applicable laws and regulations governing the civil service - designate a "Whistleblower Protection Ombudsman." 5 U.S.C.A. App. 3; Inspector General Act	Agency employees, as well as contractors, grantees, and subcontractors	Whistleblower Protection Ombuds follow the same standards as the IG or OIG. • Independence • Confidentiality • Objectivity/Impartiality • Professional Judgment	Education, particularly about rights under the Whistleblower Protection Enhancement Act, relevant protections, working to see that complaints are being handled appropriately, with Quality Control, and Liaison functions. WB Ombuds do not get involved in the resolution of complaints, but they do provide information to employees who are making or contemplating making protected disclosures.	Whistleblower Protection Ombuds can be found in all IG offices.
Analytic Ombuds	An individual or office responsible for responding to concerns raised by Intelligence Community analysts about adherence to analytic standards (including tradecraft standards) in analytic products.	The National Security Act of 1947, as amended; the Intelligence Reform and Terrorism Prevention Act of 2004; Executive Order 12333, as amended; Presidential Policy Directive/PPD-28; and other applicable provisions of law. Paragraph E3b of Intelligence Community Directive (ICD) 203, "Analytic Standards," directs the head of each IC element to designate an analytic ombuds.	Intelligence Community Analysts	• Neutrality • Confidentiality • Informality • Independence	Available to all analysts who wish to raise concerns regarding whether intelligence products are timely, objective, independent of political considerations, based upon all sources of available intelligence, account for dissenting views, distort intelligence analysis, or employ proper analytic tradecraft. Expected to address concerns regarding objectivity or politicization, as well as perceptions of breaches of the other analytic standards. Additionally, the Analytic Ombuds 1) report concerns directly to the director of the IC element or the head of analysis when circumstances warrant; 2) use broad and flexible resolution techniques, conduct informal inquiries, issue reports, and provide recommendations for positive organizational change in a manner free from interference by any organization employee or official; and 3) provide independent, impartial, informal, and confidential mechanisms to informally facilitate resolution of individual and systemic problems.	Defense Intelligence Agency (DIA), National Security Agency (NSA), Office of the Director of National Intelligence (ODNI)

EXTERNALS Ombuds who serve external or primarily external constituents such as citizens, vendors, or others outside of the Federal government.							
Type	Specialty	Definition	Authorizing Action	Constituent Groups	Standards of Practice	Purpose/Mission	Examples
Programmatic External Ombuds		An independent, impartial federal employee, usually only found at one agency or department, who is appointed or employed by that organization to facilitate the informal resolution of concerns about specific program areas, constituents, and/or issues and addresses actions and failures to act of a government agency, official, public employee, or contractor.	Either authorized by 1) the legislative body or by the executive with confirmation by the legislative body; 2) executive action; or 3) agency mandate	Specific subsets of external or predominantly external constituents: citizens, vendors, or others, outside the Federal government, including regulated entities	• Independence • Impartiality • Confidentiality • Credible Review Process	Each Department/Agency External Ombuds Office has a unique mission, depending on the language in the authorizing action and the population that the offices serve.	FDA's Center for Devices and Radiological Health; Dept of Education Student Loan Ombuds; EPA's Office of Pesticide Programs' Ombudsman; FAA's Aviation Noise Ombudsman, Medicare Beneficiary Ombudsman, USDA's Animal Welfare Ombuds, DOJ's Victims' Rights Ombudsman, and FCC's Open Internet Ombudsperson
Subject Matter Agency Wide External Ombuds		An independent, impartial federal employee with authority and responsibility to receive, investigate or informally address complaints about their agency, official, public employee, or contractor, and, when appropriate, make findings and recommendations, and publish reports. Can be agency wide or throughout government at multiple agencies.	Either authorized by 1) the legislative body or by the executive with confirmation by the legislative body; 2) executive action; or 3) agency mandate	External or predominantly external constituents: citizens, vendors, or others, outside the Federal government, including regulated entities	• Independence • Impartiality • Confidentiality • Credible Review Process	Agency External Ombuds Office hear and respond to concerns and inquiries from the public about their agency, government officials, employees, or contractors.	CFPB, SBA, FDIC, Federal Maritime Commission Ombudsman, US Patent and Trademark Office Patents Ombudsman Program, United States Citizenship and Immigration Services CIS Ombudsman, Federal Housing Finance Agency
	Task and Delivery Order Ombuds	Task and Delivery Order ombudsmen review complaints from contractors on specific types of Multiple Award Task and Delivery Order contracts (IDIQ) and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. IDIQ ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency's competition advocate.	10 USC Sec 2304c(f); Federal Acquisition Regulation (FAR), Section 16.505(b)(8), Ordering under IDIQ regulations requires that the head of the agency shall designate a task-order and delivery-order ombudsman for Indefinite Delivery Indefinite Quantity (IDIQ) Contracts. The IDIQ ombuds functions are frequently considered collateral duties.	Contractors and bidders	• Independent of the Contracting Officer • Fair • The ability to offer confidentiality • Credible Review Process	Ombuds for use in connection with multiple award indefinite quantity/indefinite delivery type acquisitions in order to 1) address contractor concerns regarding compliance with task/delivery order award procedures; 2) review contractor complaints on task/delivery order contracts; 3)ensure all contractors are afforded a fair opportunity to be considered for each task/delivery order, consistent with FAR 16.505(b); and 4) when requested, maintain strict confidentiality of the contractor requesting assistance. The ombudsman does not have the authority to overturn award decisions or adjudicate formal contract disputes.	National Nuclear Security Agency's Task Order and Delivery Order Ombudsman/Procurement Analyst, DHS Task Order and Delivery Order Ombudsman, US Coast Guard's Ombudsman Program for Agency Protests, General Services Administration Task Order and Delivery Order Ombudsman
	Procurement Ombuds	Procurement ombuds offices typically receive inquiries and resolve concerns from the vendor community about an agency's procurement program. They also conduct outreach with vendors and industry associations to understand trends in the marketplace, to identify barriers to doing business with the agency, and to promote meaningful communications between government and industry.	Either authorized by 1) the legislative body or by the executive with confirmation by the legislative body; 2) executive action; or 3) agency mandate	Contractors, bidders, and potential bidders	• Neutral • Fair • Confidentiality • Credible Review Process	The primary purpose of the Procurement Ombudsman is to ensure equitable treatment of all parties participating in the agency's acquisition and assistance pre-award, post-award and administration functions. The Procurement Ombudsman facilitates the resolution of differences through an informal, impartial administrative review of the action in question. The review requires obtaining factual information about the specific matter and researching and applying pertinent regulations/policies and, where appropriate, consulting with Senior Agency Management or other federal-wide subject matter experts.	HHS/CMS has a Competitive Acquisition Ombuds created by Sec. 154 of Medicare Improvements for Patients and Providers Act of 2008 to respond to suppliers' and individuals' complaints about the Competitive Bidding Program for Durable Medical Equipment (DMEPOS) and provide an Annual Report to Congress. NASA Procurement Ombudsman, National Oceanic and Atmospheric Administration Ombudsman, DOD's Defense Procurement and Acquisition Policy, GSA, National Science Foundation's National Acquisition Ombudsman

EXTERNALS Ombuds who serve external or primarily external constituents such as citizens, vendors, or others outside of the Federal government.							
Type	**Specialty**	**Definition**	**Authorizing Action**	**Constituent Groups**	**Standards of Practice**	**Purpose/Mission**	**Examples**
Advocate Ombuds		An individual who is appointed or employed by an organization to receive concerns about or within the organization, to evaluate and investigate these concerns objectively and to attempt to resolve them informally and is authorized or required to advocate on behalf of individuals or groups found to be aggrieved or in need of support. This ombuds is thus not always a neutral party, but at the fact determination stage, the advocate ombuds must be impartial.	Frequently legislative	External constituents as designated in their specific charter	• Independence • Impartiality • Confidentiality • Credible Review Process	Each Advocate Ombuds Office has a unique mission, which includes evaluating claims objectively but is also authorized or required to advocate on behalf of individuals or groups found to be aggrieved and may issue reports to the legislature or specific agency.They typically serve designated vulnerable populations such as long term care residents, wounded servicemen, and others. The Advocate Ombuds represents the interests of a designated population with respect to policies implemented or adopted by the establishing entity and government agencies.	National Taxpayer Advocate, Small Business Administration National Ombudsman, Census Bureau's Survey Advocates, Securities and Exchange Commission's Office of the Investor Advocate.
	Wounded Warrior Ombuds - MEDCOM Medical Assistance Group	An independent, neutral and impartial mediator for Soldiers and their Family Members. Ombudsmen are selected for their demonstrated ability and passion to help Soldiers. They are located but not assigned to Medical Treatment Facilities (MTF) and serve as a liaison between the MEDCOM, the Soldier/Family member and the MTF Commander, acting as a communicator, facilitator and problem solver.	Established in 2007 by U.S. Army Medical Command (MEDCOM) as an outgrowth of the Army Medical Action Plan. Following the airing of complaints about conditions at Walter Reed Army Medical Center and elsewhere in the media, the Army was quick to engage problem solving solutions to insure all Soldiers and Family Members that they could expect the very best healthcare. Simultaneously, steps were taken to improve infrastructure and streamline administrative actions associated with the Physical Disability System. The final pillar in the strategy was the creation of a vehicle Soldiers and Family Members can use to air grievances and obtain assistance resolving problems.	Soldiers and their Family Members assigned to Warrior Transition Units, as well as other Service members and their families.	• Independence • Neutrality • Confidentiality • Informality	The mission of Ombudsman is to act as an independent, neutral, and impartial mediator for the Warriors in Transition and their families in the Warrior Transition Brigade. The Ombudsmen were selected for their demonstrated ability and passion to help Soldiers. They are not assigned to the Medical Treatment Facility (MTF) or the Warrior Transition Brigade but serve as a liaison. The Ombudsmen have a collaborative relationship with a variety of resources to assist with the resolution of issues that come through the Soldiers in Transition (ST) among others.	Currently the program includes 52 Ombudsmen at 30 sites, mostly in locations with an Army Medical Treatment Facility. The Air Force has a similar Advocacy Program that is not identified as an Ombuds Program. The Navy adopted the Healthcare Resolution Program for its Medical Treatment Facilities, BUMED Inst 6010.28 (May 23, 2011).
	Long-Term Care Ombuds	A State Ombudsman and representatives of the Office who identify, investigate and resolve complaints made by or on behalf of long-term care facility residents, and who perform other related duties as required by the Older Americans Act (OAA). While is it mandated by the OAA, it is decentralized, and the implementation at the state level is the responsibility of the OAA grantees (i.e. the designated state unit on aging).	1972 Health Services and Mental Health Administration funded nursing home ombudsman projects to "respond in a responsible and constructive way to complaints made by or on behalf of individual nursing home patients." 1981 Older Americans Act Amendments expanded ombudsman program coverage to include board and care homes. The name was changed from Nursing Home Ombudsman to Long-Term Care Ombudsman 1992 Older Americans Act Amendments strengthened the ombudsman program. Requirements for the establishment of an Office of Long-Term Care Ombudsman Programs, headed by an Associate Commissioner (later changed to Director), and funding of a National Long-Term Care Ombudsman Resource Center were added to Title II of the Act. 2016 Older Americans Act amendments made a number of revisions, including significantly strengthened conflict of interest provisions.	Residents of long-term care facilities (which includes nursing facilities, assisted living, board and care homes, and similar residential care communities).	• Independence • Confidentiality • Advocacy	Title VII of the OAA outlines the responsibilities of the LTCOP. Section 712(a)(3) provides a list of functions, including: identifying, investigating and resolving complaints made by or on behalf of residents; providing services to assist the residents in protecting the health, safety, welfare, and rights of the residents; ensuring that the residents have regular and timely access to the services provided through the LTCOP; representing the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents; and analyzing, commenting on, and monitoring the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions.	53 State Long-Term Care Ombudsman Programs (all states, DC, PR, and Guam)
	Navy and Coast Guard Family Ombuds	An ombudsman is a volunteer who is, most often, the spouse of an active duty or reserve member, with an option to appoint a reservist or an Auxiliary member as an ombudsman. They assist the commanding officers/officers-in charge (COs/OICs) by providing a better understanding of the welfare of the command/unit's families and helping the units to better prepare families to meet emergency situations. Additionally, an ombudsman allows their members to better achieve mission readiness by helping to ensure their family members have access to available resources when issues or emergent situations arise.	For the Navy: In 1970, Admiral E.R. Zumwalt, Jr., then Chief of Naval Operations (CNO), created the Navy Family Ombudsman Program to improve communication between commands and the families of Sailors who served in them. In 2006, Admiral Michael G. Mullen, CNO, re-emphasized the importance of the program and signed an updated instruction, highlighting the requirement that all Navy families have access to a Navy Family Ombudsman. OPNAVINST 1750.1G Sept 2, 2014. For the Coast Guard COMMANDANT INSTRUCTION 1750.4E 14 January 2013.	Service members' families	Per the Ombudsman Code of Conduct, each ombudsman shall • Support the command's mission • Respect the command and family members • Maintain confidentiality • Avoid conflicts of interest and • Maintain the highest standards of professionalism	The primary purpose of the ombudsman program is to act as a source of information, both to Navy families on resources and services available, and to commanders regarding issues facing Navy families. Similarly, the Coast Guard Ombudsman Program is a Coast Guard-wide program established to serve as a link between commands and families, to help ensure their members' families have the information necessary to meet the challenges of a military lifestyle. The Ombudsman Program assists commanding officers/officers-in charge (COs/OICs) by providing a better understanding of the welfare of the command/unit's families and helping the units to better prepare families to meet emergency situations. Additionally, an ombudsman allows their members to better achieve mission readiness by helping to ensure their family members have access to available resources when issues or emergent situations arise.	Navy Family Ombudsman, The Coast Guard Ombudsman Program; other Services may have similar programs with or without the title of "ombudsman."

Appendix C:

Federal Ombuds Survey

Survey Introduction

Q1.1.

FEDERAL OMBUDS SURVEY

Dear Federal Ombuds Colleagues:

As a member of the Federal Ombuds Community, your experience and knowledge can help to shape the future of ombuds offices throughout the Federal government. Please share your insights and wisdom by participating in the Federal Ombuds Survey described below, which is being funded by the Administrative Conference of the United States (ACUS). David Pritzker, ACUS' Deputy General Counsel, fully endorses this survey, and you can read a bit more about the project in the attached letter from David.

Twenty-five years ago, ACUS Recommendation 90-2 played a pivotal role in encouraging the development of federal ombuds offices. Since that time, the number, prominence, and diversity of federal ombuds offices has grown significantly. Last June, ACUS engaged chiResolutions, LLC (CHI) to undertake a study of current federal ombuds programs and practices so that ACUS may update its recommendations. *See ACUS Federal Ombuds Project*.

This project provides an opportunity to understand the breadth and depth of federal ombuds programs and practices in order to:

1) Identify which agencies currently make use of ombuds and the scope of ombuds activities;
2) Document the activities of ombuds that have improved agency dispute resolution or program functions;
3) Provide updated 'best practices' for the establishment, organization, and operation of ombuds offices; and
4) Highlight opportunities where expanded use of ombuds may benefit agencies.

The results will build an evidence-based platform to help improve practice and inform policy on the various types of federal ombuds programs.

Over 175 federal ombuds offices identified with the assistance of ACUS have been invited

to complete this survey. We request that **each office submit only one survey**, completed by whoever is most knowledgeable about the standards, practices, functions and history of the office. If there is more than one ombudsperson in the office, we encourage the group to discuss the questions prior to completing the survey. **If your agency has more than one type of ombuds office, there should be one survey from each type of office in your agency.**

The survey instrument consists of 46 multiple-choice questions and 9 open-ended questions, and is attached to the invitation **so you may preview it or review it with colleagues prior to responding** through the online format. If you have questions about the survey, please contact us at Ombuds@chiResolutions.com. Our team of research assistants will be available telephonically if you would like assistance completing any part of the survey.

An important component of the ACUS study is to collect documents related to the standards, practices, functions, and history of federal ombuds offices. If your office has any of the kinds of documents listed below and is able to share them with our team, please either attach them to an email to the Project Coordinator at Ombuds@chiResolutions.com or mail a hardcopy to chiResolutions, LLC 1650 Harvard Street NW, #501, Washington, D.C., 20009. If neither of those is a workable option, email Ombuds@chiResolutions.com and we will work out another alternative.

- Office Mission
- Standards of Practice
- Office practices and/or functions issued by agency leadership and/or the ombuds or entity establishing the office (e.g., charter, memorandum of understanding, instruction)
- Position Descriptions
- Reports (annual, congressional, public, etc.)
- Statistics
- Regulations
- Organizational Charts
- Illustrations of Promising or Innovative Practices
- Accomplishments
- Working Group Guidelines
- Any other similar types of documents that might be useful for this study

The survey should take less than one hour to complete. If you choose to complete the survey in more than one session, the software will save your progress and allow you to pick up

where you left off within two weeks of beginning the survey.

Please note that CHI will retain a list of all offices and agencies that have responded to the survey, as well as their responses. This information will be used by the research team to help us analyze the data, identify 4-6 offices that will be invited to participate in more extensive case studies, and to follow up with participants (i.e., to learn more about an innovative practice or clarify a response). ACUS staff has requested that we provide them with a list of the offices that participate, but not the names or contact information of individuals. ACUS will not have access to any individual responses or the identity of individual participants, except for those offices that have offered to participate in the case studies.

Please notify us if you have concerns about these provisions or your ability to participate. **Thank you so very much in advance; we simply cannot accomplish this historic mission without your participation!**

The chiResolutions Federal Ombuds Team:
Mary Rowe, PhD
Neil Katz, PhD
Timothy Hedeen, PhD
Carole Houk, JD
Deborah Katz, JD
Lauren Marx, MS

Q1.2.
Informed Consent to Participate

You are invited to participate in an online survey of Federal Ombuds offices. This survey may take 45-60 minutes to complete; you can leave this survey and return to it within two weeks by following the link in the invitation email.

Please note the following terms of participation in this study:
1) Your participation is fully voluntary, and there are no known risks or incentives;
2) You must be at least 18 years of age to participate;
3) Your responses will be associated with your ombuds office, but individuals will not be identified without express consent; and
4) Your responses will be recorded via a unique link for the exclusive use of the CHI research team. The link will ensure that only invited participants take the survey, allow respondents to

leave and return to the survey within two weeks of starting it, and facilitate voluntary follow-up telephone interviews.

This survey effort is coordinated by chiResolutions and conducted by Dr. Timothy Hedeen of Kennesaw State University (KSU). Research at KSU involving human participants is carried out under the oversight of an Institutional Review Board. Questions or problems regarding these activities should be addressed to the Institutional Review Board at 470-578-2268.

Dr. Hedeen may be reached directly at 470-578-6879 or tkhedeen@kennesaw.edu.

Q1.3. Do you agree to participate in this survey?

Yes, I agree and give my consent to participate in this research project.

No, I do not agree to participate, and will be excluded from the remainder of the questions.

Structure of Ombudsman Position

Q2.1.

Glossary/Definitions

Ombuds/Ombudsperson/Ombudsman - These terms are used interchangeably.

Constituents - Those people who reasonably might contact the ombudsman office in a given year; those you are expected to serve on a regular basis.

Visitor/Complainant - For the purposes of this study, a visitor is an individual, group of individuals, or organization that contacts the ombuds office with an issue. In some practices, a visitor might be called an inquirer or complainant.

Responder - A person whose behavior is the subject of an issue or complaint.

Case - For the purposes of this study, a case occurs when a visitor presents a new problem, issue or set of issues, to the ombuds that results in a discussion or action where the ombuds helps to develop, discuss, offer options or otherwise acts on the concern. A case may or may not require multiple appointments with the visitor and/ or other parties, and may or may not involve more than one issue.

Agency - The department, agency, bureau, or other subdivision, that defines the unit of government covered by your office's ombudsman practice.

Q2.2. What is the title of your office?

Q2.3. In your office, how many people are doing ombuds work (in title or function) in the following ways? *Please enter a numeral for each:*

0 Work full-time as an ombudsperson

0 Work part-time as an ombudsperson and hold no other position within the agency

0 Work part-time as an ombudsperson and part-time in another position within the agency

0 Work part-time as an ombudsperson and part-time as administrative staff supporting the office

0 Are on detail working as an ombudsperson

0 Are in a different full-time position but do ombuds work as a collateral duty. *Please describe other position:*

Q2.4. In addition to those in your office performing ombuds functions, how many individuals in your office fit the following descriptions?

0 Full-time administrative staff supporting ombuds work

0 Part-time administrative staff supporting ombuds work

0 Interns (even if only occasionally)

0 Other, please specify

Q2.5. What is the position series classification number of the most senior ombuds in your

office?

301

343

Other, please specify

Q2.6.
What is the General Schedule level or equivalent grade level of the most senior ombuds in your office?

12 or below

13

14

15

Senior Executive Service

Political Appointee

Other - please describe:

Q2.7. Are there any formal requirements in terms of education or professional certification for some or all of the ombuds in your office?

Yes, please specify:

No

Q2.8. Can the most senior ombuds in your office be removed without due cause?

Yes, please specify:

No

I don't know

Structure of Ombuds Office

Q3.1. When was your office established?

▾

Q3.2. By what action was your office authorized?

Legislative action/statute

An agency official/agency policy

I do not know

Other, please specify

Q3.3.

Does your office have a document that articulates such matters as the office mission, standards of practice, office practices and/or functions, such as a charter, memorandum of understanding, instruction, regulation, or other instrument which was issued by agency leadership and/or the ombuds establishing the office?

Yes

No

Q3.4.

Which of the following elements are addressed within your office's guidelines (whether by statute, charter, MOU, instruction, or other)? And if your office was created by statute, which are defined within that statute? *Please check all that apply:*

	Addressed in office guidelines	Defined by statute
Independence	☐	☐
Confidentiality	☐	☐

Impartiality (without preference for any party)	☐	☐
Neutrality (without preference for any outcome)	☐	☐
Informality (cannot make or change or set aside a policy or management decision)	☐	☐
Fairness	☐	☐
"Credible Review Processes" as defined by USOA	☐	☐
Other notable practices, please specify	☐	☐

Q3.5.

If your office has a charter, memorandum of understanding, instruction, or other instrument issued by agency leadership and/or by the ombuds, what sources were relied upon in drawing up the document(s)? *Please check all that apply:*

American Bar Association (ABA) Standards

International Ombudsman Association (IOA) Standards

US Ombudsman Association (USOA) Standards

Coalition of Federal Ombudsman (COFO)/The Federal Interagency Alternative Dispute Resolution Working Group (IADRWG) Steering Committee guidelines

Coalition of Federal Ombudsman (COFO)

Intelligence Community Directive 203 and Analytic Ombuds Guide and Recommendations 150529

The Whistleblower Protection Enhancement Act of 2012

Federal Acquisition Regulation (FAR), Section 16.505

A statute other than those named above that mandated your office

Our charter was adapted or copied from other ombuds programs of the same type

My predecessor or I drew up the office charter based on the sources checked here

Our charter was drafted with the assistance of fellow ombuds

Other:

I do not know which sources were consulted

Q3.6. To whom does your office report?

Head of agency (see glossary re 'agency')

Chief operating officer or equivalent

Congress

Other senior leadership (e.g. Human Capital Officer, General Counsel), specify

None of the above

Q3.7. Is your office part of an agency function or unit? If so, which one?

Yes - please specify:

No

Standards, Practices, and Functions

Q4.1. Does your office adhere to standards set forth by any of the following? *Please check all that apply:*

The American Bar Association (ABA)

The International Ombudsman Association (IOA)

The United States Ombudsman Association (USOA)

If there are standards unique to your office, please specify anything you think may be significant about your office standards of practice

× I don't know of any standards to which my office adheres

Q4.2.

Which category/ies best describes your office? *Please check all that apply:*

Acquisitions /Procurement Ombudsman Office

Advocate Ombudsman Office

Analytical Ombudsman Office

External Ombudsman Office

Healthcare Ombudsman Office

Internal Workplace Ombudsman Office

Organizational Ombudsman Office

Whistle-blower Ombudsman Office

Other (please specify):

Q4.3. Which constituents are served by your office? *Please check all that apply:*

My office addresses the issues of internal constituents

My office addresses the issues of government employees and managers outside my own agency

My office addresses the issues of external constituents (citizens, vendors, or others, outside the Federal government)

Q4.4.

Does your office seek to resolve issues between or among the following groups? *Please check all that apply:*

Companies, organizations, groups, etc. and your agency

Individual members of the public and your agency

Interagency groups or organizational units

Intra-agency groups or organizational units

Management and an employee or employees

Members of the public and government employees

Peers and colleagues in your agency or others

Other: please specify

Q4.5.

How often does your office deal with the following issues? Some may be very rare or not

applicable. Please add other significant issues.

	Never	Less frequently than monthly	Monthly	Weekly	Daily
Acquisition and procurement questions, suggestions and concerns	○	○	○	○	○
Benefits	○	○	○	○	○
Discrimination/harassment	○	○	○	○	○
Ethics	○	○	○	○	○
Excellence, integrity, and rigor in analytic thinking and work practice	○	○	○	○	○
External constituent concerns from a person or group about the quality and/or effectiveness of government services	○	○	○	○	○
External constituent concerns about the timeliness of government services	○	○	○	○	○
External constituent concerns about government policy, procedures or processes, or lack thereof (includes concerns from specific groups)	○	○	○	○	○
External constituent concerns concerning alleged malfeasance by government employees	○	○	○	○	○
External constituent concerns about agency decisions	○	○	○	○	○
Intra-agency concerns about agency policy or procedures, (includes concerns from specific groups)	○	○	○	○	○
Interagency concerns about government decisions, policies or procedures	○	○	○	○	○
Layoffs, reorganization	○	○	○	○	○
Leadership/ management/supervisor skills	○	○	○	○	○

Mean or abusive behavior, retaliation	○	○	○	○	○
Performance evaluations	○	○	○	○	○
Policy or political disputes	○	○	○	○	○
Promotion/demotion/transfer	○	○	○	○	○
Safety issues (all kinds including fear)	○	○	○	○	○
Suggestions for improving agency operations	○	○	○	○	○
Whistleblowing issues	○	○	○	○	○

Q4.6. In your office, in what instances may confidentiality be breached? *Please check all that apply:*

There is no presumption of confidentiality unless the ombuds explicitly offers confidentiality

Confidentiality is assured except in the rare case that the information provided by the visitor or responder is deemed by the ombuds to raise an imminent risk of serious harm

Confidentiality is assured unless the visitor has given permission for the ombuds to use identifying details

Confidentiality may be breached when the ombudsperson explicitly states that it cannot offer confidentiality

Other - please specify:

Q4.7. How, if at all, does your office advocate? *Please check all that apply:*

For fair and equitably administered processes

On behalf of individuals or groups when the office's investigation indicates that government policy or actions have wrongly or adversely affected these individuals or groups

To publicly support specific government action or advocate for recommended changes

Other - please explain

Q4.8. When, if ever, do your office's standards of practice authorize an ombuds to serve as a witness? *Please check all that apply:*

In a disciplinary process

In an adjudicatory process

Neither of the above

Other - please explain

Q4.9. Which of the following actions, if any, is your office authorized to take? *Please check all that apply:*

Can make binding decisions about cases

Can offer a neutral evaluation or opinion in the situation of a conflict among peers

Can order, mandate, change or set aside agency policies or management decisions (other than those required to manage the ombuds office)

Can adjudicate in an adjudicative process

Q4.10.

If your constituents include agency employees represented by a collective bargaining representative, can your office hear or act on concerns involving the terms and conditions of employment of bargaining unit employees? *Please check all that apply:*

N/A (constituents do not include represented employees)

No

My office can hear concerns only with permission of the collective bargaining representative

My office can act on concerns only with permission of the collective bargaining representative

My office can hear or act without permission of the collective bargaining representative

My office has a written understanding with the union describing under what circumstances my office may handle concerns involving the terms and conditions of employment of bargaining unit employees

The collective bargaining agreement specifies under what circumstances my office may handle such concerns

Q4.11.

Which of the following are included in your office guidelines? *Please check all that apply:*

Using the ombuds office is purely voluntary for a complainant; no one can be required to use the office

Responding to the ombuds office is voluntary for the subject of a complaint (the responder)

The office can listen to constituents who do not identify themselves and the office can respond to anonymous concerns (if appropriate)

The office may hear concerns when raised by an interested third party ("bystander") who appears not directly connected with the concern

Q4.12. What case records does your office keep? *Please check all that apply:*

My office keeps case records with identifying information of those involved

My office keeps case records without any identifying information of those involved

My office keeps statistical records concerning cases without any identifying information of those involved

My office may make temporary working notes on cases but keeps no case records with identifying information

Q4.13. Does your office issue reports of activities? *Please check all that apply:*

Yes, non-public reports to senior management

Yes, reports to Congress

Yes, public reports as a matter of professional practice

Yes, public reports by statutory directive

No

Q4.14.

Which, if any, of the following concerns are you required to report? *Please check all that apply:*

Discrimination

Sexual harassment

Fraud, Waste, Abuse

Criminal behavior

Insider threat

National security concerns

Other (Please specify)

None of the above

Q4.15. Please estimate the number of cases handled by your office in a year, and the percentage of your office's time spent on those cases.

0 Number of cases per year

0 Percentage of office's time

Q4.16. Please estimate the number of ombuds-initiated systemic reviews handled by your office in a year, and the percentage of your office's time spent on these reviews (the prior response and this one may not sum to 100%, as ombuds offices engage in other activities).

0 Number of ombuds-initaited systemic reviews per year

0 Percentage of office's time

Q4.17.
Which of the following actions is your office authorized to take? *Please check all that apply:*

Informally look into administrative actions or omissions
Formally investigate administrative actions or omissions
Issue subpoenas
Make presentations to external constituents
Make recommendations to external constituents
Require agency officials to provide information or documents
Require agency officials to conduct investigations
Require agency officials to issue subpoenas

Q4.18. Does your office have access to independent legal counsel for consultation to the ombuds?

Yes, at any time
Yes, for only the following matters or instances

No, although the office would benefit from such access

No, and the office does not need such access

Q4.19. In a typical year, how often have you or another ombuds in your office consulted with independent legal counsel?

Never, not authorized to do so

Never, although authorized to do so

Less than once a year

Once or twice a year

Three or more times a year

Activities and Assessment

Q5.1. What do you see as your office's most significant contributions? (Some may not be applicable to your office.) *Please check all that apply:*

Contributing to the respect, dignity and fairness with which concerns are handled

Providing a safe way for constituents to discuss perceptions of unsafe or illegal behavior

Helping constituents to develop and use fair and helpful options

Providing effective informal dispute resolution for complainants

Making administrative decisions to resolve specific issues

Helping to prevent problems by coaching one-on-one, and group training and briefings

Supporting the agency with respect to specific mission-related initiatives

Helping the agency to improve specific policies, procedures, or structures

Helping within the agency to keep its organizational processes coordinated

Informally looking into issues of concern

Focusing agency attention on issues of concern

Advocating on behalf of individuals or groups of employees or members of the public with respect to issues of concern

Formally investigating concerns raised to the office

Studying systemic issues and offering recommendations for agency action

Other

Q5.2.

How many times in the past year has the work of your office fostered or contributed to the following?

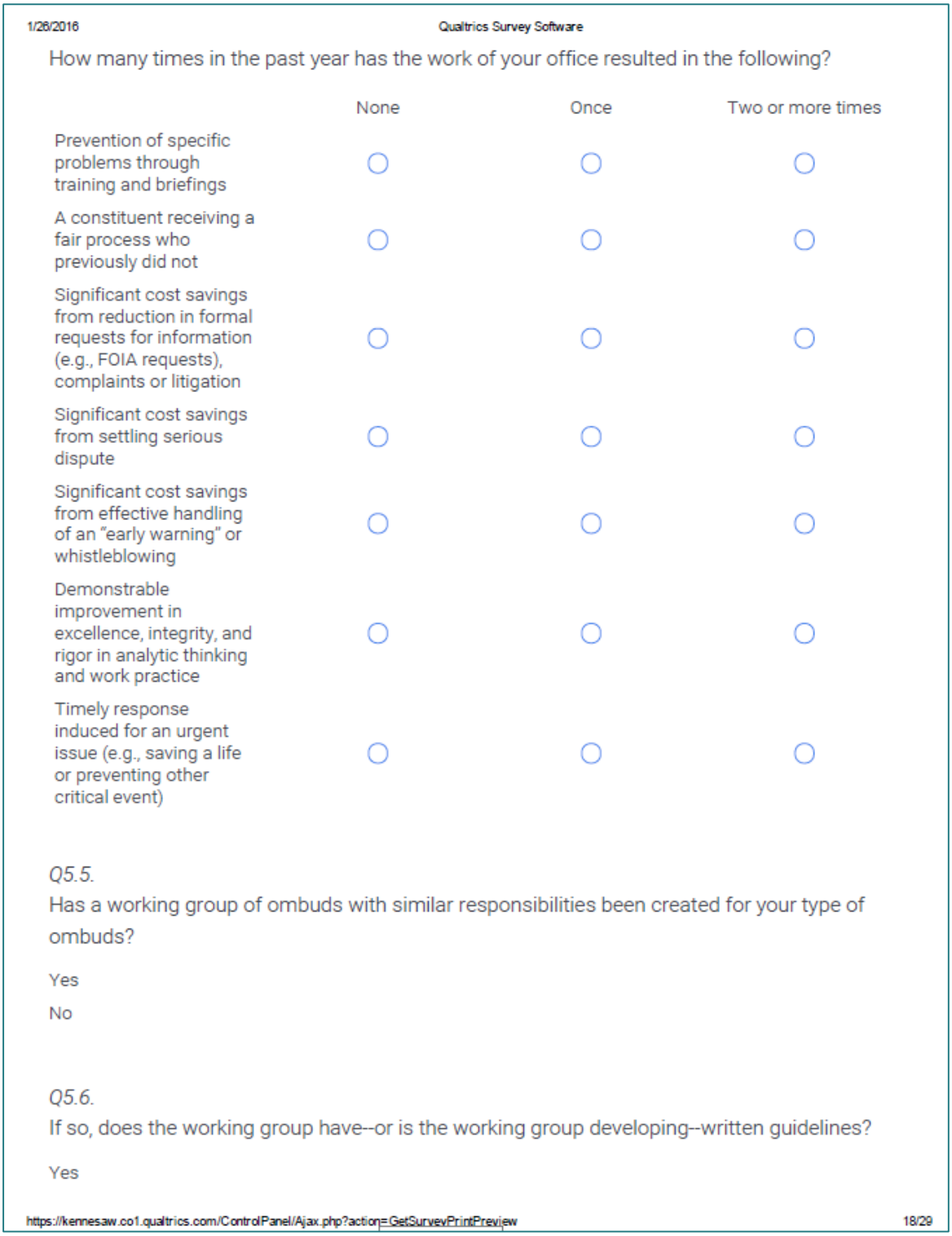
	None	Once	Two or more times
A change in a minor aspect of how a policy works	○	○	○
A significant change in a policy	○	○	○
A change in an agency procedure	○	○	○
A change in an organizational structure	○	○	○
An important liaison between colleagues, units or agencies	○	○	○
Significant improvement in morale in work unit	○	○	○

Q5.3.

How many times in the past year has the work of your office identified the following?

	None	Once	Two or more times
Other significant new issue(s) for the agency	○	○	○
Significant patterns of concerns that were not well known/being ignored	○	○	○

Q5.4.



1/26/2016 Qualtrics Survey Software

How many times in the past year has the work of your office resulted in the following?

	None	Once	Two or more times
Prevention of specific problems through training and briefings	○	○	○
A constituent receiving a fair process who previously did not	○	○	○
Significant cost savings from reduction in formal requests for information (e.g., FOIA requests), complaints or litigation	○	○	○
Significant cost savings from settling serious dispute	○	○	○
Significant cost savings from effective handling of an "early warning" or whistleblowing	○	○	○
Demonstrable improvement in excellence, integrity, and rigor in analytic thinking and work practice	○	○	○
Timely response induced for an urgent issue (e.g., saving a life or preventing other critical event)	○	○	○

Q5.5.

Has a working group of ombuds with similar responsibilities been created for your type of ombuds?

Yes

No

Q5.6.

If so, does the working group have--or is the working group developing--written guidelines?

Yes

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No

Q5.7.

Does your most senior ombudsman receive an official performance review?

Yes

No

Q5.8.

In what ways is the performance of your office assessed? *Please check all that apply:*

I (alone or the office team) regularly self-assess with respect to specific criteria

I (or we) belong to a "working group" of ombuds of the same type and we regularly discuss our work

The person to whom the office reports assesses the office

Independent assessments have occasionally been performed

The ombuds office is included on employee surveys, or 360-degree reviews

Other assessments

There are no regular assessments

Q5.9.

How often are the following functions conducted by ombuds in your office? Some may not be relevant to the practice of your office. *Please check all that apply:*

Working to be seen as fair, safe, accessible, and credible

	Never	Rarely	Sometimes	Often
Delivering respect, with careful attention to the feelings of visitors and responders	○	○	○	○
Providing an "opportunity to be heard"	○	○	○	○
Providing and explaining information, one-on-one, (e.g., about policies and rules; about the context of a concern; explaining the regular avenues and time limits for problem	○	○	○	○

resolution)

Listening to vital information, one-on-one (e.g., from those reporting unacceptable behavior, while providing safe and effective ways to get information where it needs to go)	○	○	○	○
Being alert to urgent issues, and the possibility of an emergency	○	○	○	○
Reframing issues, and developing increased awareness of others' perspectives	○	○	○	○
Helping to develop and evaluate responsible, ethical, and effective options	○	○	○	○
Monitoring the accessibility of the ombuds office, and use by diverse constituents	○	○	○	○
Monitoring the ombuds office response time	○	○	○	○

Q5.10.

Helping people to help themselves

	Never	Rarely	Sometimes	Often
Offering the option of referrals to other resources—including subject matter experts, agencies, compliance and support services	○	○	○	○
Helping visitors to collect, organize and understand their own information	○	○	○	○
Helping visitors (if they choose to do so) to use a direct approach, (e.g., with coaching and role-playing)	○	○	○	○
Teaching special skills as relevant, (e.g., counseling analysts how to protect analytic integrity, timeliness, objectivity, and quality; helping complainants with complex subject matter)	○	○	○	○
Educating constituents about their legal rights with respect to raising issues that are of concern to them or the agency	○	○	○	○

Q5.11.

Informal intervention to work for a fair process

	Never	Rarely	Sometimes	Often
Working with leaders to assuage concerns about retaliation, "getting buy-in" from agency	○	○	○	○

leaders to be seen as approachable and fair				
Offering shuttle diplomacy, inside and outside the agency (e.g., conciliation: among analysts; with individuals; within groups and teams; and between groups)	○	○	○	○
Offering mediation with people inside and/or outside the agency	○	○	○	○
"Looking into" a problem informally	○	○	○	○
Reviewing data files, studies, or other relevant information to make recommendations about a concern or process	○	○	○	○
Facilitating a generic approach to an individual problem, to lead to a fair outcome while protecting the identity of the individual	○	○	○	○
Providing training and briefings for constituents and groups, about policies and processes	○	○	○	○
Bringing together task forces to address an emerging or ongoing issue	○	○	○	○
Running focus groups or meeting confidentially with individuals or sub-groups to prepare an oral report for the group	○	○	○	○
Assisting with process issues involved in an appeals process	○	○	○	○
Following up on a specific case with relevant additional stakeholders	○	○	○	○

Q5.12.

Working within the agency and with all relevant organizational systems

	Never	Rarely	Sometimes	Often
Providing early warning of issues that are "new," in a manner consonant with your standards of practice	○	○	○	○
Keeping ephemeral notes for the ombuds office, and identity-free statistics	○	○	○	○
Identifying and communicating about patterns of issues, and their root causes	○	○	○	○
Serving as neutral facilitators for senior leaders discussing problems, policies or practices	○	○	○	○
Working for specific systems change, (e.g., recommending new policies, procedures, and	○	○	○	○

structures)

Serving as a non-voting resource person for policy committees	○	○	○	○
Helping managers with technological change, professional development, and change management	○	○	○	○
Working to support specific, mission-related, agency initiatives	○	○	○	○
Following up on organizational change recommendations made by the ombudsperson	○	○	○	○
Helping informally to coordinate services across the agency	○	○	○	○
Working informally to influence policies and procedures	○	○	○	○
Working informally to influence legislation and regulations	○	○	○	○

Q5.13.

Other organizational functions

	Never	Rarely	Sometimes	Often
Participating as a voting member on committees	○	○	○	○
Advocating within the agency on behalf of injured persons or parties	○	○	○	○
Keeping records for the office, to record the settlement/outcome of a complaint	○	○	○	○
Keeping records for compliance purposes	○	○	○	○
Maintaining agency records under a record retention schedule established under the Federal Records Act,	○	○	○	○
Conducting formal mediation where recorded settlements are kept by the agency	○	○	○	○
Writing official investigatory reports for the purpose of decision-making and administrative action by managers	○	○	○	○
Issuing official or public reports that recommend specific actions about a case	○	○	○	○
Issuing official or public reports that recommend specific actions about policies and procedures	○	○	○	○

Officially providing input to influence regulations or legislation	○	○	○	○
Acting as advocate or witness in a formal adjudicatory process before a court, arbitrator or administrative tribunal (as distinguished from advocacy for a fair process)	○	○	○	○
Acting as an advocate or witness in the legislative process	○	○	○	○
Accompaniment of a party in a formal adjudicatory process	○	○	○	○
Issuing decisions on appeals that are part of a formal appeal process	○	○	○	○
Making binding decisions about a grievance or conflict, (do not include the very rare case of imminent risk of serious harm, when the ombuds decides to act)	○	○	○	○
Acting as an arbitrator or judge	○	○	○	○

Open-ended Questions

Q6.1. To understand further your insights and experience, we seek your responses to a concluding set of open-ended questions. **Please preview them below, then elect how you'd prefer to respond**:

1. Considering all that your office does, in what ways do you think your work is adding the most value?

2. What changes would you suggest to improve, and also to demonstrate the value of your office?

3a. As an ombuds, what would you like to spend more time on?
3b. ... less time on?

4. What elements of your ombuds work give you the most personal satisfaction?

5. We seek illustrations of promising practices AND innovations among federal ombuds offices. Has your office initiated any efforts or practices you consider promising or innovative? Please describe them.

6. Have statutory or legal requirements or limitations affected your ability to fully comply with the ethics or standards of practice applicable to your office (e.g., confidentiality)?

7. What would you say to ACUS regarding the NEED and VALUE of ombudspersons in federal agencies now and in the near future?

8. What specific recommendations about ombuds would you want ACUS to consider?

9. Please feel free to share any additional information about the structure, standards, functions, innovations, or practices of your office that you believe were not covered in the survey, or that need clarification, and should be included.

We offer you two ways to respond to these questions:

I would prefer to respond within this online survey

I would prefer to respond through a telephone interview [please note that the researcher conducting the interview will not have access to any of the preceding responses]

Q6.2.
Considering all that your office does, in what ways do you think your work is adding the most value?

Q6.3.
What changes would you suggest to improve, and also to demonstrate the value of your office?

Q6.4. As an ombuds, what would you like to spend more time on?

Q6.5. As an ombuds, what would you like to spend less time on?

Q6.6.
What elements of your ombuds work give you the most personal satisfaction?

Q6.7.
We seek illustrations of promising practices AND innovations among federal ombuds offices. Has your office initiated any efforts or practices you consider promising or innovative? Please describe them.

Q6.8.
Have statutory or legal requirements or limitations affected your ability to fully comply with the

ethics or standards of practice applicable to your office (e.g., confidentiality)?

Q6.9.
What would you say to ACUS regarding the NEED and VALUE of ombudspersons in federal agencies now and in the near future?

Q6.10.
What specific recommendations about ombuds would you want ACUS to consider?

Q6.11.
Please feel free to share any additional information about the structure, standards, functions, innovations, or practices of your office that you believe were not covered in the survey, or that need clarification, and should be included.

Q6.12. If you would like to be contacted to offer or expand your responses to these open-ended

questions, or would be willing to participate in a voluntary telephone interview as we develop case studies of selected offices, please indicate your name and preferred contact information in the box below, **or** email us at Ombuds@chiResolutions.com. Please note that researchers will not have access to your online survey responses.

Q6.13. Thank you for your participation in this survey! Please remember to send by mail or email documents listed in the invitation to this survey.

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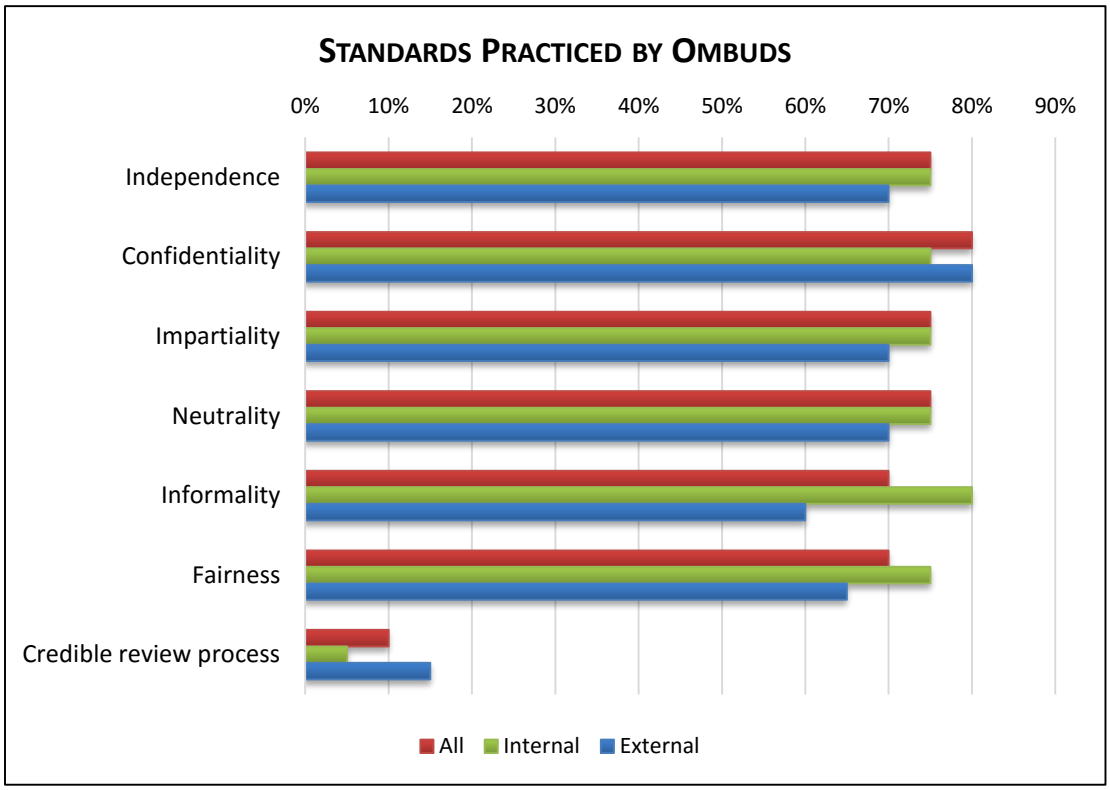
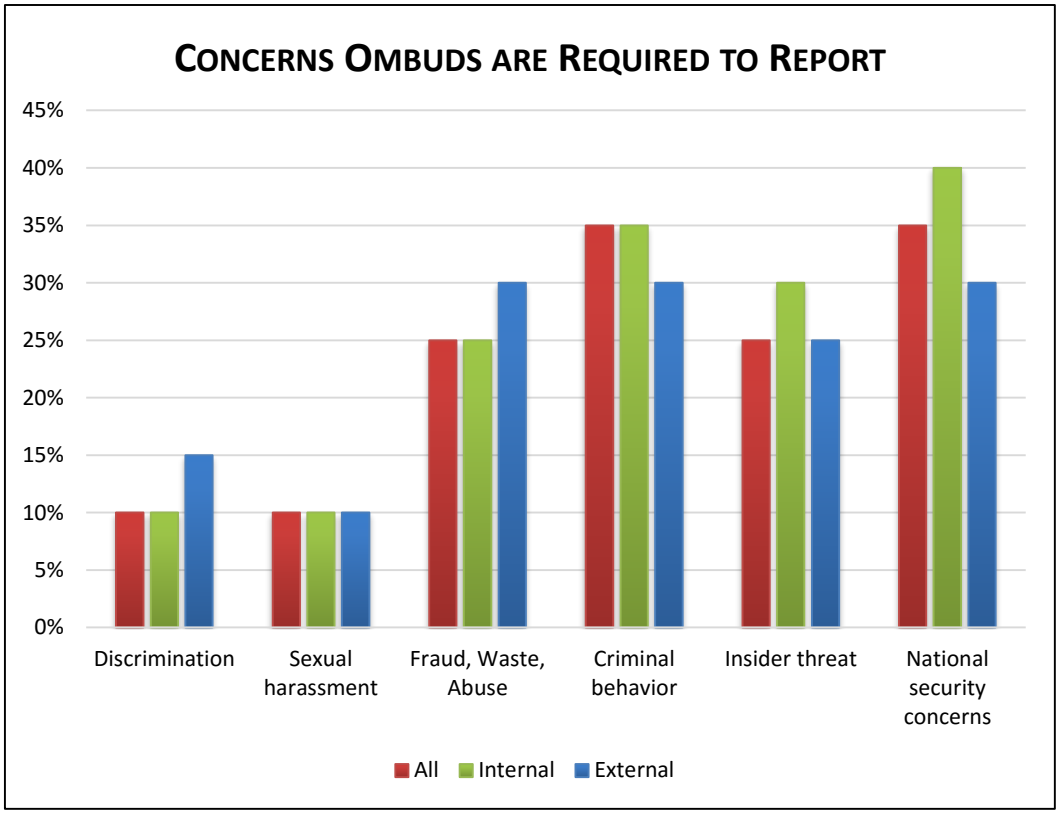
Appendix D:

Selected Charts from Quantitative Survey

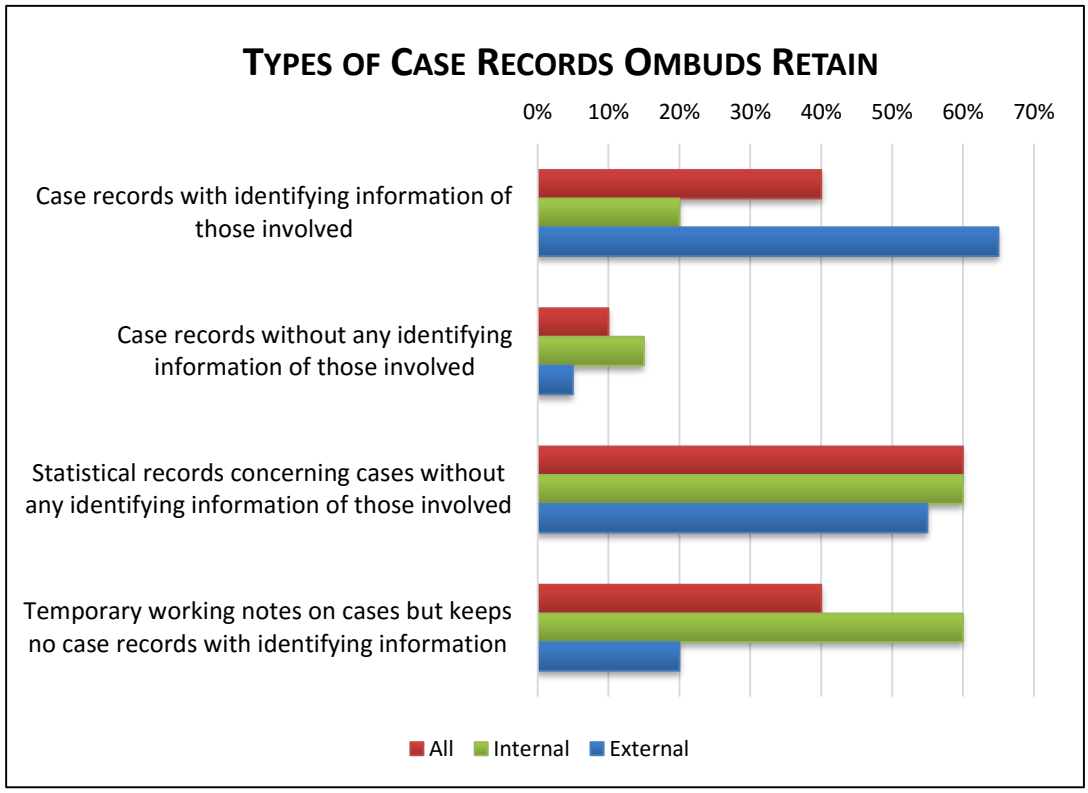
Note: We have rounded percentages in these tables to the nearest 5 percent, to make clear that the data are not "generalizable" in a scientific sense.



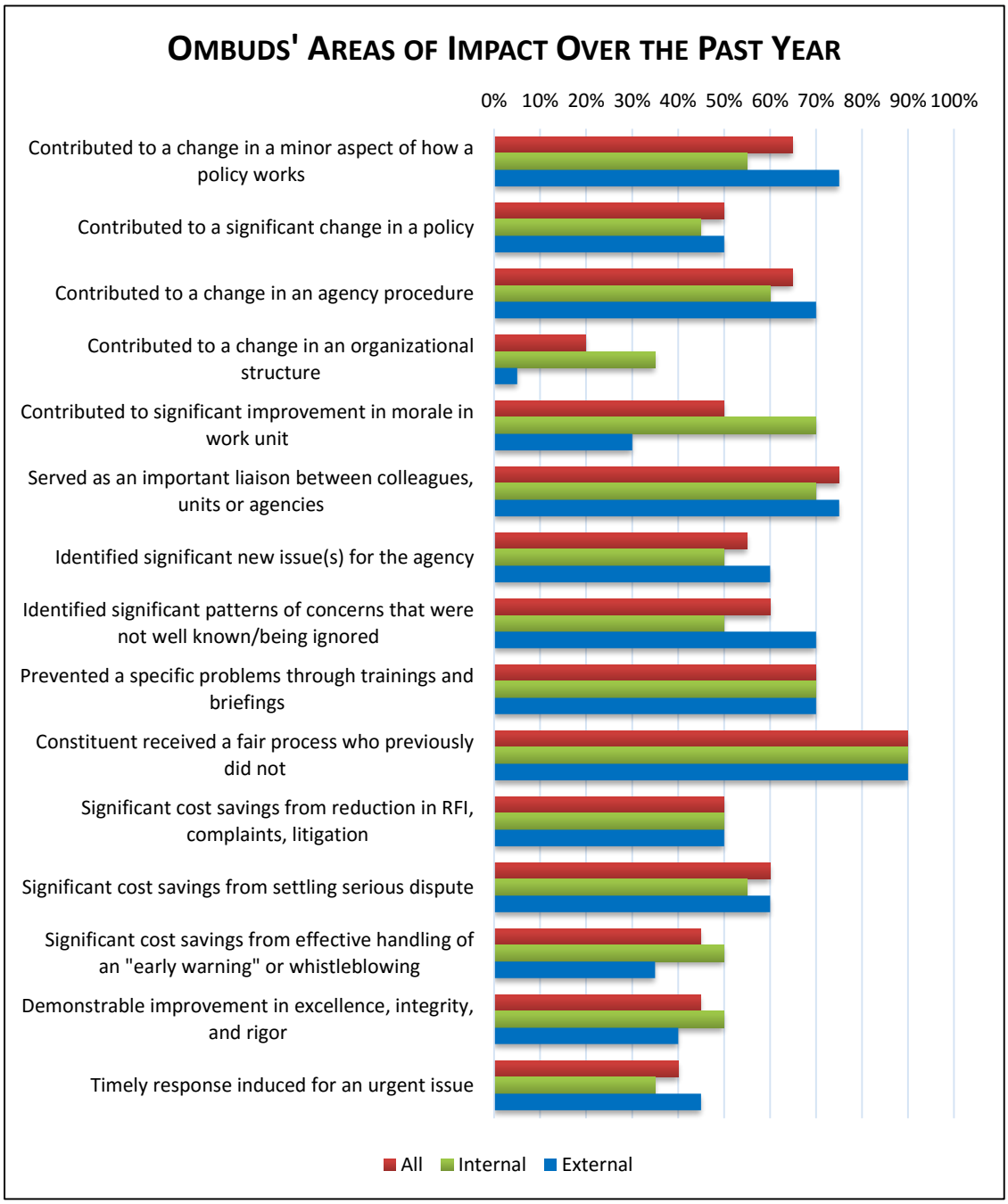
STANDARDS PRACTICED BY OMBUDS			
	ALL	INTERNALS	EXTERNALS
Independence	75%	75%	70%
Confidentiality	80%	75%	80%
Impartiality	75%	75%	70%
Neutrality	75%	75%	70%
Informality	70%	80%	60%
Fairness	70%	75%	65%
Credible review process	10%	5%	15%



CONCERNS OMBUDS ARE REQUIRED TO REPORT			
	ALL	INTERNALS	EXTERNALS
Discrimination	10%	10%	15%
Sexual harassment	10%	10%	10%
Fraud, Waste, Abuse	25%	25%	30%
Criminal behavior	35%	35%	30%
Insider threat	25%	30%	25%
National security concerns	35%	40%	30%

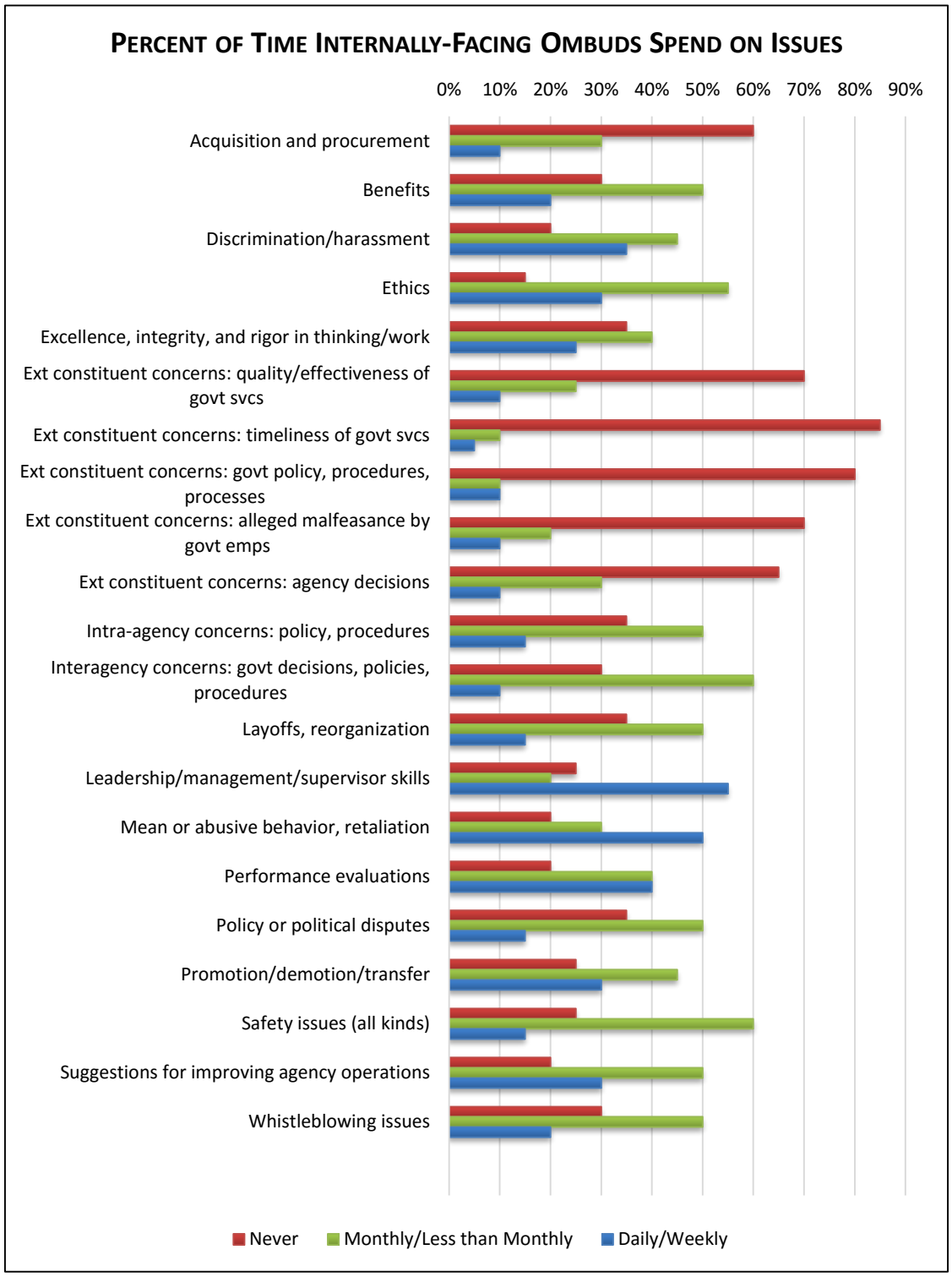


TYPES OF CASE RECORDS OMBUDS RETAIN			
	ALL	INTERNALS	EXTERNALS
Case records with identifying information of those involved	40%	20%	65%
Case records without any identifying information of those involved	10%	15%	5%
Statistical records concerning cases without any identifying information of those involved	60%	60%	55%
Temporary working notes on cases but keeps no case records with identifying information	40%	60%	20%

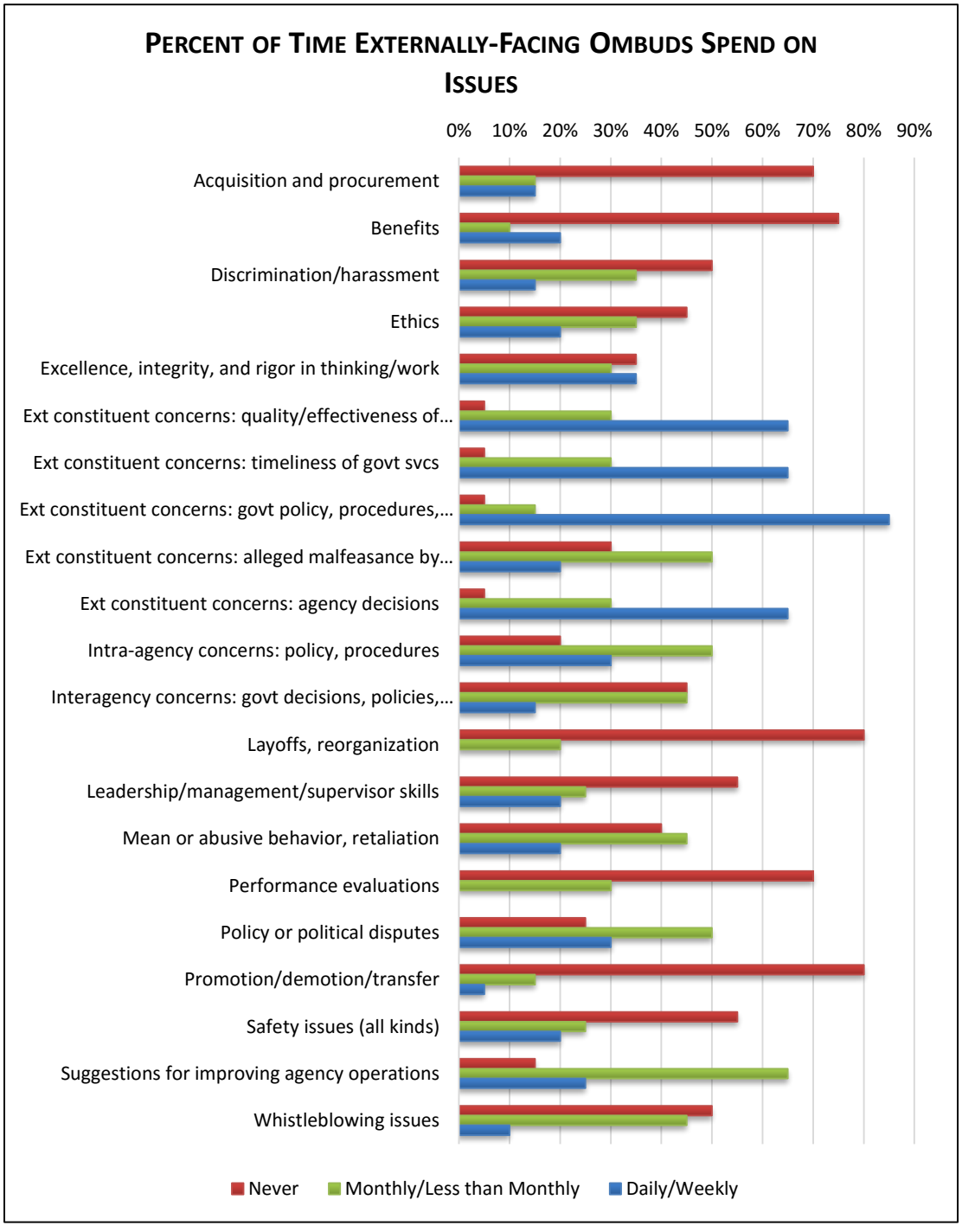

OMBUDS' AREAS OF IMPACT OVER THE PAST YEAR
0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%
Contributed to a change in a minor aspect of how a policy works
Contributed to a significant change in a policy
Contributed to a change in an agency procedure
Contributed to a change in an organizational structure
Contributed to significant improvement in morale in work unit
Served as an important liaison between colleagues, units or agencies
Identified significant new issue(s) for the agency
Identified significant patterns of concerns that were not well known/being ignored
Prevented a specific problems through trainings and briefings
Constituent received a fair process who previously did not
Significant cost savings from reduction in RFI, complaints, litigation
Significant cost savings from settling serious dispute
Significant cost savings from effective handling of an "early warning" or whistleblowing
Demonstrable improvement in excellence, integrity, and rigor
Timely response induced for an urgent issue
All
Internal
External

OMBUDS' AREAS OF IMPACT OVER THE PAST YEAR			
	ALL	INTERNALS	EXTERNALS
Contributed to a change in a minor aspect of how a policy works	65%	55%	75%
Contributed to a significant change in a policy	50%	45%	50%
Contributed to a change in an agency procedure	65%	60%	70%
Contributed to a change in an organizational structure	20%	35%	5%
Contributed to significant improvement in morale in work unit	50%	70%	30%
Served as an important liaison between colleagues, units or agencies	75%	70%	75%
Identified significant new issue(s) for the agency	55%	50%	60%
Identified significant patterns of concerns that were unknown/ignored	60%	50%	70%
Prevented a specific problems through trainings & briefings	70%	70%	70%
Constituent received a fair process who previously did not	90%	90%	90%
Significant cost savings from reduction in RFI, complaints, litigation	50%	50%	50%
Significant cost savings from settling serious dispute	60%	55%	60%
Significant cost savings from effective handling of an "early warning" or whistleblowing	45%	50%	35%
Demonstrable improvement in excellence, integrity, & rigor	45%	50%	40%
Timely response induced for an urgent issue	40%	35%	45%

SIGNIFICANT CONTRIBUTIONS OF THE OFFICE			
	ALL	INTERNALS	EXTERNALS
Contribute to the respect, dignity and fairness with which concerns are handled	90%	90%	90%
Provide a safe way for constituents to discuss perceptions of unsafe or illegal behavior	50%	65%	35%
Help constituents to develop and use fair and helpful options	75%	85%	70%
Provide effective informal dispute resolution for complainants	70%	70%	70%
Make administrative decisions to resolve specific issues	10%	10%	15%
Help prevent problems by individual coaching and group training/briefings	45%	60%	30%
Support the agency with respect to specific mission-related initiatives	35%	20%	50%
Help the agency to improve specific policies, procedures, or structures	55%	40%	70%
Help within the agency to keep its organizational processes coordinated	25%	10%	45%
Informally look into issues of concern	75%	75%	70%
Focus agency attention on issues of concern	65%	60%	70%
Advocate on behalf of individuals or groups	20%	10%	30%
Formally investigate concerns raised to the office	10%	10%	5%
Study systemic issues and offer recommendations for agency action	55%	60%	50%


PERCENT OF TIME INTERNALLY-FACING OMBUDS SPEND ON ISSUES
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
Acquisition and procurement
Benefits
Discrimination/harassment
Ethics
Excellence, integrity, and rigor in thinking/work
Ext constituent concerns: quality/effectiveness of govt svcs
Ext constituent concerns: timeliness of govt svcs
Ext constituent concerns: govt policy, procedures, processes
Ext constituent concerns: alleged malfeasance by govt emps
Ext constituent concerns: agency decisions
Intra-agency concerns: policy, procedures
Interagency concerns: govt decisions, policies, procedures
Layoffs, reorganization
Leadership/management/supervisor skills
Mean or abusive behavior, retaliation
Performance evaluations
Policy or political disputes
Promotion/demotion/transfer
Safety issues (all kinds)
Suggestions for improving agency operations
Whistleblowing issues
Never
Monthly/Less than Monthly
Daily/Weekly

PERCENTAGE OF TIME INTERNALLY-FACING OMBUDS SPEND ON SELECT ISSUES			
	NEVER	MONTHLY/ LESS THAN MONTHLY	DAILY/ WEEKLY
Acquisition and procurement	60%	30%	10%
Benefits	30%	50%	20%
Discrimination/harassment	20%	45%	35%
Ethics	15%	55%	30%
Excellence, integrity, and rigor in thinking/work	35%	40%	25%
Ext constituent concerns: quality/effectiveness of govt services	70%	25%	10%
Ext constituent concerns: timeliness of govt services	85%	10%	5%
Ext constituent concerns: govt policy, procedures, processes	80%	10%	10%
Ext constituent concerns: alleged malfeasance by govt emps	70%	20%	10%
Ext constituent concerns: agency decisions	65%	30%	10%
Intra-agency concerns: policy, procedures	35%	50%	15%
Interagency concerns: govt decisions, policies, procedures	30%	60%	10%
Layoffs, reorganization	35%	50%	15%
Leadership/management/supervisor skills	25%	20%	55%
Mean or abusive behavior, retaliation	20%	30%	50%
Performance evaluations	20%	40%	40%
Policy or political disputes	35%	50%	15%
Promotion/demotion/transfer	25%	45%	30%
Safety issues (all kinds)	25%	60%	15%
Suggestions for improving agency operations	20%	50%	30%
Whistleblowing issues	30%	50%	20%


PERCENT OF TIME EXTERNALLY-FACING OMBUDS SPEND ON ISSUES
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
Acquisition and procurement
Benefits
Discrimination/harassment
Ethics
Excellence, integrity, and rigor in thinking/work
Ext constituent concerns: quality/effectiveness of...
Ext constituent concerns: timeliness of govt svcs
Ext constituent concerns: govt policy, procedures,...
Ext constituent concerns: alleged malfeasance by...
Ext constituent concerns: agency decisions
Intra-agency concerns: policy, procedures
Interagency concerns: govt decisions, policies,...
Layoffs, reorganization
Leadership/management/supervisor skills
Mean or abusive behavior, retaliation
Performance evaluations
Policy or political disputes
Promotion/demotion/transfer
Safety issues (all kinds)
Suggestions for improving agency operations
Whistleblowing issues
Never
Monthly/Less than Monthly
Daily/Weekly

PERCENTAGE OF TIME EXTERNALLY-FACING OMBUDS SPEND ON SELECT ISSUES			
	NEVER	MONTHLY/ LESS THAN MONTHLY	DAILY/ WEEKLY
Acquisition and procurement	70%	15%	15%
Benefits	75%	10%	20%
Discrimination/harassment	50%	35%	15%
Ethics	45%	35%	20%
Excellence, integrity, and rigor in thinking/work	35%	30%	35%
Ext constituent concerns: quality/effectiveness of gov't services	5%	30%	65%
Ext constituent concerns: timeliness of gov't services	5%	30%	65%
Ext constituent concerns: gov't policy, procedures, processes	5%	15%	85%
Ext constituent concerns: alleged malfeasance by gov't employees	30%	50%	20%
Ext constituent concerns: agency decisions	5%	30%	65%
Intra-agency concerns: policy, procedures	20%	50%	30%
Interagency concerns: gov't decisions, policies, procedures	45%	45%	15%
Layoffs, reorganization	80%	20%	0%
Leadership/management/supervisor skills	55%	25%	20%
Mean or abusive behavior, retaliation	40%	45%	20%
Performance evaluations	70%	30%	0%
Policy or political disputes	25%	50%	30%
Promotion/demotion/transfer	80%	15%	5%
Safety issues (all kinds)	55%	25%	20%
Suggestions for improving agency operations	15%	65%	25%
Whistleblowing issues	50%	45%	10%

FREQUENCY WITH WHICH OMBUDS CONDUCT THE FOLLOWING FUNCTIONS: *WORKING TO BE SEEN AS FAIR, SAFE, ACCESSIBLE, AND CREDIBLE.*				
	INTERNALS		EXTERNALS	
	Never/ Rarely	*Sometimes/ Often*	*Never/ Rarely*	*Sometimes/ Often*
Delivering respect, with careful attention to the feelings of visitors and responders	10%	90%	5%	95%
Providing an "opportunity to be heard"	10%	90%	5%	95%
Providing and explaining information, one-on-one,	5%	95%	5%	95%
Listening to vital information, one-on-one	10%	90%	10%	90%
Being alert to urgent issues, and the possibility of an emergency	40%	60%	20%	80%
Reframing issues, and developing increased awareness of others' perspectives	20%	80%	5%	95%
Helping to develop and evaluate responsible, ethical, and effective options	25%	75%	20%	80%
Monitoring the accessibility of the ombuds office, and use by diverse constituents	25%	75%	35%	65%
Monitoring the ombuds office response time	25%	75%	25%	75%

FREQUENCY WITH WHICH OMBUDS CONDUCT THE FOLLOWING FUNCTIONS: *WORKING WITHIN THE AGENCY AND WITH ALL RELEVANT ORGANIZATIONAL SYSTEMS.*				
	INTERNALS		EXTERNALS	
	Never/ Rarely	*Sometimes/ Often*	*Never/ Rarely*	*Sometimes/ Often*
Providing early warning of issues that are "new," in a manner consonant with your SOPs	40%	60%	20%	80%
Keeping ephemeral notes for the ombuds office, and identity-free statistics	30%	70%	30%	70%
Identifying and communicating about patterns of issues, and their root causes	40%	60%	15%	85%
Serving as neutral facilitators for senior leaders discussing problems, policies or practices	60%	40%	65%	35%
Working for specific systems change	65%	35%	40%	60%
Serving as a non-voting resource for policy committees	85%	15%	80%	20%
Helping managers with technological change, professional development, and change mgmt	60%	40%	85%	15%
Supporting specific, mission-related, agency initiatives	80%	20%	45%	55%
Following up on organizational change recommendations made by ombuds	65%	35%	55%	45%
Helping informally to coordinate services across the agency	70%	30%	50%	50%
Working informally to influence policies and procedures	55%	45%	30%	70%
Working informally to influence legislation and regulations	90%	10%	70%	30%

FREQUENCY WITH WHICH OMBUDS CONDUCT THE FOLLOWING FUNCTIONS: *INFORMAL INTERVENTION TO WORK FOR A FAIR PROCESS.*				
	INTERNALS		**EXTERNALS**	
	Never/ Rarely	*Sometimes/ Often*	*Never/ Rarely*	*Sometimes/ Often*
Working with leaders to assuage concerns about retaliation, helping leaders to be seen as approachable and fair	25%	75%	45%	55%
Offering shuttle diplomacy, inside and outside	45%	55%	35%	65%
Offering mediation with people inside and/or	45%	55%	55%	45%
"Looking into" a problem informally	25%	75%	15%	85%
Reviewing data files, studies, or other relevant information to make recommendations about a concern	60%	40%	20%	80%
Facilitating a generic approach to an individual problem	30%	70%	35%	65%
Providing training and briefings for constituents and groups	50%	50%	35%	65%
Bringing together task forces	80%	20%	75%	25%
Running focus groups	70%	30%	85%	15%
Assisting with process issues involved in an appeals process	85%	15%	50%	50%
Following up on a case with relevant additional stakeholders	40%	60%	35%	65%

FREQUENCY WITH WHICH OMBUDS CONDUCT THE FOLLOWING FUNCTIONS: *HELPING PEOPLE TO HELP THEMSELVES.*				
	INTERNALS		**EXTERNALS**	
	Never/ Rarely	*Sometimes/ Often*	*Never/ Rarely*	*Sometimes/ Often*
Offering the option of referrals to other resources—including subject matter experts	10%	90%	5%	95%
Helping visitors to collect, organize and understand their own information	20%	80%	25%	75%
Helping visitors (if they choose to do so) to use a direct approach	30%	70%	50%	50%
Teaching special skills as relevant, (e.g.,	70%	30%	65%	40%
Educating constituents about their legal rights	35%	65%	35%	65%

FREQUENCY WITH WHICH OMBUDS CONDUCT THE FOLLOWING FUNCTIONS: *OTHER ORGANIZATIONAL FUNCTIONS.*				
	INTERNALS		EXTERNALS	
	Never/ Rarely	*Sometimes/ Often*	*Never/ Rarely*	*Sometimes/ Often*
Participating as a voting member on committees	100%	0%	90%	10%
Advocating within the agency on behalf of injured person or parties	90%	10%	65%	35%
Keeping records for the office, to record the settlement/outcome	75%	25%	40%	65%
Keeping records for compliance purposes	80%	20%	50%	50%
Maintaining agency records under a record retention schedule under FRA	55%	45%	35%	65%
Conducting formal mediation where recorded settlements are kept by the agency	90%	10%	90%	10%
Writing official investigatory reports for the purpose of decision-making and admin action by managers	90%	10%	95%	5%
Issuing official or public reports that recommend specific actions about a case	90%	10%	95%	5%
Issuing official or public reports that recommend specific actions about policies and procedures	95%	5%	85%	15%
Officially providing input to effect regulations or legislation	95%	5%	75%	25%
Acting as an advocate or witness in the legislative process	100%	0%	85%	15%
Issuing decisions on appeals as part of a formal process	100%	0%	100%	0%
Making binding decisions about a grievance or conflict	100%	0%	100%	0%

Appendix E:

Thematic Qualitative Survey Analysis

The material in this report summarizes responses from 54 offices offering ombuds services in the federal government to nine, open-ended, qualitative survey questions (see Appendix C). The responses were collected between February and March of 2016. It is designed to identify the points the ombuds believed most important to address and with what frequency. This document provides a partial basis for our recommendations and for themes further explored in the case study portion of this project. As we mentioned in previous sections, the survey sought responses at the **office level,** as such we can assume the data collected most likely represents the information of several hundred underlying ombuds.

Respondents had a choice of completing the open-ended questions electronically along with the other components of the survey or telephonically in more of an interview format conducted by a graduate student at Nova Southeastern University, Ft. Lauderdale, FL, who would record their responses. Thirty respondents or 56 percent overall chose the telephonic interview.

Open-Ended Interview Questions Asked in Electronic Survey and/or Phone Interview

To understand further your insights and experience, we seek your responses to a concluding set of open-ended questions.

1. Considering all that your office does, in what ways do you think your work is adding the most value?

2. What changes would you suggest to improve, and also to demonstrate the value of your office?

3. As an ombuds, what would you like to spend more time on? Less time on?

4. What elements of your ombuds work give you the most personal satisfaction?

5. We seek illustrations of promising practices AND innovations among federal ombuds offices. Has your office initiated any efforts or practices you consider promising or innovative? Please describe them.

6. Have statutory or legal requirements or limitations affected your ability to fully comply with the ethics or standards of practice applicable to your office (e.g., confidentiality)?

7. What would you say to ACUS regarding the NEED and VALUE of ombudspersons in federal agencies now and in the near future?

8. What specific recommendations about ombuds would you want ACUS to consider?

9. Please feel free to share any additional information about the structure, standards, functions, innovations, or practices of your office that you believe were not covered in the survey, or that need clarification, and should be included.

Methodology

For the qualitative portion of this study, comparative analysis was applied through varying methodologies and utilized a coding system which encompassed the coding traditions of several grounded theorists (Gibbs, 2007; Glaser & Strauss, 2012, 1967), in particular Charmaz (2006). The initial step involved the open coding of all of the respondents' statements (Gibbs, 2007) using the qualitative software program QSR NVivo 10. In this step, each sentence in a respondent's response is coded to identify the main idea. The second coding step involved "focused coding" as described by Charmaz (2006, p. 57). With focused coding we identify common keywords or phrases that are then used to create "parent nodes." Parent nodes are used to consolidate the "most significant and frequently used codes identified in [the] open coding process" (Charmaz, 2006, p. 57). The third step was "axial coding" as described by (Charmaz, 2006), which created and related categories and reassembled the data to "give coherence to emerging data" (p.60). This is when key themes in the data become evident.

The writing of the narrative then unbundles the data collected under each theme. Once a theme has been identified, the qualitative software, NVivo 10, allows the researcher to go back to the original data so the voice of the respondent is portrayed as accurately as possible when composing the thematic analysis. Sample quotes are used to demonstrate or illustrate the various aspects of each theme, adhering as closely to the respondents' context as possible.

A thematic analysis has several goals. The first is to identify those themes in which respondents placed the greatest significance. This is achieved by determining the number of codes per theme and providing a table (table 2) indicating the frequency of responses under each theme and a thematic narration using the responses provided. The second goal is to give equal voice to each respondent while protecting anonymity. This is achieved by the elimination of identifying information regarding the respondent and coding each sentence. In the analysis, phrases or key words from the respondents will be quoted ensuring that the data presented include the voices of all respondents. This part of the process also limits any potential researcher bias since all responses are captured somewhere in the report. The frequency of comments on a theme provides an objective weighting process. The final goal is to convey all the data provided within the thematic structure while giving emphasis on the most prevalent or shared views. This goal is achieved by providing a complete picture of all responses with some guidance as to comments that were stated in much of the same way by a few (less than 5), a significant number (more than 5) or many respondents as opposed to isolated comments by a single respondent. In addition, there may be subsets of a theme in which some respondents indicated that they were on one side of an issue while other respondents had a different perspective. It is also likely that a comment may appear under more than one theme if the comment is relevant to more than one. Particular to this study, there was a structured format survey that the respondents followed. The

narrative summary includes the key word from the underlying survey so that the reader can determine which of the survey questions elicited the response.

We selected this methodology specifically because it is consistent with the academic standards of well-regarded qualitative research including transparency and objectivity, and, most importantly, to lend respondent initiated empirical evidence to any recommendations emerging from our survey and the report.

Although the majority of this analysis captures the thought and feelings of the respondents in their own words, we present **Table 2** to illustrate the "parent nodes" of themes frequently mentioned. The table also gives one an indication which subjects the respondents, as opposed to the researchers, deemed most significant to comment on in response to the open-ended questions.

Table 2

Table of Thematic Node Analysis

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Training and Education

The survey analysis demonstrated that the most significant amount of content was on training and education. Four sub-themes were evidenced: the training requirements for ombuds;

training as a part of the service provided by the ombuds, including providing training to employees; and in the case of external facing ombuds, training of visitors.

The majority of respondents revealed interest in ACUS and others understanding the importance of consistent, formal, federal government-wide training—for all holding the position of ombuds—to ensure standardization of practice. It was stressed that "single purpose" ombuds do not receive training typically associated with the ombuds position. In discussing various types of ombuds, it was recommended that there might be two training tracks: one for internal, and one for external ombuds. The issue of cross training for ombuds was also discussed.

Mentorship of ombuds was a key sub-theme. The activity of mentorship was significant in several contexts: as a best practice, as a recommendation, as something they would like to dedicate more time towards, and as a source of great satisfaction. There were recommendations that interagency mentoring was a need particularly for one-person offices. This was identified as a need by some ombuds and as a best practice by others. Another recommendation was that there be a rotation process for associate ombuds. Those who have been ombuds for some time feel they have experience that new ombuds would benefit from. Along the same vein was the discussion of shadowing other ombuds. Shadowing was viewed as a best practice by several ombuds. This ombuds response provides an excellent summary of the discussion on enhanced training: "the value they add improves in accordance with properly trained ombuds."

The second area of focus for the theme of training and education is the discussion of the role of ombuds as trainers (one addressed it as "conflict coaching"). The theme of providing training for constituents was heavily viewed as an area of best practice. A number of offices reported creating training modules, programs and videos as a best practice and one ombuds reported providing a "quarterly conflict resolution series" while several others reported having group trainings or facilitating group sessions as a best practice. A number also reported a need

for specific conflict resolution skills trainings either as a best practice or an activity they would like to spend more time on. One ombuds recommended increasing the *capacity* to be able to train more people in conflict resolution while another discussed it as a change they would like to implement. Several others focused on providing training as a preventative tool. This activity was mentioned both as something they would like to devote more time to and as a best practice. Others also mentioned training and education in "conflict competence" as an area where they bring value.

A significant finding was that both internal and external ombuds all acknowledged the need for education about the role of the ombuds. A sub-topic of training activities emerged as a result of the office structure—in particular, internal versus external. Internal ombuds focused training discussions on enhancing efforts to interact with employees, including speaking at employee forums. An external ombuds broached the same topic from a different perspective of training both government and industry on how engagement with an ombuds office could be helpful. Another presented, as an innovation, the insertion of an ombuds into a "relevant leadership development program." A common thread appeared from those working with contractors and training. They expressed wanting to spend more time training the contractors on concerns "specific to contractors, such as guidelines for federal procurement."

Communication

The theme of communication was an area of great emphasis among the ombuds. There was a great deal of commonality in the themes of the communication gap between individuals and small businesses with the government, as well as the need for enhanced communication amongst all federal ombuds. The themes centered on the desire to bring this topic to the attention of ACUS; the value they feel that "enhancing communication" brings to the table; and the satisfaction they derive from being a conduit in the communication process.

The ombuds were fairly consistent in their desire that ACUS and others be aware of the sizeable communication gaps that exist in government bureaucracies and that the ombuds role is needed to fill that gap. One of the primary gaps identified is between governmental employees and top-level leaders. Another significant gap is between the individual and government where an individual's interests may be overlooked by the agency. The ombuds note that they provide a valuable tool for filling that gap and for dealing with issues at the lowest possible level. One agency discussed the importance of handling "5000 inquiries every year" and moving constituents in "the right direction" to address their concerns. In addition, one respondent felt strongly that "[a]ll federal agencies that deal with external agencies need an ombudsman." There were a few that commented on understanding the difference between the role of the ombuds and the Inspector General and that the "vast majority of problems don't require an IG investigator, investigation or audit to address."

The ombuds feel they provide significant value by providing a voice and an option for resolution for populations that would otherwise have limited options. The ability to bridge this communication gap or "bridge building" is a value numerous ombuds cited and it brings them great satisfaction. They note that they are able to bring this value not only to individuals but between offices and program managers through the "ability to change the narrative", enhance "collaboration" and "collegial networking," and serve as a point of contact or communication across "multiple levels." They find satisfaction in helping people communicate with their agency, providing information and resources to the public (including data and technical assistance to grantees), providing "clarity" on issues, the roles and location of agency resources, helping resolve conflict—and also in the transformative process that can emerge from genuine dialogue. A number cited the importance of "one to one" meetings and bringing a personal "transparency" to government rather than an "automated response." This transparency provides

an "unprecedented honesty." Several responses noted that they want more time to engage in direct "face to face," "one to one" and "group" communication.

Another area of interest is the desire for an increase in communication among ombuds as evidenced by a best practices recommendation of implementing an "ombuds forum" as a means for exchanging information and "providing unattributed feedback to the agency" perhaps to be "summarized with recommendations in the annual report." Another stated they would like "forums that allow exchange of ideas and information but don't formalize procedure." Several requested more time to "collaborate" with other ombuds and enhance "interagency collaborations."

Ombuds and Organizational Hierarchy

A theme that appeared consistently throughout the interviews was the issue of ombuds' and their organizational status. Status identification is discussed in the following patterns: an ombuds should enter the agency at relatively senior grade; an ombuds must have access to the most senior leaders in the agency; and leadership must "buy in" to their role's value, as well as "understand and champion" the benefit of a "comprehensive conflict resolution system." To be effective, the value of ombuds should be championed from the top down.

The greatest number of comments centered on the discussion that, in order for the ombuds to be effective, they need to have a minimum grade level. The lowest level recommended was a "GS-14" and some stated "GS-15" would be appropriate. One established office noted, "[w]hat's happened now is that more recently OPM is taking a different stance at classification and so we're not able to replace our ombuds at the same level as the 14 level which is problematic." Several respondents commented that the existence of grading ombuds at a low level is problematic and impeded their ability to effect change**.** The following is a

representational comment, "[e]levate the role of the head of the office to SES so it is not seen as subordinate to other senior leaders."

It was also suggested that there should be a "separate career field" designated for ombuds. There was a request for an organizational chart that would demonstrate where the federal ombuds position falls. One goes on to request that the Office of Personnel Management create an "ombudsman classification" rather than characterize it as a "miscellaneous" category. Along this same vein were comments that ombuds should report to the "highest levels of leadership" in an agency or department. One ombuds recommended that all "federal ombuds report to the President and Congress." There were several comments that the value of ombuds is in their access at the senior level and their distinction from other officials. They suggest that ombuds bring additional value by filling a conflict management gap above the mediator level. The following is a representational statement:

> [T]here are conflict resolution gaps unmet by mediation. Specifically, mediation is often used just prior to, or as a preliminary stage of, formal adjudicative processes such as discrimination or grievance complaints. It [mediation] appropriately focuses on issues between parties at the lowest possible level. Mediation does not address larger systemic issues that gave rise to the issues in the first place.

Several ombuds noted that they needed greater authority as some issues occurred above the office level and the ombuds is unable to address them without the backing of a senior executive. One ombuds stated, "I meet the managers but I don't have power." It was noted that there needs to be a clear distinction between ombuds and human resource personnel since these offices have different functions and roles.

Some additional comments and best practices noted the importance of leaders in areas such as: setting the tone, preparing the agency for the role of the ombuds, taking responsibility for the agency's conflict competence and creating the appropriate ethical culture. One ombuds noted that they were perceived as management when they went out to the workforce and they didn't "have much credibility" as a result. A need for leaders to take time for one-on-one and team-building sessions with their ombuds as well as using the ombuds as "sounding boards" to utilize their role as an objective audience was noted as a best practice. Several of the ombuds noted that their value is having difficult and uncomfortable conversations with leaders and that leaders need to be open to participating in these challenging dialogues. They further noted that they bring value by building leadership capacity and take satisfaction in being able to identify issues for senior management.

Ombuds Defined

A theme that elicited a significant number of comments was the definition of the term "ombudsmen" and its use. This was an issue repeatedly raised to be brought to the attention of ACUS and others. There was also a thread of discussion suggesting that the definition of ombuds should be defined for the public and employees. A representational comment stated, "I am going into environments where people are assuming they know what an ombuds is but it's very different, they might know about a newspaper ombuds or they might know of a healthcare ombuds and that of course is not how I am operat[ing] but they think immediately that they know."

One of the important issues is that the term ombudsmen is often used inappropriately and that continued misuse will "water down" the term. Many spoke of the creation of ombuds programs who are not in compliance with the generally recognized ombuds professional standards of practice. The same concern is directed at what are referred to as "single purpose"

ombuds who are unable to address "systemic issues" and, in some cases, do not produce sufficient work and are therefore assigned "additional duties," a direct contradiction of the standards of traditional ombudspersons. It was stated that the "single purpose" ombuds is problematic to the field as they do not meet the criteria that ombuds must be "unambiguous" and not "dual hatted" in order to succeed.

A number of comments addressed concerns such as, "there are ombudsman offices out there that say they are ombudsman offices but are really customer service or complaint intake places." In addition, one respondent asserted that "it's critical that we not castrate the profession by allowing complaint processing offices and others to self-identify as ombudsmen; any office professing to have an ombudsman role must adhere to the standards of practice of independence, impartiality or neutrality, and confidentiality." Along this same vein were several comments that discussed the Inspector General (IG) whistleblower ombuds as problematic as they function in a strictly educational capacity. Several comments noted that there should be a clear distinction between ombuds and ADR specialists under the Administrative Dispute Resolution Act (ADRA), with ombuds generally functioning at a higher level addressing systemic issues, and, further, "that the Administrative Dispute Resolution Act should be updated to reflect all types of work an ombuds does and not just a 'dispute resolution proceeding' to be completely effective."

A number of comments spoke to refining the notion and implementation of ombuds so that they all adhere to the same standards, although a few respondents believed that there is a need for advocate ombuds, though they might be distinguished from other ombuds. Furthermore, one respondent suggested recognition of the "variation of types of ombuds programs similar to those that [the] American Bar Association included in their standards."

The definition of an ombuds portrayed to the public and employees was another sub-theme identified. Ombuds would like to spend less time explaining the profession of federal

ombuds and would like more clarity and uniformity among ombuds to address a public misunderstanding of the role of the federal ombuds. Clarity of position and functions was also discussed so that they could spend less time on matters that could be handled by managers and supervisors, as well as dealing with problem employees. One comment identified that there needs to be an awareness that "ombuds are an enabling role and not there to fix problems" and another respondent stated that they serve the agency "by acting like an aggressive independent watchdog." They would like federal ombuds to be defined as distinct from state, local and corporate ombuds. There was also a request for support for those ombuds who are uniquely structured, and a recommendation that the ombuds position should never be temporary.

Confidentiality

The issue of confidentiality drew comments from three different perspectives: those ombuds who feel the position does not offer confidentiality to their constituents and they do not represent their interactions as confidential; those ombuds who feel the ambiguity of confidentiality is problematic by being implied but not guaranteed by the limits of their protection; and those who feel they are able to provide confidentiality as a standard procedure.

The following is a representational quote: "Federal ombuds offices should adhere to the essential ombudsman tenets of independence, impartiality (neutrality), and confidentiality to be able to effectively carry out the office's mission." It was proposed that existing legislation, such as ADRA, should be strengthened to enforce the confidentiality and impartiality of the ombuds. Concern was noted that, even with a policy of confidentiality, the "culture" of the agency encourages those who engage with the ombuds to keep their "supervisors in the loop."

Those offices that do not offer confidentiality recommended that there be legal protections for ombuds confidentiality. One office posited that more "sensitive" issues would come to them if they could guarantee that communications with the ombuds would be privileged.

There were also concerns regarding the lack of protection of ombuds confidentiality in the federal sector. One office is concerned that "they do not have the legal infrastructure to protect confidentiality."

One agency considers it a best practice to get a records schedule approved by the "U.S. Archivist" as "temporary" and then ombuds' records could be destroyed once an issue is resolved. The same agency is concerned, however, with the GAO recommendation of one-year ombuds' record retention. On the same issue another ombuds noted that the GAO's one-year recommendation "does not align with federal and (prior GAO) guidelines." One office felt strong concern about the issue and offered a detailed response:

> I am concerned that the GAO recommendation of one-year retention of temporary records does not align with federal (and prior GAO) guidance. In 2001, GAO published "Human Capital: The Role of the Ombudsmen in Dispute Resolution" [GAO-01-466]. The study found that ombudsman offices were explicit about providing for confidentiality in their dealings by not keeping a log of visitors' or callers' names or formal case records and by destroying any informal notes. At the time, GAO also found that federal agencies do little to evaluate their ombuds programs and recommended the Coalition of Federal Ombudsman (COFO) and the Interagency ADR Working Group develop standards based on the American Bar Association's publication on federal ombudsman standards. COFO developed a "Unified Model for Developing an Ombudsman Function" in response to GAO's recommendations, including confidentiality standards. On page 15, it states that ombuds can preserve confidentiality by "discarding informal notes and other non-record materials related to case issues once they have been resolved." Further, a parallel may be found in the attached "ADR Confidentiality" documentation (p. 41) developed by the Department of Justice regarding protected notes: "For confidential federal records (such

> as a neutral's formal notes, an ADR program administrator's notes on particular disputes, or case logs which contain confidential, identifying information), short retention schedules should be established that run up until the dispute is resolved or the dispute resolution proceeding is terminated. The schedules should identify the documents as sensitive documents under the Federal Records Act and the schedules should be submitted to NARA for approval (as the law requires)." Therefore, I am concerned about GAO's recommended one-year retention of temporary records when prior GAO materials, COFO, Interagency ADR Working Group, ABA, and IOA all assert that such temporary records should be destroyed "upon resolution of the matter.

Several offices articulated a concern that there is no specific exemption for ombuds in legislative requirements for record retention and for providing information when requested by Congress or under the Freedom of Information Act.[306] A significant number of offices noted this as a serious concern. While several offices noted the need for improvement, one office shared its own concern as to how to respond when someone asks "if this is confidential and I would have to say yeah. It presents an ethical dilemma given the ambiguity in the legal framework supporting ombuds confidentiality." Additional comments addressed the dilemma of how to manage confidentiality concerns of an ombuds who wanted to be able to share notes with a colleague when working with the same client, or when another ombuds needs to step in. Another office noted that there are tensions with other offices when they request confidential information.

One office felt the need for "a founding document or charter" that addresses the issue of confidentiality. One office deals with the issue of confidentiality by not keeping notes, but "this

[306] See Part 3, Legal Analysis, for more information.

is a problem when the same person comes back through." A solution presented by another office is not to promise confidentiality "but [just] maintain the best attempts of confidentiality within the bounds of the law."

Some ombuds report no issues with confidentiality—especially several newer offices and ombuds specializing in external visitors, as several of these ombuds deal with non-confidential complaints. One ombuds refers to the value they bring their agency by providing "a safe confidential resource for conflict management." Some analytic ombuds—despite having collateral duties—feel that one of the biggest distinctions they have is the confidentiality they offer.

One ombuds noted it is a best practice that confidentiality be provided. It allows people to "feel comfortable to discuss issues." Another ombuds noted "word of mouth has confirmed that confidentiality is respected." This issue is considered significant as a number of offices noted the same consistency of practice**.** The value that the ombuds bring is an option for "information to travel up the chain in a safe, confidential way, particularly with controversial issues that might not come forward without confidentiality."

Empowerment of Constituents

Without fail, empowerment was viewed by almost all the respondents either as a source of satisfaction and/or noted as an area in which the ombuds believe they bring value. The majority of ombuds found satisfaction in helping others "find their voice and resolve their own issues." The theme of giving people a "voice" was also where the majority of ombuds felt they brought value. Some approached it from the complementary perspective of giving people the opportunity to feel "heard." Several linked "being heard" with satisfaction in reducing "frustration and confusion." One comment noted the value of giving employees an informal option to be heard "outside the normal chain of command." There was a secondary theme along

these lines of satisfaction and value through providing an "equitable" process. Another similar response was in helping the individual or small business navigate or "humanize" the bureaucracy.

Great satisfaction was found in "helping" others. The help identified took a variety of forms. The most popular comment along this theme was helping individuals gain a different "perspective," whether their own or of another. The second most noted comment was helping others find and access "resources" that may not have been previously considered, or that they were unaware of availability. Helping people be more "affirmed", and "valued" through displaying empathy is where several ombuds feel they provide value.

Standardization

Standardization is a recurrent theme throughout the survey responses. In this thematic category we are dealing with the global standardization of practice for federal ombuds. Under this theme we identified **four** sub-themes: standardization of practice; protocol for new offices; software; and best practices.

There were several generic requests to call attention to a need to develop a "standard description of ombudsmen from a federal perspective." There were more specific requests which will be addressed either in the thematic areas of COFO or Organizational Clarity. There were a significant number of requests that [ombuds [r]eview all Department … issuances to ensure the programs, policies, and procedures are consistent with recognized ombudsman standards" and that practice be "standardized" across all federal agencies. It was posited that consistency will lead to "less confusion and higher quality." One office noted that within the "same agency" ombuds functioned differently. One office suggested that it should be a best practice to have an office run by an "individual with ADR knowledge and appreciation" while another office identified that it was established by the agency so therefore its standards were "not codified."

There is a recommendation to address the "unique population of ombuds" with statutory requirements not "captured under traditional ombuds models when making recommendations and developing resources." One office would like more time to create a process to "layout steps for dealing with the agency." Another office is requesting the "consideration of regulations to ensure grantees comply." There are several requests from newer offices that ACUS consider a "start-up guide" or that the appropriate lawmakers "establish laws and regulations that each federal agency establishes a federal ombudsman office which will help the organization itself and provide guidelines of how the office will be set up" and a similar request for documentation highlighting "best practices" for setting up new offices.

There does appear to be a divide between those agencies with software or technology needs to improve their "electronic presence" and others who view their use of technology as one of their best practices. One office noted "[o]ne of the things that we have done is to try to make the process of interacting with us as user friendly as possible. We have been trying to use technology, to offer webinars, pre-taped things, virtual presentations, and are thinking about using an online interface to submit questions. Those are sort of using technology in new exciting ways that makes it easier and faster to interact with us." Another characterized their use of worldwide teleconferencing as an innovation. Another agency noted that they maintain the Long Term Care ombuds National Ombudsman Report System (NORS) and "make the aggregate, non-identifiable data available publicly." Furthermore, there are several calls for "a proper software program" or an "improved database for case management."[307]

[307] See ACUS Recommendation 2016-1, Consumer Complaint Databases, for guidance on drafting policies regarding online consumer complaint databases. https://www.acus.gov/recommendation/consumer-complaint-databases

There are numerous requests for codified "best practices" for federal ombuds. One specific request was a best practice for "internal scientific dispute resolution process for significant issues of high importance e.g. public health." There was a request that one of the ombuds associations consider recommending a protocol for handling callers identified as "dangerous callers" which would include a need for how best to follow up with these callers.

Ethics and Standards

This theme included strong advocacy for ACUS and others to support a culture of "ethics," "accountability" and "transparency" among federal ombuds. An overarching comment noted that standards are essential to the role and credibility of ombuds and are valuable for "staving off protests, fostering transparency and integrity."

The most frequent and significant comments about ethics indicated the strong desire for certain ombuds offices to follow the Standards of Practice and Code of Ethics of the International Ombudsman Association (IOA), which apply to organizational ombuds. One agency said they follow an ethical framework, which they view as a best practice, which integrates the IOA standards with the views of COFO. Several commenters wanted ACUS to be aware that standards are "needed," as ombuds should be held accountable to the ombuds standards. Others noted inconsistencies, with one stating "some agencies pick and choose standards of practice."

Several offices stated that they use "a combination" of all of the generally recognized professional standards. One recommended that there should be "specific tenets that as ombuds they can say they follow." Other comments regarding standards noted that one office follows ABA, another USOA and one whistleblower ombudsman noted "[w]e have our own standards called CIGIE (Council of the Inspector General on Integrity and Efficiency). It's specific standards for us." A significant number of responses noted that they do not have any issues

concerning standards. Several noted that they have no standards as they follow "laws issued by Congress" and another noted that "attorneys and judges deal with it." On a slightly different note one ombuds office noted that they found it "hard to explain to people what ombuds ethical standards are." Another discussed an ethical dilemma: should ombuds investigate if they are neutral?

Office Staffing

The theme of ombuds office staffing was one that approximately 40 percent of the respondents wanted brought to the attention of ACUS. The prevailing sub-themes included: an overall increased need for ombuds; a need for more organizational or internal ombuds; some agency specific recommendations; and access to independent counsel.

A significant number of responses noted that there was a need for additional ombuds to deal with the heavy workload**,** and one noted an area of improvement would be appropriate office space. One raised the point that "if every agency had one [ombuds] they could consolidate resources." One ombuds supported their request for additional ombuds noting "demand for the services of ombuds has been high." Another projected that "the need for ombuds will continue to increase as issues become more complex." One suggestion was that more agencies should appoint a senior ombuds to focus on "external constituent issues."

There were several requests that ombuds have access to independent counsel. Another comment stated, "Department of Defense schools worldwide could benefit from an independent ombuds." It was recommended in several comments to ACUS that every military base and joint command worldwide needs an ombuds and that "every defense agency or field activity with more than 4000 people should have an organizational ombuds." One specific comment noted that there was a need for the Joints Chiefs of Staff to have a corps of ombuds for each combatant

command. There was also a request that ACUS be aware that more "analytic ombuds programs are needed."

There were a significant number of responses requesting specifically to have "organizational ombuds" in all agencies. A representational comment states, "ombuds could bring huge improvements to agencies, and in particular those with the lowest OPM Federal Employee Viewpoint Survey scores." Comments noted that some of these agencies have outwardly facing ombuds to help address concerns of the people they serve, but most do not have organizational ombuds. For those that do have ombuds, it may be necessary to provide additional support and resources to the office so the program could more adequately serve the agency. One respondent requested that government provide each hospital with an organizational ombuds who "are not patient advocates."

Centralized Federal Ombudsman Association

The majority of comments addressing a centralized federal ombudsman association were framed as recommendations. There were specific recommendations for an "enhanced role of the Coalition of Federal Ombudsman (COFO)," as well as more detailed recommendations of oversight and standards.

General comments included a recommendation for greater "collaboration" between the agencies and COFO, or a centralized federal ombudsman association. Consideration was given to strengthening a centralized federal ombudsman association to "provide infrastructure" and "an oversight body" that could "reduce duplication." One suggested that it would be helpful if agencies, especially those with nascent, single-person ombuds offices, could contract for support from a centralized federal ombudsman association. Many ombuds spoke of a central association to help standardize and strengthen the profession and to provide "functional oversight on use and application [of ombuds] through[out] the government." Several comments suggested

"credentialing" ombuds as well as "reviewing" them. A significant number noted that a centralized association could and should provide "common practices and standards." Two comments addressed an ombuds accountability aspect: one suggested a "self-assessment," while another suggested a central association could "review complaints" against federal ombuds. There were several comments that this group could and should interact with Congress. Specifically, there were two suggestions that the group collect "anecdotal evidence" to share with Congress "biannually, and that Congress "consult with the centralized federal ombudsman association prior to introducing a new ombuds program within the federal government."

Marketing and Promotion

The theme of marketing and promotion was one that included a significant number of divergent positions on similar issues. Sub-themes included value of promotion, need for outreach, and best practices in promotion. Several noted one of the values they bring is in the area of promotion by "branding" the agency mission, "promoting the office on the outside," preventing "negative publicity" and overcoming the perception of "promoting a culture of secrecy." Several suggestions along the same lines, were the need for more "publicity," "outreach," "education," and "support groups" to help increase awareness "amongst the public about the profession." A consistent comment among many of the respondents was the need to spend "more time on promoting" and "communicating value" but cited they "don't have enough time." Conversely, this was also an area that some ombuds wanted to spend "less time on." They stated they would like to spend less time explaining what the agency "can and cannot assist on" and "what the agency can or can't do." The two are not necessarily contradictions but likely differing perceptions of what marketing entails.

The need for additional outreach was agreed upon by several and recommended by one as something for consideration, in particular, "formal outreach highlighting role and function."

Some viewed their practice in this area to be innovative and a necessary best practice. Several offices commented on innovations in this area such as developing "a commercial to increase awareness," implementing "in-reach and outreach plans that accompany our office strategic plan so that we are organized and deliberate in how we do these activities with our internal/external stakeholders," and starting an "Ombuds in Practice" section to their annual report.

It was noted that outreach demonstrates value through "greater public reporting, visibility and promotion" while another noted that they needed greater promotion within the agency so they "could see what the ombuds could do for the agency and not see the ombuds as a threat." Along a similar direction other recommendations included greater outreach to address "misconceptions" and the need to "raise awareness of the benefits of the program."

Another subtheme was the need for greater visibility for the office to attract more visitors supported by comments such as "people don't use it" and "customers don't know it exists." A comment from a respondent from a new office stated that they "need people to know they exist." It should be noted that the majority of these comments on the need for greater use and visibility were particularly identified as a theme from new offices.

Systemic and Policy Solutions

Addressing "systemic issues" and performing "system reviews" were key areas where ombuds feel they can bring value and would like to "spend more time." Several ombuds noted that they would like ACUS and others to be aware that ombuds can "very cost effectively help identify and correct systemic issues" in a manner leading to positive outcomes. Another noted, "problems found in government, as in many places, requires someone to have the courage to come forward and point out the problem within a system— that the system should actively support candor, work toward meaningful change, and not marginalize or fire the messenger."

Another viewed it as a value they provide, "raising issues others cannot or will not discuss… such as barriers in governance structures."

One ombuds did note that they found "many ombuds programs do not take full advantage of their capacity to link back to the agency mission or agency redress of systemic issues." A differing perspective they wanted addressed was that although there is a "broad" discussion on ombuds addressing systemic issues, they believed they would benefit by specific discussions on "teasing out" such issues. The request for guidance and "best practices" when dealing with systemic issues was mirrored by other ombuds as well. A majority of the organizational ombuds reported that the identification of systemic issues was something to which they would like to be able to devote "more time," and "identify trends." An ombuds noted that IC Directive 203, which created the role of the analytic ombuds, is missing "the ability to look at the systemic issues that gave rise to the concerns in the first place." Another office acknowledges its uniqueness as "specifically" designated to identify systemic issues. A significant number stated that addressing systemic issues is one of the areas where they bring the most actual and/or potential value.

Some ombuds feel that they bring value and would like to spend more time on public policy issues. One noted, "I would like to be more of a resource to the agency on policy changes instead of always attempting to resolve individual disputes or concerns." One ombuds mentioned specifically contributing to policy development "from an ombuds perspective" as something they would like to spend more time on and another discussed the same issue but noted that ombuds can reflect "a variety of perspectives" on policy issues.

Administration of the Ombuds Office

There was unique consistency on the topic of administration in which all but one respondent identified this area as something they would like to spend "less time on." Overall,

they identified a need for improvement of administrative support. One ombuds noted as a best practice the use of a "detailee" as acting outreach specialist. The sub-themes in this area focused on dealing with calls and inquiries, clerical activities, meetings and data entry.

In the area of phone calls, problem areas noted were time spent on a high volume of calls. Another noted spending time fielding repeat calls from individuals "who have difficulty accepting a decision." An individual for whom ombuds work is a collateral duty wants to spend "less time on inquiries and complaints" and would "prefer to limit the time spent on explaining ombuds' functions," while another individual discussed spending less time on "statutes of application and status of inquiries." Additional respondents noted they would like to spend less time "redirecting inquiries," and less time on meetings. Two respondents noted that they would like to spend less time on "reporting" functions such as the "kind of issues." Individual comments included less time "duplicating the creation of documents that must already exist, e.g., charter, record retention policies and job descriptions," and on "data entry."

Positive Work Environment

Creating a more positive work environment was a theme where the majority of ombuds felt they brought value and also achieved a sense of satisfaction.

When addressing the value they bring, one of the ombuds made the point in a succinct but representational statement, "[w]e increase organizational focus on mission critical activities by helping senior leaders, managers, supervisors, and staff to minimize unwarranted distractions in the workplace." Another respondent explained, "Our work is increasing morale and helping employees and managers to refocus, reframe, and address conflict, however it is manifesting, in a healthy and productive manner."

An excellent summary statement of the points noted for the attention of ACUS and others can be noted in this respondent's comments:

> [C]onflicts that are not handled well can permanently poison the work environment/culture. I have sometimes observed certain groups who are "married to the misery" they perceive as intrinsic to our workplace. It's a huge problem once trust has been lost. An ombudsman that is truly independent of management and unions sends a strong message to the workforce--you have somewhere to go even if just to sort out your thoughts.

Informality

The informal aspect of an ombuds role is one of the ways in which they create value according to the majority of comments on this theme, and an area that many would like stressed in the report. They note that the informal process is a "cost effective" means of conflict resolution. One office demonstrates their impact when they note, "[o]ur organization had a disproportionate number of formal complaints. Since the inception of the Ombudsman Office we have seen a significant decrease in the number of formal complaints." Several noted that the ombuds fill a gap that previously existed. One office explained that some issues went to "a formal process that really had no business being there, but there was no alternative."

The following quote is a representative summary of those comments on this theme that the ombuds wanted to bring to ACUS' attention:

> Our ombudsman is our Senior Dispute Resolution professional at our agency and is responsible for implementing a systemic informal conflict resolution process for the agency that embraces a variety of conflict resolution tools and processes. We have found this informal space of the ombudsman office is an essential form of organizational support for employees at all levels of the organization. It is critical for employees to have an informal space in which to receive help to resolve conflicts, receive assistance with

taking a holistic view of the conflict, focus on the business problem presented, and develop strategies and ideas that they generate to resolve the conflict.

Independence

The theme of independence was an area where the ombuds felt strongly that they bring value and emphasize that ACUS and others should understand the role that independence plays in their ability to be effective. The majority of the comments focused on the value that their independent status contributes towards facilitating discussions that are not likely to occur otherwise. Statements covered such topics as ombuds can "raise questions others can't or won't" and have "no barriers from raising anything to anyone;" provide "unbiased, unfiltered perspective;" or "honesty and candor;" and are "independent advisors."

In discussing the theme of independence and what they would like brought to the attention of ACUS, they use unequivocal language requesting that ACUS "explicitly prohibit ombuds from being connected to human resources, general counsel, inspector general, EEO, diversity, privacy, or civil liberties offices because of the limited scope and conflict of interests that exist by being placed in these programs." Another ombuds requested that ACUS recommend to Congress that "ombuds have statutory independence and confidentiality protections."

One office provided support for this argument stating "we are now an independent office that reports directly to the chairman and have a multitude of benefits from that. There are no influences from other offices." Another office recommended, "[t]o meet its required standard of independence, all Federal Ombuds should report to the President and Congress. As an alternative, maybe all ombuds could be aligned under an independent organization and assigned

to specific agencies." One office provided an example of an adverse experience when an ombuds lacks independence:

> In another instance, a manager who did not like the ombudsman's independence insisted on a 360 evaluation for the ombudsman, which led to closing the office. I'd like to posit that no organizational ombudsman can be fairly evaluated by anyone who doesn't fully understand the role (i.e., most people even within your organization). A supportive supervisor and complete independence is paramount.

Enhanced Outcomes

Achieving enhanced outcomes was one theme that the majority of respondents drew great satisfaction from and a significant number felt they added value. The major sub-themes were: better outcomes and improving the conflict resolution process. In discussions of better outcomes, a significant number of participants noted satisfaction in achieving "solutions that are helpful to everyone" or as another put it, "when someone's crisis turns into a win for the group." One comment discussed satisfaction working with leadership and employees and "getting good outcomes." Another summed it up when stating "that they can add value if they take initiative and they are allowed to."

The other sub-theme in this area was improving the conflict resolution process and was cited as a significant source of added value and one that yielded great satisfaction for the ombuds. The most frequent comment was that everyone in the process benefited from a perceived "good faith effort" to resolve or address the issues. One noted that at the very least the process "[has] given the industry or consumers restored faith in the government's ability to serve them." Some ombuds noted satisfaction in "reducing stress and anxiety in the process." Several ombuds noted that they could devote the time to "study and make recommendations the agency may be aware of, but doesn't have the bandwidth to review." Others discussed enhancing the

process through "interest based problem solving" rather than a "blaming or adversarial" process. One also felt they brought value by allowing individuals to "vent" and allowing the agency to concentrate on "more productive activities."

Fairness

Fairness was one area that a significant number of respondents emphasized that they provide value and that is a source of satisfaction particularly "when both parties accept a decision as fair." The theme elicited a number of specific recommendations and comments including (1) "[f]ederal agencies that regulate commercial enterprise and/or provide services to individual members of the public should have ombuds offices to ensure fair process for those interfacing with the federal government"; (2) ombuds demonstrate the "fairness of government to employees and the public"; and (3) "[a] fundamental value of the ombuds program is that fairness guidelines should and could be incorporated in all organizational ombudsman offices; in fact we challenge all ombuds to establish fairness guidelines as part of their governing charter or by-laws." One particular respondent felt so strongly about this issue that he referenced some of Howard Gadlin's published comments, as follows:

> [I]n his article "Assessing Effectiveness in Ombudsman Programs", JIOA, vol. 3, no. 1, 2010, Gadlin addresses "the need for an informal, confidential, independent channel by which all members of an organization can explore and pursue complaints and grievances and raise concerns without fear of retaliation and with the knowledge that they will be treated fairly and that their issues will be addressed honestly and impartially." Howard went on to say "it is in the nature of large, bureaucratic organizations that their internal dynamics create impediments against people bringing forward issues and concerns that point to individual and structural problems within the organization. It is in the nature of large bureaucratic organizations that important information that could matter enormously

> for the better management and functioning of the organization is kept from the very people who could use it. An ombudsman program that is doing "good work" can be an effective way to address these needs.

One unique comment about the ombuds is that "companies and lawyers feel it's the only place they can go when they feel that decisions are not fair, or when they feel there is blockage and have the power to move things along."

Organizational Clarity

There were a number of issues raised in regards to the structural clarity of the ombuds role. One comment was that one of the values an ombuds brings is that leadership is now "involved" in the problem solving process. One commenter stated "the ombuds program won't be successful if it is mandatory and forced." Ombuds cannot succeed "without the support of leadership, key line managers, and employees." "Ombuds cannot be seen as oversight, and oversight committees need to know this."

They also would like to share their view that ombuds provide a "means of resolving conflicts that are not easily resolved in the formal or more traditional conflict resolution processes and as resources to provide guidance on policies and systemic issues that go beyond one particular conflict or complaint." One suggestion is to consider ombuds as an "umbrella" under which ADR programs can "flourish," as opposed to some programs where ombuds and ADR are "separate." Another suggestion along the same lines would be the location of ombuds as "an independent organization assigned to specific agencies." A concern was raised that "agencies diminish ombudsman roles by exerting too much power and control over it; thus eliminating independence and the role's effectiveness."

Another would like ACUS to consider "some way to clarify" between an internal or external facing ombuds. On a more macro level "you have a couple of agencies where you have

[now] an ombuds office, an ADR office and an EEO office, [a]nd it's confusing; so there does need to be some clarification about what the roles are and who is handling what." One office requested that it be moved "from the Office of Human Resources to the Office of the Director." Another office stated that the title ombuds "can be confusing since we don't do mediation or many other traditional ombuds functions, and our independence derives from that of the OIG, as opposed to being independent ombuds within the OIG." Another office noted "we currently are spending inordinate amounts of time on HR classification issues, as well as recruitment activities that are cumbersome given the lack of flexibility within the federal bureaucracy." A concern was raised regarding the single-issue ombuds that "though important, does not produce enough work to support the role. A senior person will likely be assigned this additional responsibility, and will likely have absolutely no experience whatsoever in ombuds work. It is also highly likely that the senior person assigned cannot be neutral or independent, thus unable to adhere to core ombudsman standards."

Whistleblower Ombuds

The title and role of the "whistleblower ombuds" was one of the more controversial and opinionated themes that resounded through this research. Sub-themes regarding this area include: are whistleblower ombuds in fact ombudsmen; what is the value of the whistleblower ombuds; and various other issues specific to the whistleblower ombuds.

A number of ombuds have commented that whistleblower ombuds are not traditional ombudsmen, which was a concern for a significant number of respondents. There were a significant number —both pro and con — that wanted this issue brought to the attention of ACUS. One commenter stated "the role does not comport with any definition of an ombudsman." One suggestion supported by several is to consider "re-naming" whistleblower ombuds to something else, as "the role does not fit any published description or recognized

standard of an ombudsman. This has caused confusion among federal employees and significant damage to the profession as a whole." One respondent stated "the whistleblower ombuds is superfluous in our agency. We have plenty of other channels for those at the Department to get information on ways to protect themselves from retaliation." A whistleblower ombuds reported that they bring value by helping the agency to "the realization or acknowledgement of how important whistleblowers can be." Another ombuds suggests they bring value by fulfilling the statutory requirement to "provide a whistleblower ombuds." Yet another noted where they bring value is in "the liaison role…it brings people together to talk about best practices." One ombuds noted, "I don't see this office…as adding a tremendous amount of value. I think maybe the office has a well-deserved reputation of not being welcoming towards whistleblowers."

Whistleblower ombuds themselves discussed some issues problematic in the performance of their duties. One ombuds noted a case "where management, when a suspected whistleblower left my office, management here kind of ordered me to write up a memorandum of what the whistleblower told me." In another case, "I was threaten[ed] that they would make trouble for me if I did what I was supposed to do and explain the whistleblower laws to a potential whistleblower." Another issue of concern was stated as: "There is a negative. In some agencies, with some personnel, there is a very negative reaction and negative concept of the whistleblower ombudsman."

Some recommendations suggested are to "change the organization" and "have our investigators go out and actually go to bat for some of our whistleblowers in the agencies." Another recommendation was that the whistleblower ombuds "report directly to the inspector general or the organizational head." One ombuds did note a best practice or innovation where they "put together a slideshow" that was well received on educating the whistleblower.

Accountability

Accountability was a clear theme in the survey responses. The most common responses were noted as recommendations to help enhance accountability or best practices. There were several requests to recommend a "five-year peer review" for ombuds (one suggested they be voluntary). Another respondent suggested a "facilitated self-assessment" as a proposed best practice. One office:

> created an automated tracking system that throughout our investigation divisions all over the country keeps track of all of these [cases] not just reprisal but all the allegations we get and whistleblowers are very important sources of information for an OIG. And so it keeps track of all that, where they are, basically keeps track of key dates, when we get them, when we acknowledged it because it's very important to acknowledge, what happened to it and when we've let the people know what's happened to it. And that tracking system sends a report to me every couple of weeks. I can see if things are, you know if there's an issue I can check. It's actually a pretty good system. So that's something we created from scratch that I think is pretty innovative.

Additional innovations from several offices included a "weekly case review," "mid-year updates" to all their stakeholders "so they could learn what we were doing," "a very specific three-year plan," to enhance development and the utilization of "peer panels" to assist in managing in-house conflict. One office suggested that there be a "permanently funded ombudsman program analyst to continually do program evaluation."

Problem Solving

The theme of creativeness was one where the majority of comments acknowledged that this was where they bring value, derive satisfaction and would like to spend more time. The sub-themes in this area focused on being proactive and applying creativity to problem solving. There

was a consensus that a unique value provided by the ombuds position is the ability to be "proactive" rather than "reactive" and the ability to "apply cutting edge solutions;" and "move people beyond their comfort zone to resolve an issue;" providing "new perspectives;" and "unique insights."

Credentialing

The theme of credentialing of ombuds was one that the majority of comments wanted brought to the attention of ACUS. They noted that they would like to see a credentialing or accrediting process for ombuds as a primary sub-theme. Among the suggestions offered were to require training or a program for federal ombuds that leads to certification, a recommendation that an ombuds should "have a degree in conflict management or organizational design" and developing a "profile template for hiring candidates." An alternate, but similar suggestion was the recommendation of "core competencies for federal ombuds." The other sub-theme in this area was that ACUS should consider "standards" and that the standards be "consistent in application throughout the government." A specific suggestion was that CIGIE [Council of Inspectors General on Integrity and Efficiency] consider an "Oversight Community of Ombuds that is available to all IG personnel federal-wide" distinct from "whistleblower ombuds since that role does not comport with any definition of ombudsman."

Early Warning

The theme of providing an early warning system and heading off issues before they become more complex and costly was where the majority of ombuds comments felt they bring value, was a source of satisfaction and was something they noted should be brought to the attention of ACUS and others. The most frequent comments centered on the ability to be an "early warning system" and provide "feedback" on issues before they need to go to "a formal process," or "become a worldwide systemic problem," "or "could lead to a major violation."

Several comments noted that leaders "appreciate ombuds because they can get ahead of an issue before it escalates," and ombuds can provide "issue trends" that are "problematic" to leadership.

Funding

The majority noted the need for additional funding for more ombuds. Two comments of particular note on this point was that "relative to other programs they are understaffed and underfunded" and, comparatively speaking, that they are doing "more with less resources." Another discussed the need for a properly funded office. One comment noted they would like to spend "less time on budgetary issues" such as "wrangling for money for outreach."

Funding for new activity included suggestions that a budget for "independent counsel" be implemented as a best practice. Another suggested that a permanently funded "ombuds program analyst would be helpful to continuously do program evaluations." One specific request is that "Congress fund an ombudsman for the corps of senior executives" that would operate across all agencies.

Program Evaluation and Metrics

Program evaluation and metrics were areas of divergent comments. These included some items identified as best practices, needs, recommendations and value. In terms of best practices, the items identified were "a peer review program," (one office did report this as a need), "constant evaluation of what worked and what didn't," and "two year strategic plans that outlined objectives." One of the areas generating diverse responses was in regards to whose time should be involved providing the metrics. One comment noted they would like "improved metrics to demonstrate value" while another noted that they would like to spend less time on "metrics justifying position" and still another suggested that "full time researchers should be permanently funded to do program evaluations." One unique approach was that this "same survey" be conducted with their supervisor to see what similarities and differences "the

leadership of the organization" sees versus the ombuds themselves. One comment noted that they provide value through program evaluation within their agency. An example was noted by one agency, that one office had very low HR workplace survey scores in many areas, including communication, trust, collaboration, and overall effectiveness as a team. The ombuds facilitated a self-assessment that asked everyone, privately, what was working well, what wasn't working well, and recommendations for improvement. This produced a report with best practices to continue doing, areas of concern, but most importantly, specific ideas from employees on where to make substantive changes. In this case, the leaders were incredibly responsive and developed an action plan and put employees in charge of carrying out approved changes. The following year, the top leaders shared that nearly all of their scores on the HR workplace survey went up. Although the leader gave credit to the ombudsman, the ombudsman credited the leader for listening, respecting, and acting on the concerns and recommendations that came out of the process.

Accessibility

The theme of accessibility focused on the value of equitable access, the ability to access those with the power to address the issues and the speed of resolution. The most common response noted was the value provided by being able to provide "prompt responses, accurate information and explain the process" to "everyone" with an inquiry. The role of ombuds "enhances access to the government." The process works best when there is "upper management support." There were several best practices submitted in this area: "being open to evolving;" "an ombuds of the day to handle walk-ins;" an "online interface to submit questions;" and a "24-hour commitment to start on problem resolution from initial contact." There were two comments submitted in this area for the attention of ACUS: every office that has an "EEO should have an ombuds also;" and ombuds fill a gap "as a senior person [who] is not investigative or providing

formal oversight." One comment noted they would like to spend time on "[n]on-meritorious complaints that relate to personality disputes" and they would like to spend more time with "[m]ore customers with more work-related issues" unrelated to personality."

Positive Change Agent

All of the comments in this area identified the ability to effect positive change as a value that ombuds provide and a source of satisfaction. On comment in particular noted that the opportunity for change was both on a "macro and micro level." They find satisfaction in "reducing conflict"; "developing conflict competence;" "creating a collaborative team;" and "seeing situations and environments improve." Several comments noted that ombuds bring value by "creating efficiency" and "identifying where change may be necessary." They also noted that the help "get people back on track in the process" and effect "conflict resolution." One comment noted that they bring value "as an organizational change agent."

Benefits

The theme of benefits primarily focused on those values identified that ombuds provide that they want to bring to the attention of ACUS and others. A significant number of ombuds mentioned the cost savings provided by having an ombuds program. They felt that the cost savings are a result of avoiding "legal costs" and "conflict management through informal processes." They also are interested in ACUS and others being aware of the intangible benefits and "invaluable service" of an ombuds program. These include bringing "an independent eye" to a situation and directing "the right things to the right people." Along the same lines, ombuds are a "mechanism to understand and determine" what agency needs may exist. They improve "product and service delivery." They want recognition that prior to the ombuds there was not a process with a "win/win" option. They fill a "gap between helping agencies." One ombuds

stated the value succinctly, "[they] know how to navigate through the agency, employees, industry advocacy organizations and the public."

Administrative Conference of the United States

A REAPPRAISAL – THE NATURE AND VALUE OF OMBUDSMEN IN FEDERAL AGENCIES

PART 3: LEGAL ANALYSIS

Final Report: November 14, 2016

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The Ombudsmen in Federal Agencies: Legal Analysis[1]

I. Introduction[2]

With the exception of specific federal ombuds positions created by statute, there is no statute applicable government-wide mandating that federal ombuds offices exist in the United States or addressing specifically how federal ombuds offices must or even might be created, organized, funded or operated.[3] The ombuds concept, as described elsewhere in this study, originated in the Swedish *classical ombudsman,* appointed by the legislature and established to review executive action. The classical ombudman's attributes and standards of practice were thus determined by legislation, and according to a particular paradigm. However, in the United States organizational ombuds began to evolve alongside ombuds that were modeled on the classical ombudsman. Organizational ombuds evolved, not by legislative dictate, but rather as organizations such as corporations and universities and agencies recognized the need for creating safe places for internal issues to be raised and resolved. These organizational ombuds offices, most of them originally in the private sector, were conceived and developed without *statutory* mandate, template or protection, although they have sought legal refuge using several legal tools discussed later in this analysis.

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[1] We would like to acknowledge here the sustained, diligent work and many valued contributions of legal assistant Jonathan Osler as well as the assistance of legal intern Elise McCray. Additionally, we gratefully acknowledge the invaluable foundational research, analysis and writing done by Charles L. Howard, most particularly in his book THE ORGANIZATIONAL OMBUDSMAN, ORIGINS, ROLES, AND OPERATIONS—A LEGAL GUIDE, ABA Publishing (2010), which includes Howard's identification of numerous unpublished cases pertaining to ombuds in the private sector discussed herein. We are also grateful for Charles Howard's reading of and comments on an earlier draft of this analysis.

[2] This legal analysis adheres to the Twentieth Edition of The Bluebook: A Uniform System of Citation, which was published in the summer of 2015. Other than by possible inadvertent error, citation in this analysis differs from the Bluebook only in that the publication date is supplied for statutes and regulations solely where they are cited in the first instance.

[3] To the extent that federal ombuds function as "neutrals" under the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–584 (2012), however, § 574 of the Act imposes restrictions on the disclosure of confidential communications. These are discussed at length, *infra.*

Departures from a traditional legislative model of established parameters in the United States generated both much innovation and a lack of uniformity, even and perhaps particularly among federal ombuds. Those federal ombuds offices created pursuant to executive initiative and by executive action are essentially conceived and operated according to individual policy decisions rather than legal prescriptions and proscriptions. When the architects of federal ombuds offices, whether Congressional or executive, have sought ombuds-specific references at the inception, they have typically looked to generally recognized professional standards of practice applicable to the type of ombuds office being established, the example of other federal ombuds offices, and a variety of resources available to federal alternative dispute resolution practitioners.

Were a new ombuds office a typical box being added to an agency organizational chart, it might just assume the mantle of laws generally applicable to federal agencies and employees such as the Freedom of Information Act,[4] the Federal Records Act,[5] or the Federal Service Labor-Managements Relations Statute,[6] without caveat and proceed from there. However, many federal ombuds offices have adopted, at least to some extent, generally accepted professional standards of practice that stipulate certain attributes and requirements that have been found to encourage ombuds use by constituents and the effective accomplishment of the ombuds' mission. The legal questions before us are to what extent these (professional) standards are reflected in, and find protection in, the surrounding legal environment, and to what extent these standards conflict or are harmonious with the dictates of statutes of general application applicable to federal agencies or employees, case precedent or regulatory demands. An important backdrop for the consideration of these questions inevitably is the delicate balance of

[4] 5 U.S.C. § 552 (2016) (current through Pub. L. No. 114-185).
[5] 44 U.S.C. §§ 3101–3107 (2016) (current through Pub. L. No. 114-185).
[6] 5 U.S.C. §§ 7101–7135 (2012).

government openness and accountability on the one hand with the degree of confidentiality critical for the effectiveness of government ombudsmen on the other.[7]

Of the commonly accepted professional ombuds standards of practice, the standard primarily affected by these legal questions is *confidentiality*, offered in some form by the majority of federal ombuds offices. *Neutrality* or *impartiality* come into *legal* play only insofar as the degree to which they are manifest affects the application of the ADRA's requirements for and protection of confidentiality, and vice versa. *Independence* is not reflected in the general legal framework at all except insofar as it may be enhanced or diminished depending on the extent to which an ombuds is perceived to be a neutral, confidential resource, and to the extent that evidence of independence from the agency management structure may have an impact on whether notice to an ombudsman is deemed notice to the agency. Other professional standards of practice variously embraced by different kinds of ombuds are essentially matters of policy not specifically addressed in generally applicable statute or case law.

Some federal ombuds and commentators have suggested that new legislation or modification of the Administrative Dispute Resolution Act (ADRA) could and should clarify, standardize, protect and bolster the standards and practices of federal ombuds.[8] This legal analysis considers that possibility as well as how, in light of the current legal environment, federal ombuds might best position themselves to articulate and protect the professional commitments they make to constituents.

As noted above, some federal ombuds are mandated by statute. These statutory provisions are exceptionally varied in purpose and structure as well as in the level of detail each

[7] *See generally* Administrative Conference of the U.S. Recommendation 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality*, 52 Fed. Reg. 5212 (Feb. 2, 1989).
[8] *See, e.g.*, TAXPAYER ADVOCATE SERVICE, *2009 Annual Report to Congress, Vol. 2, Survey of Federal Government External Ombudsmen*, at 114–15 in which a proposal is made for a Federal Agency External Ombudsman Act.

statute affords both the description of the office and the standards to be applied. At one end of the spectrum is the whistleblower protection ombuds (WPO) created at § 117 of the Whistleblower Protection Enhancement Act of 2012.[9] That statute requires every Inspector General to "designate a Whistleblower Protection Ombudsman who shall educate employees" about prohibitions on retaliation for protected disclosures and, for those employees who have made or are contemplating making a protected disclosure, about the rights and remedies for retaliation.[10] The law prohibits the WPO from acting as a legal representative, agent or advocate for employees.[11] No further guidance is given in the statute, leaving the questions of how these educational functions are to be carried out, what additional functions, if any, a particular WPO must perform and what standards, if any, a WPO must adhere to up to the individual Inspector General's Office in which that ombuds resides.

In contrast, at the other end of the spectrum is the Taxpayer Advocate Service (TAS) at the Internal Revenue Service. The office was originally created in 1979 by the IRS itself as a voice for taxpayers called the Taxpayer Ombudsman. Through the two Taxpayer Bill[s] of Rights in 1988 and 1996, respectively, the TAS was given the authority to issue Taxpayer Assistance Orders and renamed the Office of the Taxpayer Advocate.[12] TAS carries the dual responsibilities of resolving cases brought to them by individual taxpayers and proposing both administrative and legislative fixes for systemic problems that TAS identifies. Further, the 1998 IRS Restructuring and Reform Act mandated Local Taxpayer Advocates in every state.[13] The

[9] Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1474, 1475 (codified at 5 U.S.C. app. § 3(d)).
[10] *Id.* § 3(d)(1)(C).
[11] *Id.* § 3(d)(2).
[12] *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, Title VI, § 6230, 102 Stat. 3342, 3733 (Nov. 10, 1988); Taxpayer Bill of Rights II, Pub. L. No. 104-168, § 101, 110 Stat. 1452, 1453 (July 30, 1996).
[13] *See* Pub. L. No. 105-206, § 1102, 112 Stat. 685, 697 (July 22, 1998). For a more detailed description of the evolution of the Taxpayer Advocate, refer to IRS, HISTORY OF THE TAXPAYER ADVOCATE, https://www.irs.gov/advocate/history-of-the-office-of-the-taxpayer-advocate.

statutory framework addresses both the independence and confidentiality of TAS. Although the National Taxpayer Advocate reports to the Commissioner of the IRS, TAS submits two yearly reports to Congress. Only the National Taxpayer Advocate, the Commissioner of the IRS or the Deputy Commissioner of the IRS are empowered to modify or rescind a taxpayer assistance order. Local advocates report to the National Taxpayer Advocate office rather than the regional IRS structure and are required by statute to notify taxpayers that they operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate.[14] In this regard the statute requires that each local advocate office maintain a separate phone, facsimile, and other electronic communication access, and a separate post office address.[15] With regard to confidentiality, Congress also granted the local taxpayer advocates the discretion to not disclose to the Internal Revenue Service contact with, or information provided by, taxpayers who come to them with issues and concerns.[16]

As these examples of ombuds mandated by statute suggest, each kind of federal statutory ombuds is unique in form and function.[17] Likewise, those ombuds offices initiated and shaped

[14] *See* I.R.C. § 7803(c)(4)(A)(iii) (2012).
[15] *Id*. § 7803(c)(4)(B).
[16] *Id*. § 7803(c)(4)(A)(iv).
[17] For some additional examples of variations in federal ombuds created by statute, see also: Private Education Loan Ombudsman, created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2009, 2010 (2010) (ombuds is authorized by statute to informally resolve complaints from borrowers of education loans); Citizenship and Immigration Services Ombudsman, created by the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2197–99 (2002) (ombuds was created to assist individuals and employers in resolving problems with the Bureau of Citizenship and Immigration Services; the statute gives the ombuds discretion not to disclose to the Bureau "contact with, or information provided by, such individual or employer."); Federal Housing Finance Agency Office of the Ombudsman, created by the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2668 (statute authorizes the ombuds to consider complaints and appeals from regulated entities and persons or entities having a business relationship with a regulated entity, but leaves it to FHFA to "specify the authority and duties" of the ombuds. FHFA implementing regulations require that the ombuds conduct independent inquiries and act as a neutral facilitator or mediator to help resolve complaints and submit fact findings and recommendations to the FHFA Director. *See* 12 C.F.R. § 1213 (2011)); Office of Government Information Services, created by the OPEN Government Act of 200, Pub. L. No. 110-175, 121 Stat. 2529, 2530 (amending the Freedom of Information Act, 5 U.S.C. 552) (created within the National Archives and known by the agency as the "FOIA Ombudsman"; empowered by statute to offer mediation services to resolve disputes between persons making FOIA requests and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the ombuds office, issue advisory opinions if mediation has not resolved the dispute. The FOIA ombuds has authority

by executive action also cover a remarkable range. Given the variability among federal ombuds offices, necessity requires that the legal conclusions and recommendations here are made with the preponderance of federal internal and external ombuds in mind, while inviting all federal ombuds offices to apply the law and commentary described here to the circumstances of their respective offices including, if applicable, to the statute which has mandated their office.

II. Background — Ombuds Privilege, Inherent Judicial Authority to Manage Discovery, and the Administrative Dispute Resolution Act (ADRA) of 1996

At the time that ombuds first began to appear in the federal government, there were virtually no legal underpinnings on which to rely. An attempt was made to rectify this omission, at least in part, when ADRA was reauthorized and amended in 1996 adding "use of ombuds" to the list of procedures defined as "alternative means of dispute resolution" in § 571(3).[18] However the significance of this addition is not entirely certain[19] and hence has been subject to different interpretations by commentators. Accordingly, to the extent that there may be

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to recommend policy changes to Congress and the President and to review agency FOIA compliance.); Office of Ombudsman for Civil Service Employees, Pub. L. No. 100-204, 101 Stat. 1360 (1987) (codified at 22 U.S.C. § 2664a) (operating within the Department of State, this is one of the few internal ombudsman created by federal statute. With regard to independence, the statute specifies that the ombuds reports to the Office of the Secretary, that it is a career senior executive service position and that the ombuds has the right to participate in certain management meetings. The office publicly states that it adheres to the principles of independence, neutrality and impartiality, confidentiality, and informality. *See*, *About Us*, DEPARTMENT OF STATE OFFICE OF THE OMBUDSMAN, http://www.state.gov/s/ombudsman/.). Additional examples of statutory ombuds and ombuds-like offices can be found in WENDY R. GINSBERG & FREDERICK M. KAISER, CONG. RESEARCH SERV., FEDERAL COMPLAINT-HANDLING, OMBUDSMAN, AND ADVOCACY OFFICES 22–47 (2009).

[18] *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

[19] *See, e.g.*, Howard Gadlin & Samantha Levine, *Stranger in a Strange World, the Ombudsman in the Federal Government*, ACRESOLUTION, Spring 2008, at 19 ("Not until the act was amended in 1996 was 'use of ombuds' listed as one of the 'alternative means of dispute resolution' and, to this day, the language in ADRA is tailored to the essential features of mediation-based programs. As a result, it is not always clear whether the activities of ombudsmen offices are covered by ADRA, a situation that contributes to some of the confusion that exists around the ombudsman concept."). *See also* Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dep't of Justice December 29, 2000) (interpreting provisions of the Administrative Dispute Resolution Act broadly but seemingly based on a mediation model). Additionally, in the introduction to its 2006 guide on ADR confidentiality, the Interagency ADR Working Group Steering Committee states: "This Guide focuses solely on confidentiality related to the use of mediation in federal workplace disputes. Confidentiality under the ADR Act may also apply to other ADR processes used to address workplace disputes, such as facilitation, conciliation and use of ombuds." INTERAGENCY ADR WORKING GROUP STEERING COMM., PROTECTING THE CONFIDENTIALITY OF DISPUTE RESOLUTION PROCEEDINGS 3 (2006) [hereinafter *IADRWG Guide*].

ambiguity or gaps in coverage, this analysis will discuss other elements of the law that might inform interpretation of the Act or supplement it. The legal analysis will then discuss the implications of the inclusion in ADRA of "use of ombuds," and the degree to which the Act's requirements and protections apply to the functions of federal ombuds.

In the context at issue in this study, there is a difference between confidentiality and privilege. Confidential information is that which may be communicated to an ombuds and which the ombuds is precluded, either by virtue of pledge, charter, standard of practice or law, from disclosing voluntarily without the consent of the constituent that made the communication. Privileges, on the other hand, are generally fashioned by law[20] or case precedent to shield certain information from discovery or, in the case of some privileges, to shield individuals from involuntary testimony. While assertion of privileges, particularly by the government, is not favored by the courts and is of narrow application, given the scant case law interpreting relevant provisions of ADRA or addressing the parameters of federal ombudsmen confidentiality, the law pertaining to ombuds privilege and related privileges is one factor, among others, indicating how expansive courts and administrative tribunals might be if and when required to define the scope of federal ombuds confidentiality. However, the scope of ombuds confidentiality is not delimited by the degree to which a federal ombuds privilege has, or has not, been recognized.

A. Ombuds Privilege

In discussing the protection afforded by the law to communications made to a federal ombuds, we turn first to the question of whether a federal common law privilege for ombuds

[20] *See, e.g.*, FED. R. EVID. 502 (establishing attorney-client privilege).

exists.[21] The inquiry begins with Federal Rule of Evidence 501, which states that "[t]he common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless" the Constitution, a federal statute, or rules prescribed by the Supreme Court provide otherwise.[22] Thus, "we start with the primary assumption that there is a general duty to give what testimony one is capable of giving."[23] The Supreme Court articulated the federal common law boundaries of privilege in *Jaffee v. Redmond*,[24] which considered whether conversations between an individual and a psychiatric social worker were privileged. In that case a man was shot and killed by a police officer, and the family of the deceased sued the officer and the town, alleging violations of the deceased's constitutional rights by use of excessive force. After the shooting the officer received extensive counseling from a therapist. The relatives attempted to compel disclosure of statements made by the officer to her therapist during the counseling sessions. The officer argued against disclosure, urging the court to recognize a common law "psychotherapist privilege" under Rule 501 of the Federal Rules of Evidence.[25]

The Court began by acknowledging that there is generally a presumption against creating new evidentiary privileges.[26] However, the Court recognized that Rule 501 authorizes federal courts to define new privileges "in the light of reason and experience," and also that case law precedent stood for the proposition that new exceptions may be justified "by a compelling 'public good transcending the normally predominant principle of utilizing all rational means for

[21] Inasmuch as we would expect that cases involving federal ombuds will be heard in federal courts under the Federal Rules of Evidence and Civil Procedure the analysis of privilege begins there. Some state cases are discussed *infra* to the extent that they shed light on national trends with regard to ombuds privilege and the rationale therefore.
[22] FED. R. EVID. 501.
[23] Trammel v. United States, 445 U.S. 40, 50 (1980)).
[24] 518 U.S. 1, 9 (1996)
[25] *Id*. at 3–4.
[26] *Id*. at 9.

ascertaining truth.'"[27] Turning to the nature of the therapist relationship, the Court explained that "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust. . . . The mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."[28]

Having established that open and candid communications are essential to successful psychiatric therapy, the Court held that recognizing a psychotherapist privilege "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry . . . is a public good of transcendent importance."[29] Moreover, the Court concluded that in contrast to the "significant" interests served by recognizing the privilege, "the likely evidentiary benefit that would result from the denial of the privilege is modest."[30]

Notably the Court "reject[ed] the balancing component of the privilege" adopted by the 7th Circuit:

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . An uncertain privilege, or one which purports to be certain but results in widely varying applications by the court, is little better than no privilege at all.[31]

Thus, the court eschewed a balancing test in factor of absolute certainty; however, the Court determined that it was "neither necessary nor feasible" to define the "full contours" of the privilege.[32]

In the often-cited case of *Folb v. Motion Picture Indust. Pension & Health Plans*,[33] the court distilled the principles set forth by the Supreme Court in *Jaffee* and applied them in a case

[27] *Id*. at 9 (quoting *Trammel*, 445 U.S. at 50).
[28] *Id*. at 10.
[29] *Id*. at 11.
[30] *Id*.
[31] *Id*. (citing lower court's decision in *Jaffee v. Redmond*, 51 F.3d 1346).
[32] *Id*. at 18.

involving a mediation proceeding. In *Folb*, a former employee of the Motion Picture Industry Pension & Health Plans brought suit alleging employment discrimination on the basis of gender. He also claimed that the Plans had improperly discharged him for whistleblowing, and had relied on a complaint of sexual harassment made against him as a pretext for his discharge. The magistrate judge below denied the plaintiff's motion to compel production of documents and statements generated during mediation between the Plans and Vasquez, the employee who had brought the harassment claim against Folb. According to Folb, the Plans intended to argue that he was properly terminated as a consequence for sexually harassing Vasquez "despite the fact that they may have argued in mediation or settlement negotiations . . . that she was never sexually harassed at all."[34]

On appeal, the *Folb* court reduced the privilege analysis in *Jaffee* down to four elements: "(1) whether the privilege is necessary for confidence and trust; (2) whether the privilege would serve public ends; (3) whether the evidentiary detriment caused by exercise of the privilege is modest; and (4) whether denial of the federal privilege would frustrate a parallel privilege adopted by the states."[35] The court then applied these principles in determining whether, "in light of reason and experience," it should recognize a federal mediation privilege.[36] First the court found that, on balance, the public interest in "encouraging parties to attend mediation and communicate openly and honestly in order to facilitate successful alternative dispute resolution"[37] favored the privilege. Second, after an exhaustive examination of the state and federal legal authorities on the issue, the court determined that "the majority of the courts to have

[33] 16 F. Supp. 2d 1164 (C.D. Cal. 1998), aff'd, 216 F.3d 1082 (9th Cir. 2000). The case has been called "the bedrock of the federal common law mediation privilege." *See* Lipps, *infra* note 60, at 4.
[34] *Id*. at 1166–67. The court noted that Vasquez and the Plans had signed a confidentiality agreement covering communications made during the mediation.
[35] *Id*. at 1171.
[36] *Id*.
[37] *Id*. at 1172.

considered the issue appear[] to have concluded that the need for confidentiality and trust between participants in a mediation proceeding is sufficient imperative to necessitate the creation of some form of privilege."[38] Finally, citing *Jaffee*, the court reasoned that the "evidentiary benefits that would result from the denial of the privilege [would] [be] modest[,]" inasmuch as, absent the mediation, the evidence "would simply never [have] come into being."[39] On a final point, the court limited its holding "only to information disclosed in conjunction with mediation proceedings with a neutral."[40]

While the instruction this case provides with regard to general principles of confidentiality and impartiality is of interest when considering how such a privilege might be applied to ombuds, the court in *Folb* decided what they considered to be a very narrow issue based on the facts of the case. The court specified that its duty was only to decide "whether communications between parties who agreed in writing to participate in a confidential mediation with a neutral third party should be privileged, and whether that privilege should extend to communications between the parties after they have concluded their formal mediation with the neutral."[41] This disinclination to "address the outer limits of a federal mediation privilege"[42] is important because the shape of the privilege found contains certain elements that are common or necessary to the process of mediation, but not to all functions of ombuds. These elements include the signing of a written agreement to participate in a confidential mediation and the designation of the process as a "formal" process with a neutral mediator (as opposed to private settlement discussions). In this regard, the court distinguished communications that were "in

[38] *Id*. at 1175.
[39] *Id*. at 1178 (citing *Jaffee*, 518 U.S. at 11).
[40] *Id*. at 1180.
[41] *Id*. at 1172.
[42] *Id*. at 1178.

conjunction with" or "in preparation for and during the course of a mediation with a neutral,"[43] which it found to be protected, from discussion between the parties that occurred after conclusion of the mediation, which it found to be unprotected by the mediation privilege.[44]

Addressing the holding in *National Labor Relations Board v. Joseph Macaluso*,[45] discussed *infra*, the *Folb* court stated that both confidentiality and neutrality in mediation "serve the same ultimate purpose: encouraging parties to attend mediation and communicate openly and honestly in order to facilitate successful alternative dispute resolution."[46] These two principles are distinguished by the goals of implementing them, but they still go hand in hand. According to *Folb*, confidentiality exists to encourage parties to speak freely without fear of their statements being brought up later in court, or elsewhere, and impartiality is necessary to prevent undermining mediation as a fair alternative to litigation.[47]

A number of courts, including the one in *Folb*, have made it clear that not enforcing these rules has consequences for parties and neutrals regardless of whether the mediation is successful. For example, prior to *Folb*, the Ninth Circuit Court of Appeals in *Macaluso* had found that failure to protect neutrals such as mediators could have consequences well beyond the impact on the case at hand for the larger federal systems relying on mediation as a valuable tool, such as the labor management system.[48] In that case, involving unfair labor practice allegations before the National Labor Relations Board (NLRB) and a subpoena of a Federal Mediation and Conciliation Service (FMCS) mediator, the court considered whether the preservation of

[43] *Id*. at 1180.
[44] *Id*. The court noted, however, that settlement negotiations not part of the mediation might come within the domain of FED. R. EVID. 408 ("Compromise Offers and Negotiations").
[45] 618 F.2d 51 (9th Cir. 1980).
[46] *Folb*, 16 F. Supp. 2d at 1172.
[47] *Id*. at 1171–76.
[48] *Macaluso*, 618 F.2d at 55 ("[F]ederal mediation has become a substantial contributor to industrial peace in the United States. . . . Any activity that would significantly decrease the effectiveness of this mediation service could threaten the industrial stability of the nation.").

mediator effectiveness by protection of mediator neutrality was a ground for revocation of the subpoena consistent with the power and duties of the NLRB under the National Labor Relations Act.

Relying on federal law and policy favoring mediation — particularly in the labor management arena — the court in *Macaluso* determined that "the public interest in maintaining the perceived and actual impartiality of federal mediators does outweigh the benefits derivable"[49] from the mediator's testimony even though, in that instance, it would likely have resolved the pivotal credibility issue between the two parties. The court stated that "[i]f conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other."[50] It further opined:

> To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference.[51]

The court found such disclosures would not only be harmful to the person or persons who made them in confidence, but also to these programs whose goals are to promote public trust in them and their ability to resolve disputes fairly. Ultimately the court held that "the complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor

[49] *Id*. at 54. *Cf*. Blackmon-Malloy v. United States Capitol Police Bd., 575 F.3d 699, 711 (D.C. Cir. 2009) ("Congress understood what courts and commentators acknowledge, namely, that confidentiality plays a key role in the informal resolution of disputes.").
[50] *Id*. at 55.
[51] *Id*. (quoting Tomlinson of High Point, Inc., 74 NLRB 681, 688 (1947).

mediation, and that labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence."[52]

Similarly, the court in *United States v. Gullo*[53] considered confidential communications that arose during a dispute resolution proceeding[54] involving neutrals at a Community Dispute Resolution Center operated under the direction of the chief court administrator. In upholding "a privilege" precluding the government from disclosing the dispute resolution communications to a grand jury, the court warned about the threat to such programs if dispute resolution confidentiality is not upheld, citing the state policy encouraging participation in informal dispute resolution processes without restraint and intimidation and the impact on both participation and candor that the "privilege generally serves to foster . . . ."[55]

Significantly, in *Molina v. Lexmark*[56] the same district court that had decided *Folb* qualified its holding, stating that the "exact contours of the privilege recognized in *Folb* are unclear."[57] *Molina* was a class action suit. When the defendant attempted to remove the case to federal court, Molina argued that Lexmark had not sought removal within the requisite time

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[52] *Id*. at 56.
[53] 672 F. Supp. 99 (W.D.N.Y. 1987).
[54] The court refers to the proceeding in the case as "mediation/arbitration"; the dispute resolution agreement executed by Gullo provided for both, stipulating that the parties "would attempt to reach settlement through mediation and, if that failed, in binding arbitration." *Id*. at 102-103.
[55] *Id*. at 104. Note however, that there is a hint in *Gullo* that courts view the question differently during criminal actions in which the defendant's rights often trump other imperatives. Although the *Gullo* court held that disclosure was not required because the grand jury already had enough evidence to indict the target, it is likely that absent such evidence the subpoena would have been enforced despite the court's strong support for protection of alternative dispute resolution communications. In a recent civil case, the Second Circuit set forth a three-factor test for disclosure of confidential mediation communications:

> A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material; (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. [citations omitted] All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.

In Re Teligent, 640 F.3d 53 (2d Cir. 2011). Although it is not clear whether the Second Circuit intended for the test to apply to any kind of of request to the court for disclosure of mediation communications, the court's language is sufficiently broad to support such an interpretation.
[56] No. CV 08-04796, 2008 WL 4447678 (C.D. Cal Sept. 30, 2008).
[57] *Id*. at *15.

period because Lexmark had been provided notice of the facts that were the predicate for removal during the mediation of the case. Lexmark disputed this claim based, *inter alia*, on its assertion that the information obtained during the mediation was privileged under *Folb.*

The *Molina* court stressed that the *Folb* court had repeatedly limited the privilege that it found to the factual context before it, namely one in which a third party who did not participate in the mediation sought in discovery to obtain mediation communications. Noting that "confidential does not necessarily mean privileged," the *Molina* court described confidentiality as affecting the freedom of the neutral or the parties to disclose information whereas privilege would affect the ability of third parties to compel disclosure. Therefore the court concluded that the information sought was subject to disclosure in *Molina* inasmuch as a party to the case was seeking mediation communications in the same case, the case was a class action and thus entailed a greatly diminished expectation of confidentiality, and because it found the reason for disclosure (establishing an "objective baseline" for calculating the timeliness of removal) compelling.[58]

Molina discusses the mixed case law on mediation privilege after *Folb* and notes that no Circuit court had thus far adopted a mediation privilege. In this regard, it highlights the Fifth Circuit's analysis in *In re Grand Jury Subpoena*.[59] That case will be discussed in some detail below with regard to the interpretation of confidentiality under ADRA.

Concerns about protecting confidential mediation communications from involuntary disclosure have also been articulated in many scholarly articles on the subject. Illustratively, Alan Kirtley argues that "[w]ithout adequate legal protection, a party's candor in mediation

[58] Although it found the *Folb* privilege inapplicable, the *Molina* court considered the four factors outlined in *Folb* and still found that the applying the privilege in *Molina* was unwarranted. The court noted that, unlike *Folb*, neither Lexmark nor Molina had signed a confidentiality agreement implying that this omission might have some significance.

[59] In re Grand Jury Subpoena Dated December 17, 1996, 148 F. 3d 487 (5th Cir. 1998) [hereinafter *In re Grand Jury*].

might well be 'rewarded' by a discovery request or the revelation of mediation information at trial. A principal purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed mediation."[60]

While the significance for ombuds of the common law mediation privilege articulated in *Folb* is not clear, the trajectory of cases discussing ombuds privilege itself is even more equivocal. Courts have gone back and forth over time on ombuds privilege manifesting profound differences in how courts discuss ombuds and their functions. Some courts have viewed them as very similar to mediators, while others have found the resemblance less striking, and less supportive of creation of an ombuds privilege. Courts that have found an ombuds privilege have construed it very narrowly.

The first case in the chronology of key decisions on ombuds privilege is *Shabazz v. Scurr*.[61] In this case, multiple "Section 1983"[62] suits were filed against state prison officials following an inmate's death. Officials of the state's ombudsman office moved to intervene and assert a state law evidentiary privilege against a former prison ombudsman employed by the plaintiffs in his subsequent occupation as an investigator operating a private consulting firm. The district court held that "a limited privilege exists under federal law" for communications received by a prison ombudsman, and that this privilege belonged to the office.[63] However, the court relied in part on a state law "and other confidentiality provisions" that provided for

[60] Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation*, 1995 J. DISP. RESOL., 1995, at 10-11 (1995). *See also* Joseph Lipps, *The Path Toward a Federal Mediation Privilege*, 2010 AM. J. OF MEDIATION 4, 2010; Marcia S. Cohen, *The Mediation Privilege*, 87 FL. BAR J. 4, 2013, at 14; Ryan D. O'Dell, *Federal Court Positively Adopts a Federal Common Law Testimonial Privilege for Mediation*, 1999 J. DISP. RESOL., 1999. The latter article concurs with the need for protection of mediation confidentiality but argues that the basis for the decision articulated in *Folb* fell short of a convincing argument for privilege.

[61] 662 F. Supp. 90 (S.D. Iowa 1987).

[62] 5 U.S.C. § 1983 (2012). A section 1983 claim is a civil action filed against a person who, acting under "color of law," has deprived the plaintiff of rights, privileges, or immunities granted under federal law or the United States Constitution.

[63] *Id*. at 90–91.

confidentiality of communications made to the ombudsman office, and did not recognize an ombuds privilege generally.[64] It did, however, recognize that courts have an interest in protecting the means of compromise and settlement of disputes and, in this circumstance, the office's "problem-solving" function.[65]

Eight years later in *Gartsang v. Superior Court*,[66] a California court of appeals addressed the question of whether communications made to a university ombudsman during mediation sessions are privileged. Garstang, a California Institute of Technology employee, sought to compel answers to certain deposition questions concerning conversations between several of her co-workers and the Caltech ombuds. The court stated that, although there was no specific statutory privilege for ombuds under California law, the basis for a qualified privilege could instead be found in the state's constitutional right of privacy.[67] Again, while the holding itself is of little utility outside of California, the court's rationale is of interest. It specifically relied on evidence in the record of the ombuds' observed and widely publicized pledge of confidentiality creating an expectation of confidentiality on the part of the employees. Further, the court found that communications with this ombuds were privileged because, on balance, the confidentiality essential to the relationship, the societal value of the relationship and the potential injury to the relationship outweighed the possible benefit to be gained by disclosure.[68]

Perhaps the most cited of the cases on ombuds privilege is *Carman v. McDonnell Douglas Corp*.[69] in which the 8th Circuit Court of Appeals found that communications between

[64] *Id*. at 92.
[65] *Id*.
[66] 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84 (1995).
[67] *Id*. at 532.
[68] *Id*. at 534 (discussing and citing with approval Kientzy v. McDonnel Douglas Corp., 133 F.R.D. 570, 571 (1991), *vacated*, 990 F.2d 1051 (8th Cir. 1993)). *See also* Helen Hasenfeld, *Lessons Learned: A Revisit to the Garstang vs. California Institute of Technology Ruling*, 4 J. OF THE INT'L OMBUDSMAN ASS'N 2, 2011, at 16 (for a discussion of *Garstang* written by the ombuds who was the subject of the decision).
[69] 114 F.3d 790 (8th Cir. 1997).

an employee and a company ombudsman who both investigated and mediated workplace disputes were not privileged from disclosure. In this case an employee, Carman, sued his former employer, McDonnell Douglas, claiming that his termination violated the Age Discrimination in Employment Act, the Missouri Human Rights Act, and the Employee Retirement Income Security Act of 1974 (ERISA). The District Court granted summary judgment to McDonnell Douglas and Carman appealed. The Court of Appeals agreed with the employer "that fair and efficient alternative dispute resolution techniques benefit society and are worthy of encouragement,"[70] but ultimately decided that they were not convinced as to the necessity of the privilege based on the evidence submitted by McDonnell Douglas. In the words of the court:

> To justify the creation of a privilege, McDonnel Douglas must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information. The creation of a wholly new evidentiary privilege is a big step. This record does not convince us that we should take it.[71]

The court in *Carmen* went to some lengths to describe the limits of the record on which it was constrained to rely. The court distinguished corporate ombuds, who are "paid by the corporation and lack[] . . . structural independence," from government *classical* ombuds, "where the office of ombudsman is a separate branch of government that handles disputes between citizens and government agencies."[72] The court noted that McDonnell Douglas failed to argue or present any evidence that "the ombudsman method" is superior to other forms of alternative dispute resolution, and, additionally, that the company failed to demonstrate the efficacy of its own ombuds at resolving disputes prior to litigation.[73] Further, the court found "McDonnell Douglas has failed to make a compelling argument that most of the advantages afforded by the

[70] *Id*. at 793.
[71] Carman v. McDonnell Douglas Corp., 114 F.3d 790, 794 (8th Cir. 1997).
[72] *Id*. at 793.
[73] *Id*.

ombudsman method would be lost without the privilege," asserting that "corporate ombudsmen still have much to offer employees in the way of confidentiality, for they are still able to promise to keep employee communications confidential from management."[74] Relying thus on McDonnell Douglas' complete failure to carry its burden of proof, the *Carmen* court rejected the argument of ombuds privilege and concluded that granting the privilege would neither convince an employee that the ombuds is neutral nor affect the relationship between the ombuds and management, and that the ombuds would still be able to "promise confidentiality in most circumstances even with no privilege."[75]

Charles L. Howard in his seminal and comprehensive book, *The Organizational Ombudsman,*[76] has argued that the decision in *Carmen* was a captive of the circumstances, the limitations of the evidence presented and the limited arguments made by the employer in defense of the ombuds privilege.[77] In this regard, Howard notes that in an earlier case involving the same ombuds program, *Kientzy v. McDonnell Douglas Corp*.,[78] the magistrate judge found that communications with the corporate ombuds sought in a suit alleging employment discrimination were privileged. The judge in *Kientzy* had relied on his findings that: (1) the communications were made to the ombuds in the belief that they would be kept confidential; (2) the confidentiality of communications is essential to the relationship between the ombuds and both employees and management; (3) the relationship between the company's ombudsman office and its employees and management is worthy of societal support; and (4) the harm caused by a

[74] *Id*. at 793–94.
[75] *Id*. at 794.
[76] *See* HOWARD, *supra* note 1.
[77] *See id*. at 233–39.
[78] 133 F.R.D. 570.

disruption of the confidential relationship between the ombudsman's office and others would be greater than the benefit to plaintiff by disclosure.[79]

Howard suggests circumstances that may have led the court in *Carmen* to reject the *Kientzy* holding. He notes initially that by the time of the *Carmen* decision the McDonnell Douglas ombuds program had been disbanded and thus posits that the company's ardor for defending the interests of the program had faded.[80] As a result, in the proceeding before the trial judge in *Carmen*, the company merely relied on two unreported decisions in the same federal district court in which the privilege had been recognized and presented no evidence in support of the claim of privilege in the case at hand.[81] Thus, Howard argues, the *Carmen* decision was based on a lack of evidence supporting the claim of privilege and a fundamental misunderstanding of how properly structured ombuds offices function.[82] Howard concludes that, despite *Carmen,* in a properly litigated case concerning an ombuds office that is structured and functions according to recognized standards, a claim of testimonial privilege might still prevail.[83]

A subsequent case validates Howard's concern about how ombuds privilege cases are litigated. Following *Carmen*, in *Solorzano v. Shell Chemical Co.,*[84] the court approached the question of privilege very cautiously. The case involved a Shell employee who was allegedly

[79] *Id*. at 571–73 (employing the four-factor "Wigmore test" set forth in *In re Doe*, 711 F.2d 1187, 1193 (2nd Cir. 1983)).
[80] *See* HOWARD, *supra* note 1, at 234.
[81] *Id*. at 235.
[82] *Id*. at 236–37.
[83] *Id*. at 221 ("[W]hile Carman placed a cloud on an ombuds' ability to claim a testimonial privilege, the court's opinion serves as a useful guide in articulating several issues that should be addressed by ombuds in seeking recognition of an ombudsman privilege."). *Cf.* Scott C. Van Soye, *Illusory Ethics: Legal Barriers to an Ombudsman's Compliance with Accepted Ethical Standards*, 8 PEPP. DISP. RESOL. L. J. 117, 132 (2007) (taking the more negative view that "a future claim of [ombudsman] privilege stands a poor chance of success in the federal courts."). *See also* Kendall D. Isaac, *The Organizational Ombudsman's Quest for Privileged Communications*, 32 HOFSTRA LAB. & EMP. L.J. 31, 47 (2014) (discussing the history of the ombudsman privilege and recommending the creation of "both a federal and a state statutory privilege."); James R. Coben & Peter N. Thompson, *Disputing Irony: Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 68–73 (2006) (meta-analysis of over 1000 cases involving legal disputes about mediation, including 152 opinions where courts considered mediation confidentiality — of which 46 addressed privilege issues — and addressing the importance of how such claims are raised and litigated).
[84] No. CIV.A.99-2831, 2000 WL 1145766 (E.D. La. Aug. 14, 2000).

fired for substance abuse, but claimed he was discriminated against by the company. In pursuing a discrimination suit, he requested any files maintained on him by Shell's ombudsman program regarding his claims. The court stated that "in deciding whether to recognize a new federal privilege, the Court should 'balance the public's need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality in order to achieve the objectives underlying the privilege in issue.'"[85] The magistrate judge noted that the Supreme Court refused to carve out a privilege in a case involving federal claims that — like Solorzano's — were brought under "broadly remedial statutes, which set forth an integrated, multi-step enforcement procedure designed to be initiated by laymen."[86] The judge concluded that "[t]his court, like many others, is reluctant to find a new privilege that may undermine the federal interests at stake in . . . claims brought under federal law." On the specific question of whether to create a federal ombudsman's privilege, relying on a similarly limited record the *Solorzano* court was persuaded by the reasons elucidated in *Carman* for rejecting such a privilege. After quoting from Carman at length, the judge held: "I am particularly reluctant to recognize such a privilege as a matter of federal common law when a narrowly drawn protective order . . . short of recognition of a broad-ranging privilege, will suffice to accommodate any need for confidentiality . . . ."[87]

Two cases arising in California are additionally of interest, based on their rationale and dicta, although they rely on state law. In *Ombudsman Services of Northern California v.*

[85] *Id*. at 5 (quoting Syposs v. United States, 179 F.R.D. 406, 409 (W.D.N.Y.1998) (internal citations omitted)).
[86] *Id*. (citing University of Pa. v. EEOC, 493 U.S. 182, 190 (1990); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 123–24 (1988).
[87] *Id*. at 5. *Cf.* Miller v. Regents of the Univ. of Colo., 1999 WL 506520, 188 F.3d 518 (10th Cir. 1999) (Table), at *3, *15 (affirming district court's ruling "limiting discovery pursuant to an ombudsman privilege"; but recognizing "that neither Colorado nor federal law . . . recognize an ombuds privilege."). *Miller* is discussed, *infra*, with regard to judges' inherent authority to manage discovery.

Superior Court[88] the California court, on appeal, decided that the trial court had erred in requiring the production of records of the Ombudsman Services of Northern California, an authorized representative of the Office of the State Long-Term Care Ombudsman. A representative of a decedent's estate sued the care facility where the decedent had been living and other defendants for elder abuse, wrongful death, and other causes of action. The Superior Court below had ordered the long-term care ombudsman to provide the parties with all records relating to the care facility over a specified time period.

On appeal, the court noted that "confidentiality is critical to the functioning of the ombudsman."[89] The court began its analysis by recognizing that California Evidence Code § 911[90] codifies the Legislature's intent "to abolish common law privileges and to keep the courts from creating new non-statutory privileges as a matter of judicial policy."[91] In this case, however, the court found that it did not need to address the issue of common law privilege, because "there is a specific [state] statute providing a privilege for the investigatory records and files of the office of the long-term care ombudsman."[92] The court noted that the California statute comports with federal laws requiring that states receiving federal funding for long-term care ombudsmen "preserve the confidentiality" of information gathered pursuant to those programs.[93] In concluding its analysis, the court "balance[ed] the need for discovery against the fundamental right of privacy" afforded under article 1, § 1 of the California Constitution,

[88] 154 Cal. App. 4th 1233 (2007).
[89] *Id*. at 1242.
[90] The provision states:

> Except as otherwise provided by statute:
> (a) No person has a privilege to refuse to be a witness.
> (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.
> (c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

CAL EVID. CODE § 911 (2007).
[91] *Ombudsman Servs*., 154 Cal. App. 4th at 1243 (Welfare Rights Org. v. Crisan, 33 Cal. 3d 766, 768–769 (1983)).
[92] *Id*. (citing CAL WELF. & INST. CODE § 9725 (2007) ("Records and files of office; confidentiality")).
[93] *Id*. at 1246 (citing 42 U.S.C. §§ 3058d(a)(6)(A), (C), 3058i(e)(2)(A)).

determining in this case that the "undisputed evidence established a very strong constitutional privacy interest in the records sought to be discovered by [the] plaintiff." Thus the court held that to compel disclosure of the ombudsman's records would violate the protected privacy rights under the state's constitution.

In contrast, in *Gazzano v. Stanford University*,[94] the United States District Court relied on *Carman* and *Miller v. Regents of the University of Colorado*, discussed *infra*, to deny a claim that communications with the university ombuds should be privileged. In a case of alleged dismissal for whistleblowing, the plaintiff sought to obtain all prior written correspondence between himself and the ombuds. Inasmuch as the case had been removed to federal court because of certain labor issues, the judge found that federal, rather than state, law on privilege applied. Acknowledging that Stanford had "failed to provide specific facts emphasizing the need for confidentiality in this situation," the judge concluded that ombuds "are generally known to be company representatives, making them fundamentally different from neutral, third-party mediators," and that therefore employees are "unlikely to approach the ombudsmen with the expectation that such communications be kept confidential."[95] Once again, *Gazzano* raises the question of whether, had the case been litigated differently and the court thus been more knowledgeable about this ombuds and ombuds generally, the outcome might have been different.[96]

[94] Case No. C 12-05742 PSG, 2013 WL 3158075, at *3 nn.18–19 (ruling on an order regarding motion to compel and motion for protective order).
[95] *Id*. The court appeared to assume, arguably erroneously, that any privilege would belong to the constituent seeking ombuds assistance rather than to the ombuds him or herself.
[96] *Id*. *See also supra* notes 80–83 and accompanying text discussing the impact of litigation strategy on the outcome in *Carman*.

B. Judicial Authority to Manage Discovery

Although courts have been reluctant to find a federal ombuds privilege, courts generally have inherent authority to control the introduction of evidence in a given case by determining the proper scope of discovery. For example, the court in *Dondi Properties Corp. v. Commerce Savings & Loan Ass'n* stated:

> By means of the Rules Enabling Act of 1934, now codified as 28 U.S.C. § 2072, Congress has authorized the Supreme Court to adopt rules of civil procedure. The Court has promulgated rules that empower district courts to manage all aspects of a civil action, including pretrial scheduling and planning (Rule 16) and discovery (Rule 26(f) . . . . In addition to the authority granted us by statute or by rule, we possess the inherent power to regulate the administration of justice."[97]

Correspondingly, Federal Rule of Evidence 102, states: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[98] In addition, Federal Rule of Evidence 403 provides a balancing test ensuring that a judge has the discretion to determine the relevancy of evidence and whether its probative value is substantially outweighed by, *inter alia,* a danger of unfair prejudice.

Illustrating this discretion, in *Seattle Times Co. v. Rhinehart*[99] the U.S. Supreme Court discussed a Washington state rule pertaining to protective orders in discovery. The Supreme Court of Washington had affirmed a protective order issued by the trial court compelling discovery of certain information regarding the members, contributors and clients of the Aquarian Foundation, a religious organization, which had sued the Seattle Times after the newspaper

[97] 121 F.R.D. 284 (N.D. Tex. 1988) (en banc). We note that subsequent modifications to the Federal Rules of Civil Procedure in 1993 and 2000 though altering discovery in the federal courts in some respects did not in relevant part reduce the judges' discretion to manage it. *See* Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform"*, 64 LAW & CONTEMP. PROBS. 197, 246 (2001).
[98] FED. R. EVID. 102 ("Purpose").
[99] 467 U.S. 20 (1984)

published several articles about the organization.[100] The protective order prohibited the newspaper from "publishing, disseminating or using the information in any way except where necessary to prepare for and try the case," however, "[b]y its terms, the order did not apply to information gained by means other than the discovery process."[101] On review the Supreme Court concluded that the provision for protective orders in the Washington Rules required "no heightened First Amendment scrutiny," noting that the rule follows the example set in Federal Rule 26(c), which "confers broad discretion on the trial court to decide when an order is appropriate and what degree of privacy protection is required."[102]

While the Court in *Seattle Times* considered only the narrow question of whether a litigant had the right to disseminate information he obtained pursuant to a court order "that both granted him access to that information and placed restraints on the way in which the information might be used[,]"[103] its rationale evokes some of the policy considerations that might be brought to bear should a court be called upon to use its inherent authority to protect the confidentiality of certain ombudsman communications.[104]

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[100] *Id*. at 23.
[101] *Id*. at 27.
[102] *Id*. at 36.
[103] *Id*. at 32.
[104] An excerpt from the Court's analysis in *Rhinehart*, reproduced below, fleshes out the rationale for imbuing the trial court with broad authority to fashion protective orders:

> Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery. There is an opportunity, therefore, for litigants to obtain — incidentally or purposefully — information that not only is irrelevant but, if publicly released, could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of processes.

467 U.S. at 34-35 (footnotes and internal citations omitted).

Generally, cases in which judges have used this inherent authority to protect communication with ombuds are unreported and difficult to obtain. One exception is *Miller v. Regents of the University of Colorado*,[105] a sexual harassment case in which Miller, a university employee, alleged that her former supervisor had subjected her to workplace sexual discrimination. Due to the "sensitive nature" of the case, the defendants filed a motion for a protective order early on in the discovery process which the magistrate judge granted.[106] Subsequently, Miller filed a series of motions in order to compel the testimony of the university's former ombudsperson. The district court denied the motions, holding that the ombuds was precluded from answering questions or revealing any information covered by an "ombudsman privilege," which protected all communications "made with an expectation of privacy to the University ombudsperson."[107] On appeal, Miller argued, *inter alia*, that the district court erred by "upholding a protective order which improperly limited her discovery rights . . . [and] limiting discovery pursuant to an ombudsman privilege."[108] In affirming the district court's rulings, the court of appeals did not reach the university's claim of ombuds privilege. Instead, in support of its holding, the court turned to the balancing language in Rule 26(b) & (c) of the Federal Rules of Civil Procedure.[109] As a matter of broad principle, the appeals court held that the district court's discretion to define the scope of discovery is wide because it is in the best position "to view firsthand the progression of the case, the litigants, and the impact of discovery on parties and nonparties."[110] The court found it unnecessary to address the issue of ombuds

[105] 1999 WL 506520, 188 F.3d 518.
[106] *Id*. at *3.
[107] *Id*.
[108] *Id*. at 3.
[109] Specifically, the court referenced Rule 26(b)(2)(iii): "Courts have the power to limit discovery if 'the burden or expense of the proposed discovery outweighs its likely benefit[,]'" and 26(c): "[d]istrict courts may also issue a protective order if 'justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Id*. at *12.
[110] *Id*.

privilege inasmuch as it found that the information precluded by the lower court pursuant to its finding of such a privilege concerned other employees and would not have saved the claims at issue from summary judgment.

C. Administrative Dispute Resolution Act (ADRA) of 1996

In light of the current state of the case law surrounding ombuds privilege and the uncertain reception of requests to judges to exercise their authority over discovery to protect ombuds confidentiality, the primary protection for federal ombuds confidentiality is to be found in the Administrative Dispute Resolution Act (ADRA).[111] Apart from its recognition that the use of ombuds is a form of alternative dispute resolution, the chief practical impact of the inclusion of ombuds in the definition of "means of alternative dispute resolution"[112] in ADRA in 1996 is in the application of § 574 on "Confidentiality." However, the inclusion of ombuds in the definition of means of alternative dispute resolution in ADR in § 571(3) does not assure that the confidentiality provisions in § 574 apply to everything that an individual with the title ombuds does.

Significantly, § 574 imposes obligations on the neutral and the parties with respect to confidentiality. It is not articulated as a privilege but rather as a proscription describing what neutrals and parties may and may not do and the specific exceptions to confidentiality that apply respectively. ADRA § 574 "does not provide a mere privilege or general endorsement of 'confidentiality.' It prohibits disclosure . . . ."[113] Further, § 574's reach exceeds that of a privilege in that it is not limited to adjudicatory applications.

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[111] 5 U.S.C. §§ 571–584 (2012).
[112] *See* 5 U.S.C. § 571(3).
[113] AM. BAR ASS'N, AD HOC COMM. ON FED. ADR CONFIDENTIALITY, GUIDE TO CONFIDENTIALITY UNDER THE FEDERAL DISPUTE RESOLUTION ACT 17 (2005) (*ABA Guide to Confidentiality*).

Section 574(a) lays out the broad rule that a neutral as defined in the Act "shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral…"[114] This ban has four exceptions: (1) if all parties to the dispute and the neutral consent in writing to the disclosure;[115] (2) if the communication has already been publicly disclosed;[116] (3) if the dispute resolution communication is required by statute to be made public;[117] and (4) if a court determines that disclosure is necessary to "prevent a manifest injustice[,] help establish a violation of law[,] or prevent harm to public health or safety."[118] The fourth exception also requires a court to perform a balancing test determining whether the magnitude of the potential harm "outweigh[s] the integrity of dispute resolution proceedings in general" so as not to "reduce the confidence of parties in future cases that their communications will remain confidential."[119]

Section 574(b), covering parties to a dispute resolution proceeding, provides an almost identical blanket rule for confidentiality and four of the exceptions to this rule are identical to the ones listed under subsection (a).[120] However it includes additional exceptions. These exceptions are for disclosures made by parties when "the communication was prepared by the party seeking disclosure[,][121] when the communication is relevant to determining the existence of or enforcing

[114] 5 U.S.C. § 574(a).
[115] 5 U.S.C. § 574(a)(1).
[116] 5 U.S.C. § 574(a)(2).
[117] 5 U.S.C. § 574(a)(3). However, this provision says that "a neutral should make such communication public only if no other person is reasonably available to disclose the communication." The interpretation of § 574(a)(3) and its implications for ombuds are discussed further below as the report addresses the potential conflicts between § 574 and various other statutes.
[118] 5 U.S.C. § 574(a)(4)(A)–(C).
[119] 5 U.S.C. § 574(a)(4).
[120] *See* 5 U.S.C. § 574(b)(2-5). These are the exceptions based on consent, prior public disclosure, requirement by statute that information be made public, and a decision by a court that disclosure would prevent a "manifest injustice" as provided in § 574(a)(1)–(4).
[121] 5 U.S.C. § 574(b)(1).

an agreement or award that resulted from the dispute resolution proceeding[,]"[122] and, most notably, when, "except for dispute resolution communications generated by the neutral, the . . . communication was *provided to or was available to all parties to the dispute resolution proceeding*."[123] The language of § 574(b)(7) effectively means that a party may freely disclose any documents or oral statements, made by anyone other than the neutral, as long as those communications were provided to or were available to all parties to the proceeding. The effect is that parties are protected from disclosure of dispute resolution communications by the neutral(s), but not from disclosure by each other under certain circumstances, including when communications are made during joint sessions with all parties present. Importantly, the Act also specifies that the parties may agree to alternative confidentiality procedures for disclosures by themselves[124] or by the neutral, provided they fully inform the neutral of their agreement.[125]

The ABA guidelines on confidentiality under ADRA raise a concern about the § 574 exception pertaining to parties for shared dispute resolution communications, finding potentially "detrimental impacts" compared to non-governmental settings in that this exception undermines the reasons why a party hoping to handle a dispute privately would choose an alternative to litigation.[126] The ABA cautions that "reduced candor in joint sessions, over-emphasis on "private caucus or evaluative styles of ADR, and confusion or detrimental surprise for unsophisticated participants" are possible negative results of this exception to the prohibitions on disclosure by parties.[127] For ombuds, to the extent that the ombuds' practices are covered by § 574, application of this exception to confidentiality for parties is likely limited inasmuch as most federal ombuds typically spend a minority of their time facilitating the functional equivalent of

[122] 5 U.S.C. § 574(b)(6).
[123] 5 U.S.C. § 574(b)(7) (emphasis added).
[124] 5 U.S.C. § 574(b)(2).
[125] 5 U.S.C. § 574(d)(1).
[126] *See ABA Guide to Confidentiality*, *supra* note 113, at 21.
[127] *Id*.

mediation joint sessions. However, there may be occasions when it is important for an ombuds to inform a party who might share sensitive information with all the "parties" in the dispute resolution process of any possible limitations on the scope of the confidentiality obligations of the other parties.

The question remains as to what extent activities of federal ombuds are covered by § 574. As discussed below, there is as yet no unanimity among commentators about the extent to which ADRA § 574 applies to ombuds. Nonetheless, ombuds should be mindful of its requirements and prohibitions for themselves, for the constituent who seeks their assistance, and potentially for others that the ombuds may engage as part of the dispute resolution process.

Parsing the language of the statute itself, there are several words and phrases such as "alternative dispute resolution," "issue in controversy," "neutral," "party," and "administrative program" that are used throughout ADRA. Definitions of these terms and others are found in section 571 of the Act.[128] Starting with ADRA's sole mention of ombuds, § 571(3) states "'alternative means of dispute resolution' means any procedure that is used to *resolve issues in controversy*, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof[.]"[129] None of these "means of dispute resolution" are defined in the statute but "issue in controversy'" is defined as "an issue which is material to a decision concerning an administrative program of an agency[.]"[130] At § 571(2) "administrative program" is defined as including "a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation[.]"[131]

[128] 5 U.S.C. § 571.
[129] 5 U.S.C. § 571(3) (emphasis added).
[130] 5 U.S.C. § 571(8).
[131] 5 U.S.C. § 571(2).

Section 574 ("Confidentiality") specifically applies to the "neutral" and all "parties" in a "dispute resolution proceeding" and describes their rights and obligations with regard to "dispute resolution communications."[132] In section 571 ("Definitions"), "dispute resolution communication" is defined as any "oral or written communication prepared for the purposes of a dispute resolution proceeding[.]"[133] A "neutral" is defined as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy[.]"[134] Additionally, in § 573 ("Neutrals"), neutrals are described as "a permanent or temporary officer or employee of the Federal Government or *any other individual who is acceptable to the parties* to a dispute resolution proceeding."[135] Neutrals "shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve."[136]

The case law interpreting these provisions of ADRA is scant. Beginning with the question of what is a neutral under ADRA, case law provides no guidance as to what "neutral" means. ADR.gov, a website created by the Interagency Alternative Dispute Resolution Working Group under the aegis of the Department of Justice, suggests that the key definitional component is the matter of choice in the selection of an individual who assists the parties in dispute resolution: "The broad definitions of neutral, along with other parts of the FAR[137] and ADRA of

[132] *See* 5 U.S.C. § 574(a)–(j).
[133] 5 U.S.C. § 571(5).
[134] 5 U.S.C. § 571. "Party" is defined at § 571(10) as: "(A) for a proceeding with named parties, the same as in section 551(3) of this title; and (B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding[.]" 5 U.S.C.§ 551(3) stipulates that a "party": "includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes . . . ."
[135] 5 U.S.C. § 573(a) (emphasis added).
[136] *Id*.
[137] *I.e.*, the Federal Acquisition Regulation, 48 C.F.R. §§ 1.00–51.205 (2016).

1996, ensure that parties can use a neutral of their choice, whether from an established forum, other agencies, other levels of government (state, local, and tribal), and the private sector."[138]

Cases citing relevant provisions of ADRA tend to reinforce the statutory definitions but do not appreciably enhance them. In *United States v. Park Place Associates, Ltd.*[139] the court simply restated that the use of ADR processes under the Act is restricted to "an administrative program of an agency" and that the "issue in controversy" must be one "which is material to a decision . . . with which there is a disagreement."[140] Likewise, *Park Place* merely repeats that "administrative program" is defined by § 571(2) to mean "a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation."[141]

There is one case that does somewhat more than merely recite the statute, *In re Grand Jury Subpoena Dated December 17, 1996*.[142] As precedent, however, it is problematical. The case concerned a feature of the Agricultural Credit Act of 1987[143] that provides financial assistance to states for agricultural loan mediation programs to resolve disputes between farmers and their agricultural lenders. In Texas, the mediation program receiving federal assistance was administered by Texas Tech University and called the Texas Agricultural Mediation Program ("TAM").[144]

In its proposal to perform loan mediation services, TAM agreed that it would operate in accordance with the confidentiality provisions of the Texas Alternative Dispute Resolution

[138] *See* Contracted Neutral Services, ADR.GOV, at https://www.adr.gov/adrguide/24-cns.html.
[139] No. CV 04-8387 DT CTX, 2005 WL 6066062 (C.D. Cal. June 13, 2005), *rev'd on other grounds*, 563 F.3d 907 (9th Cir. 2009).
[140] *Id*. at *16.
[141] *Id*.
[142] 148 F.3d 487 (5th Cir. 1998).
[143] Pub. L. No. 100-233, 101 Stat. 1568 (Jan. 6, 1988).
[144] *In re Grand Jury*, 148 F.3d at 489.

Procedures Act.[145] The Texas statute provides that communications relating to subject matter of civil or criminal disputes made in the course of alternative dispute resolution procedures are confidential, not subject to disclosure and "may not be used as evidence against the participant in any judicial or administrative proceeding."[146] However, it further specifies that if the confidentiality provision conflicts with other legal requirements, the court having jurisdiction of the proceedings must consider whether or not under all the circumstances a protective order is warranted.[147]

The case at issue arose when the USDA (United States Department of Agriculture) Office of Inspector General (OIG) was conducting an audit of TAM and discovered irregularities suggesting criminal wrongdoing. These suspicions led to a grand jury investigation and the grand jury subpoenaed TAM, which then moved to quash the subpoena based on a claim of privilege. The district court, relying on the Agricultural Credit Act, the Texas ADR Procedures Act and ADRA, vacated a magistrate judge's order that had refused the request of a party to one of the mediations to quash the subpoena.[148]

On appeal, the 5th Circuit Court of Appeals reversed the district court concluding that although the TAM mediations were confidential they were not privileged under the Agricultural Credit Act.[149] The court found that while that statute provided for confidentiality, there was no clear congressional intent to create an evidentiary privilege for mediations protecting them from disclosure in grand jury proceedings.[150]

On its facts, *In re Grand Jury* might be particularized in that it involves a criminal inquiry before a grand jury and therefore, on balance, is more compelling than civil proceedings.

[145] *See* TEX. CIV. PRAC. & REM. §§ 154.001–073.
[146] *See In re Grand Jury*, 148 F.3d at 489 (citing and quoting TEX. CIV. PRAC. & REM. § 154.073(a)).
[147] *See* TEX. CIV. PRAC. & REM. § 154.073(d).
[148] *See In re Grand Jury*, 148 F.3d at 489–90.
[149] *Id*. at 492–93.
[150] *Id*. at 492.

Curiously, however, rather than apply the balancing test applicable to courts in § 574, the 5th Circuit panel held that neither ADRA nor the Texas statute were even applicable.[151] With regard to ADRA, the court held without analysis that the case did not involve an "issue in controversy" of the type contemplated by sections 571 and 572 of the Statute.[152] The court indicated, in dicta and again without explication, that if ADRA had applied, it would have ordered disclosure under the exception to confidentiality for disclosure when a court determines that disclosure is necessary to help establish a violation of the law of sufficient magnitude to outweigh the integrity of dispute resolution proceedings.[153]

An article by Charles Pou, Jr.[154] examines this case and the evolving nature of confidentiality in federal alternative dispute resolution. Of the ADRA confidentiality provisions, Pou begins by saying that "[m]ost observers have found them to reflect an appropriate balance between the openness needed for legitimacy and oversight and the confidentiality necessary for many sensitive negotiations."[155]

Pou argues that the 5th Circuit's ruling was in error in not applying ADRA to the case and notes that ADRA defines "issue in controversy" quite broadly. Pou also contends that the 5th Circuit ruling misses the larger point of ADRA and statutes like it. He states, "the 5th Circuit's recent decision did not discuss, much less strike a balance between the important, but somewhat divergent, goals of furthering accountability and promoting flexible, efficient decision-

[151] *Id*. at 491.
[152] *Id*. at 492 (citing 5 U.S.C. § 571(2) (defining "administrative program"); 5 U.S.C. §§ 8(A) & (B) (defining "issue in controversy"); 5 U.S.C. § 572(a) (describing general authority of an agency to use ADR "for the resolution of an issue in controversy that relates to an administrative program . . . ."). The court reached this conclusion without finding it necessary to discuss or discount the facts that the case involved subpoenas generated by a federal inspector general investigation, involved a federally funded mediation program and most of the mediations had the Farm Service Agency, part of the USDA, as a party.
[153] *Id*. at 493 (citing 5 U.S.C. § 574(a)(4)(B)).
[154] Charles Pou, Jr., *Gandhi Meets Eliot Ness: 5th Circuit Ruling Raises Concerns About Confidentiality in Federal Agency ADR*, 5 DISP. RESOL. MAG. 9 (Winter, 1998).
[155] *Id*. at 9.

making."[156] Pou acknowledges that while the relationship between ADRA and the Inspector General Act would likely have had to have been assessed had ADRA been applied by the court, the court's opinion finding ADRA inapplicable did so "without significant analysis or relevant citation . . . . As a result, the rationale for the court's conclusions is unclear."[157] Pou concludes that the decision is not helpful to those trying to understand the implications both of that case or the practical applications of ADRA generally.

Pou also questioned the arguments of the U.S. attorney, calling these arguments "dubious."[158] They included arguments that: (1) ADRA was intended to apply only to programs created after its passage; (2) there is a relevant distinction between a "confidential" and a "privileged" communication, with the former being inferior to the latter; (3) disclosure of confidential information to a grand jury is not a "public" disclosure; and (4) ADRA was intended to be limited to civil cases and has no application in criminal investigations.[159] With regard to the question of privilege versus confidentiality, Pou explains that it is a distinction without a difference in this case because ADRA provides the applicable "comprehensive statutory scheme that defines the extent of protection to be afforded . . . ."

Pou points out that the intent of the passage of laws such as the ADRA by legislative bodies is to encourage parties to participate and to increase their existing participation in alternative dispute resolution, striking a careful balance between open government and confidentiality. These bodies also recognize that parties to ADR proceedings would be less forthcoming, and the proceedings therefore less effective, if they knew there was a significant possibility that communications made during them would be publicly disclosed or later used

[156] *Id*. at 10.
[157] *Id*. at 10.
[158] *Id*. at 10.
[159] *Id*. at 10–11.

against them. Accordingly, ADRA puts disclosure decisions in the hands of the courts, rather than the hands of the person seeking the information. Pou concludes that by failing to meaningfully analyze and balance the competing interests, including those of future parties and mediators, the Fifth Circuit abdicated its responsibility to balance competing interests and in so doing created doubts and concerns that would extend far beyond that case.

In re Grand Jury was followed by *FDIC v. White*,[160] in which a party alleged that a settlement agreement had been coerced in the course of a mediation. Relying on *In re Grand Jury's* treatment of ADRA, the district court held: "The Court does not read the ADRA or its sparse legislative history as creating an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation."[161] The court made no mention of the exception to confidentiality in ADRA § 574(b)(6) permitting disclosure where "relevant to determining the existence or meaning of an agreement or award . . . or to the enforcement of such an agreement or award."[162] Instead the court expanded on its rationale for declining to recognize a mediation privilege, explaining that "such a privilege would effectively bar a party from raising well-established common law defenses such as fraud, duress, coercion, and mutual mistake" to challenge a settlement agreement.[163] According to the court: "It is unlikely that Congress intended such a draconian result under the guise of preserving the integrity of the mediation process."[164]

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[160] 76 F. Supp. 2d 736 (N.D. Tex 1999).
[161] *Id*. at 738.
[162] *Id*.
[163] *Id*.
[164] *Id*. *See also Hanson v. County of Kitsap*, 2014 WL 549833 (W.D. Wash.), where the court mentioned ADRA in a case shielding communications with an Employer Support for Guard and Reserve (ESGR) ombuds established under the Uniformed Services Employment and Reemployment Rights Act (USERRA). In *Hanson*, the plaintiff asked to interview the ESGR ombuds about communications between the ombuds and various agents of plaintiff's employer, Kitsap County. Under ESGR policy, the employer and the employee must both agree to such an interview; however, the county refused to participate. In discovery the plaintiff served a Notice of Deposition on defendants indicating his intention to solicit the identity of the county employee "who refused to go forward with the ESGR interview and the reasons for refusing . . . ." The county moved for a protective order, arguing that all ESGR

In 2005, the ABA Ad Hoc Committee on Federal ADR Confidentiality issued a *Guide to Confidentiality Under the Federal Administrative Dispute Resolution Act*[165] that addressed many ADRA interpretive questions. As an initial matter, the Committee noted the change in language from the original more restrictive definition in the 1990 Act referring to ADR as a procedure used "in lieu of an adjudication," with adjudication being by reference "an agency process for the formulation of an order."[166] Noting the far broader language of the 1996 version of the Act regarding "issue[s] in controversy," the Committee described the Act's reach as including both "cases" and other disputes or conflicts either within the Federal government, before the government or offered or authorized by the government.[167]

The ABA Ad Hoc Committee also addressed the meaning of "neutral" under the Act. To the Committee, a neutral is anyone acceptable to the parties who "specifically assists parties to resolve a particular governmental dispute."[168] The Committee found that neutrals perform a range of tasks including: acting to mediate, facilitate, find facts, and arbitrate as well as performing intake or convening in support of dispute resolution processes and advising potential parties about different dispute resolution processes.[169] The Committee delineated two types of neutral roles, acknowledging that the roles often overlap. One role is labeled as "administrative" or "program" neutrals, defined as those who administer or assist with ADR processes but do not

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dispute resolution proceedings are protected by ADRA § 571–584. The court did not reach the question of whether ADRA applied in this case, instead determining that the evidence plaintiff sought was unrelated to "the underlying issues" of whether defendants had "violated USERRA" or related laws. *See also Fields-D'Arpino v. Restaurant Associates, Inc.*, 39 F. Supp. 2d 412, 417-18 (S.D.N.Y. 1999) which also includes language interpreting ADRA ("The Alternative Dispute Resolution Act of 1998 requires each federal district court to authorize, by local rule, the use of alternative dispute resolution processes in all civil actions. . . . The Act requires that ADR processes be confidential and prohibits disclosure of confidential dispute resolution communications, though it does not make mediation communications privileged.").

[165] Cited *supra* note 113.

[166] *Id*. at 22 n.21.

[167] *Id*. at 23.

[168] *Id*. at 23–24.

[169] *Id*. at 23–25. For the Committee's findings on "administrative neutrals," see *id*. at 26–36; for information on "session neutrals" see *id*. at 37-46.

actually participate in dispute resolution.[170] The other role is labeled as "session" neutrals, defined as those who preside over "party-to-party" sessions in a specific application of ADR such as mediation or facilitation, and may work with the parties between sessions.[171]

Regarding administrative neutrals, the Committee described them as primarily doing intake, convening dispute resolution processes, and performing a range of functions from technical assistance to recordkeeping. As the Committee deemed these individuals to be neutrals under the Act, it notes that a dispute resolution process "may commence well before the parties meet in a negotiation session[,]"[172] thus invoking the Act's protections and prohibitions even before any dispute resolution session has convened or even in the event that such a session never comes about. By the same token, the Committee cautions that some activities relating to dispute resolution might not be protected. These would include generalized training about dispute resolution, establishing a roster of neutrals and some standard office functions presumably because none of these activities relate to a particular issue in controversy.[173]

Likewise, the Committee cautions that not all functions of designated "session" neutrals will necessarily be deemed the activities of a neutral under ADRA. In this regard, the Committee distinguishes, illustratively, a neutral who facilitates a generalized discussion to enhance a group's mutual understanding or long range planning, from a neutral who works with a group to resolve conflict, indicating that only the latter should be considered acting as a neutral under the Act.[174]

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[170] *See id*. at 26–34.
[171] *See id*. at 37–45.
[172] *Id*. at 28. *See also IADRWG Guide supra* note 19, at 21 ("The confidentiality protections of the ADR Act start when the employee first contacts an ADR program staff member concerning a dispute.").
[173] *Id*. at 29.
[174] *Id*.

While the Committee thus takes a somewhat narrow view of the requirement that a neutral "resolve an issue in controversy," it takes a broader view of the meaning of neutrality itself. It posits that under ADRA's own definitions, a "neutral need not even be 'neutral' so long as the parties accept and use her specifically to aid in resolving an issue in controversy."[175]

Noting that ombuds have expressly been included in ADRA's definition of "alternative means of dispute resolution" and are ADR professionals, the Committee concludes that many but not all ombuds activities fall under the Act's confidentiality protections.[176] Specifically, "[t]he fact that ombuds personnel may only sometimes engage in 'traditional mediation' does not detract from their ADR status, or their status as neutrals in those cases where they do help resolve disputes."[177] The Committee counters the suggestion that issues may be presented to an ombuds at too early a stage to constitute an issue in controversy by asserting that the Act's broad definition includes no "ripeness" test.

Further, the Committee interprets ADRA's "concerning an administrative program" broadly to include issues relating to the activities of a federal agency, an interpretation likely to cover most if not all issues — including internal disputes — within the mandate of any federal ombuds having an impact on, but only indirectly related to, government programs. Similarly, the Committee interprets the requirement that there be "parties" as consistent with the typical federal ombuds *modus operandi* in that the two parties would likely consist of the person who approaches the ombuds with a problem and the agency or agency official responsible for the decision or policy under which there is disagreement.[178] Accordingly, the ombuds is, by the definition of mutual acceptability, a neutral inasmuch as the agency has in effect committed in

[175] *Id*. at 38.
[176] *Id*. at 59. *See also id*. at n.72 in which the Committee cites "numerous articles" stating "unequivocally that some ombuds activities fall under the cluster of processes known as 'ADR.'"
[177] *Id*. at 60.
[178] *Id*. at 61.

advance to use the ombuds as a neutral and the visitor has done so by voluntarily approaching the ombuds with his or her issue.

The conclusions of the ABA Ad Hoc Committee with respect to federal ombuds contrast to some degree with those set forth by Professor Harold J. Krent in his article discussing federal agency ombuds and confidentiality.[179] In light of the "increasingly important role" of Federal ombuds "in agency life," Krent argues that the promise of confidentiality serves as an important "inducement" for getting constituents to raise issues before the ombuds.[180] Krent also explains how the ambiguity about, or potential limitations on, the promise of confidentiality that a federal ombuds can authentically make may negatively affect ombuds practices and effectiveness.[181] To this end, Krent states that "a pledge of confidentiality may be fundamental to discharge of an ombuds' functions."[182]

In this regard Krent discusses, *inter alia*, the threat of disclosure under the Federal Recordkeeping, Freedom of Information and Privacy Acts, discussed *infra*, as well as disclosure due to agency or congressional compulsion with respect to their potential to undermine a federal ombuds pledge of confidentiality. He concludes that the "degree to which ombuds fall under the ADRA . . . is unclear[,]" and further that "the Act's criteria do not clearly apply to *many* activities of an ombud."[183] Therefore he questions the extent to which ADRA may serve to shield ombuds communications and stand behind a federal ombuds' confidentiality pledge. Contrary to the ABA Ad Hoc Committee, Professor Krent suggests that many issues may be brought to an ombuds too early, before anyone has been affected substantially enough to give rise to an issue in controversy. Similarly, Krent questions whether personnel disputes or other

[179] Harold J. Krent, *Federal Agency Ombuds: The Costs, Benefits, and Countenance of Confidentiality*, 52 AD. L. REV. 18 (2000).
[180] *Id*. at 22.
[181] *Id*. at 23–25.
[182] *Id*. at 25.
[183] *Id*. at 39–40 (emphasis added).

internal agency concerns might be deemed issues in controversy relating to an administrative program. Lastly, Krent notes that both ADRA § 573 defining "neutral" and § 574 addressing confidentiality refer to "parties" and that, in his view, inasmuch as typically only one party seeks access to the ombuds, there is no adversarial relationship in evidence.[184]

In light of these concerns, Professor Krent observes that while Congress amended the Act to include ombuds, it did not fully account for the differences between ombuds and other ADR practitioners. Accordingly, "ombuds currently rely on existing privileges at some peril."[185] The ABA in its *Guide to Confidentiality* expressly took some issue with Professor Krent's "negative conclusion" in his analysis of the ADRA's applicability to the activities of federal ombuds.[186] As set forth above, the Committee generally interpreted ADRA's provisions more inclusively, but while they found Krent's conclusions "that most ombuds casework is not covered is unpersuasive," they did not elaborate on this assessment considerably beyond what is set forth above.[187]

Conclusions and Recommendations for Agency Officials and Ombuds Offices on the General Applicability of Privilege, Inherent Judicial Authority to Manage Discovery and ADRA to Federal Ombuds

As we have discussed, the first line of legal defense, when there is a request to the ombuds for confidential information, in most instances will be ADRA. However, inasmuch as its reach for ombuds is not clearly established as yet, if such a request should come in the course of litigation, precedent on privilege and inherent judicial authority to manage discovery may be of importance.

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[184] *Id*.
[185] *Id*. at 41.
[186] *See ABA Guide to Confidentiality supra* note 113, at 59 n.74.
[187] *Id*.

Given the foregoing discussion of legal precedent, one can say that the law on privilege and confidentiality as it pertains to ombuds generally, and federal ombuds specifically, is less than clear and still evolving — if in an uncertain direction. This appears to be attributable to one or some of a variety of factors: the ombuds office in question was not structured and operated consistent with standards and in a way that would support confidentiality; sufficient evidence supportive of confidentiality was not provided to the tribunal; the court failed to fully analyze the law as applied to the evidence; and the evidence presented was not in the circumstances deemed sufficient to overcome the strong presumption against privilege and for public disclosure. Examining the cases leads to one overarching observation that pertains to both assertions of privilege and requests that a judge use his or her inherent authority. In short, it does matter how the ombuds and his/her agency respond to any request (in whatever form) in the course of litigation for documents or testimony concerning confidential ombuds information, specifically how well the purposes, structure, function and need for confidentiality on the part of that ombuds office, as well as ombuds generally, is both explained and documented for the tribunal.

Those mandating and establishing ombuds offices that offer confidentiality and the ombuds themselves should situate, structure and operate the ombuds office so that an expectation of confidentiality is created and strictly maintained. Should this confidentiality be challenged, the ombuds and legal counsel should attempt, if possible, to informally resolve the issues with the individual or entity requesting confidential documents or testimony. This might involve education about the ombuds office and a persuasive explanation of the need for whatever confidentiality is offered by the office. Further, alternative ways the information sought might be obtained from other sources could be explored with the requestor.

Failing an informal resolution, if the ombuds and his/her counsel seek to quash a subpoena or obtain a protective order, ample information with supporting documentation should be presented to the tribunal. This should include why and how the ombuds office was created and how it functions. Additionally, it is important to include any facts supporting independence, impartiality and confidentiality, as well as the reasons therefore and how these office standards are both practiced *and* communicated to constituents and actual visitors. Any court that might consider a qualified privilege, or that might be inclined to exercise its inherent authority to manage discovery, will look to what the ombuds and the ombuds' agency have done to create an expectation of confidentiality. The strongest evidence would be a signed confidentiality agreement with the visitor seeking ombuds assistance, but charters, by-laws, office websites and brochures, and evidence of office practices designed to protect independence, impartiality and confidentiality would also be probative. What little precedent there is indicates that failure to respond cogently and compellingly may result in an unnecessarily negative outcome in that instance with implications for the profession as a whole.[188]

It cannot be sufficiently stressed that when there is a legal challenge to ombuds confidentiality, the ombuds should have access to independent, rather than agency, counsel. If an ombuds does not have independent counsel, the ombuds should be cautious about what dispute resolution communications are revealed to the agency's counsel should that counsel be called upon to defend ombuds confidentiality. Although attorney client privilege may apply, in a

[188] *See, e.g., Carmen*, 114 F.3d 790 (finding that there is no ombudsman privilege); HOWARD, *supra* note 1. *See also* Ryan Spanheimer, *Justification for Creating an Ombudsman Privilege in Today's Society,* 96 MAR. L. REV. 659, 681–683 (2012).

given situation the agency's interests and the ombuds' interests (in confidentiality) may not be the same, and thought should be given by all concerned as to how best to proceed.[189]

Turning to protections afforded by the statutory scheme created by ADRA, as noted the case law interpreting its provisions is scant, and there is no reported case law to date applying it to ombuds. With the 1996 reauthorization of ADRA, Congress clearly expressed its intent to include "use of ombuds" under the Act's requirements and protections. Given the uncertainties in its application described above, Congress could reinforce and fully realize this intent by expressly aligning the Act's provisions to embrace those ombuds functions that require confidentiality — thus ensuring the safe place for raising issues that is the ombuds' special purpose. Failing such an amendment, some basic principles of statutory interpretation must be considered in order to makes sense of the 1996 addition.[190]

The task of interpreting a statute begins with a thorough reading of the text. The language of the statute itself is the first and primary source for insight into its construction and meaning. From a strictly textual standpoint, the words of the statute alone embody what the law is, and what it means. "Congress' intent is found in the words it has chosen to use."[191] Any such examination must be done with the knowledge that what may be the "plain language" of the text to one reader may not be the only possible interpretation of what the statute means. It is also important to keep in mind the purposes behind the investigation of the statute in order to determine points of inquiry that are relevant to those goals.[192] In the case of ADRA, as we have discussed the "plain" meaning of the text as applied to ombuds is in some dispute. Although

[189] HOWARD, *supra* note 1, at 305–07. *See also* ABA STANDARDS FOR ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004) and accompanying Report, at 14 ("ombuds should have access to resources for independent legal advice and counsel"); *COFO Guide*, *infra* note 215, at 8.
[190] *See generally* LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2011), https://www.fas.org/sgp/crs/misc/97-589.pdf.
[191] Harbison v. Bell, 556 U.S. 180, 196 (2009) (slip op.) (Thomas, J., concurring).
[192] WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 832–33 (3d. ed. 2007).

"use of ombuds" is included in § 571 under the definition of "alternative means of dispute resolution,"[193] some ambiguities arise as the wide range of functions of federal ombuds are held up to the other definitions in that section and the language in § 574 itself. As others have noted, on its face it appears that the relevant portions of the statute may have been originally based on a mediation model, and these provisions were not *explicitly* realigned when "use of ombuds" was added to the statute.

In cases of such ambiguity, courts often look to the legislative history of a particular statute in order to determine the intent of the legislative body in drafting the law. The assumption is that this examination will give the persons interpreting the statute guidance as to how it should be applied.[194] However, as noted there appears to be no legislative history[195] that definitively resolves the questions that have been raised concerning which ombuds functions are covered by the amendment of ADRA to include "use of ombuds" as a form of alternative dispute resolution.[196] Accordingly the underlying presumption of statutory construction, which requires the body construing the statute to do so in a manner ensuring that the statute is internally consistent, may be employed. "A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[197]

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[193] 5 U.S.C. § 571(3).

[194] *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) ("Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute.").

[195] See, however, S. Rep. 104-245, at 8 (1996): "To increase the effectiveness of the work of ombuds, the bill would extend the protections of the ADR Act's confidentiality provisions to disputes in which they serve as neutral parties." This statement underlines the intention of Congress to include ombuds under the umbrella of ADRA § 574 but does not clarify which ombuds functions are covered or what might have been meant by the somewhat contradictory term "neutral parties."

[196] Nor is there legislative history that is particularly edifying on the confidentiality provisions of ADRA. Illustratively, at one point during the debate, a sponsor mentioned that "[t]he bill also provides for the confidentiality of the alternative dispute resolution process and prohibits the disclosure of such confidential communications." 144 CONG. REC. H10457-01 (October 10, 1998) (statement of Rep. Coble). And the Senate report for the original Act recognizes that "protections are created to enable ADR proceedings to be forthcoming and candid without fear that frank statements will be used against them." S. Rep. No. 101-543, at 11 (1990).

[197] Hibbs v. Winn, 542 U.S. 88, 101 (2004).

Likewise, with respect to statutory amendments, there is "a general presumption" that "when Congress alters the words of a statute, it must intend to change the statute's meaning."[198]

Professor Krent suggests that the attempt by Congress to shelter ombuds under the umbrella of dispute resolution by adding "use of ombuds" in 1996 failed in that the typical inquiry to an ombuds is made too early to constitute an issue in controversy; the personnel or other internal agency disputes handled by many federal ombuds do not relate to "an administrative program"; and the Act envisions "parties" in the plural while ombuds frequently deal with only one party in a dispute. Professor Krent concludes that "the congressional effort to assimilate ombuds to other dispute resolution officials ignored the substantial differences between ombuds and the others."[199] Yet, one might alternatively read the statute so that the addition of ombuds to ADRA was not, in effect, "inoperative or superfluous, void or insignificant." In the absence of any definitive case law or legislative history to shed light on the addition of ombuds to ADRA in 1996, such an alternate reading would give meaning to the amendment by looking to the language of the statute and attempting to reconcile seemingly inconsistent clauses and terminology.

As this study has shown, the broad spectrum of federal ombuds cover an impressive array of different activities, and a single ombuds may have a variety of responsibilities and numerous different arrows in his or her quiver. There are surely some ombuds functions that cannot easily be placed within the requirements and protections of § 574. These might include, for example, general conflict management training that is not part of an intervention or facilitation of agency conversations that are proactive (e.g. strategic planning) and not part of resolving existing conflicts. Some, though not all, of the systems work in which a subset of federal ombuds

[198] *See* United States v. Wilson, 503 U.S. 333, 336 (1992); Stone v. INS, 514 U.S. 386, 397 (1995).
[199] Krent, *supra* note 179, at 41.

engage, would also likely be excluded from coverage depending on the extent to which it might be deemed part of a resolution process. On the other hand, there are certain functions characteristic of some ombuds that fall neatly within the mediation model that is the most obvious target of ADRA's protections and requirements, and therefore are clearly covered by ADRA.

Falling in between these two poles are a host of other ombuds functions that form part of the uniquely fluid and flexible approach to resolving issues that is the hallmark of ombuds practice. With regard to the issue of ripeness, there appears to be some consensus in federal guidance that the confidentiality provisions of ADRA begin to apply when the individual seeking assistance first approaches the dispute resolution office and raises his or her concern. Illustratively, the guidance concerning ADRA confidentiality issued by the Federal Alternative Dispute Resolution Council in 2000 concluded that ADRA confidentiality applies to the intake and convening stages of ADR.[200] Further, the *IADRWG Guide* states that ADR program administrators are "neutrals when they are helping the parties resolve their controversy by, for example, discussing ADR options with the parties, coaching, and preparing them to negotiate . . . ."[201] Inasmuch as many issues that are raised with ADR intake personnel never reach a dispute resolution session during which the neutral facilitates a discussion among the parties — whether because the constituent accepts a referral to a different process or decides not to pursue the matter — it must be presumed that ADRA's confidentiality provisions apply even when there is no later dispute resolution session among the parties that might be recognized as mediation, conciliation or adjudication. Absent that presumption, confidentiality would only attach after the fact once it is known whether or not a party raising an issue goes forward with a specific ADR

[200] *See Confidentiality in Federal Alternative Dispute Resolution Programs*, *supra* note 19, at 83,090.
[201] *See IADRWG Guide*, *supra* note 19, at 8.

session procedure like mediation. Such an approach would increase the uncertainty of potential users of ADR and diminish their willingness to approach the ADR office. Looking specifically to ombuds, it is logical to assume that the dispute resolution process commences when the constituent approaches the ombuds office with an issue and does not end until, in effect, "the case" is closed — whether or not a mediation-like process is ever a part of the ombuds' approach to resolving the issue.

With regard to the question of whether or not ombuds, including internal ombuds, resolve issues in controversy, certainly the statute's definition of "issue in controversy" is very broad, requiring only that the issue be "*concerning* an administrative program" about which there is disagreement.[202] By the time the 1996 ADRA reauthorization, with attendant modifications, was proposed and passed, internal workplace mediation was a known quantity in the federal government and yet no modification to this definition of "issue in controversy" in order to expressly include "internal" conflict was deemed necessary.[203] Moreover, by the time the addition of ombuds to ADRA was proposed, federal internal ombuds were known to the Administrative Conference (ACUS),[204] which was instrumental in the initial passage of ADRA and in formulating the 1996 reauthorization,[205] and there were a number of organizational ombuds already in the government at that time. In fact, internal ombuds offices had been created

[202] *See* 5 U.S.C. § 571(8).
[203] In fact S. Rep. 104-245, *supra* note 195, at 8 indicates that the proposed modification to the definition of "issues in controversy" in the bill was intended to include workplace mediations. Moreover, such mediations to resolve employment disputes in the federal government have become almost routine and are presumed covered by ADRA; a contrary interpretation would upend this broadly accepted view. *Cf.* INTERAGENCY ADR WORKING GROUP STEERING COMM., A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS 9 (2006) ("Unless a specific statute controls, the confidentiality standards of the ADR Act . . . will govern the confidentiality obligations in federal administrative mediations, and federal employee mediators should consider this statute to be the 'applicable law' . . . .").
[204] *See, e.g.*, David R. Anderson & Larry Hill, *The Ombudsman: A Primer for Federal Agencies*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1991, at 2.
[205] ACUS was defunded in 1995 but Congress never repealed the Administrative Conference Act of 1964. In 2004, ACUS was reauthorized by Congress and was officially re-established in 2010.

in the federal government as early as the 1970s.[206] Therefore, one can assume that those who drafted and those who passed the 1996 ADRA reauthorization intended to include both direct, explicit disputes about a government program and those that *concern* a government program less directly by virtue of their impact on federal budgets, contracts, processes or employees administering or executing federal government programs.[207]

Turning to the question of whether or not the use of "parties" in the plural precludes most ombuds activities from ADRA coverage, it must be said that the visible assistance offered to the constituent seeking help in resolving an issue may be limited to the ombuds' interaction with that visitor. Illustratively, the ombuds office may offer vital help in the form of a "reality check," or by educating the visitor about his or her rights and options, or through coaching with an eye toward helping the visitor self-manage his or her conflict. By the same token, the ombuds may inquire and investigate the matter by separately questioning agency officials or staff, without actually bringing the visitor and relevant staff together or revealing the identity of the visitor to agency officials. Significantly, however, an "issue in controversy" by definition denotes a conflict between two or more parties, and accordingly the use of "parties" in the plural should not be an obstacle to coverage of this sort of assistance with dispute resolution. Further, one could conclude that the agency is always, in effect, *de facto* a party when the ombuds is, under the general terms of his/her appointment by the agency, assisting in the resolution of an issue concerning an agency program.[208] Support, by way of a less than perfect analogy, for this conclusion may be found in the federal sector EEO process. There was some concern in the ADR community when federal agencies began requiring agency managers and supervisors,

[206] *See* Leah D. Meltzer, *The Federal Workplace Ombuds*, 13 OHIO ST. J. ON DISP. RESOL., 549, 551 (1998); *see also* Jeffrey S. Lubbers, *Ombudsman Offices in the Federal Government –An Emerging Trend?*, 22 ADMIN. & REG. L. NEWS, 6 (1997).
[207] *See also ABA Guide to Confidentiality*, *supra* note 113, at 60.
[208] *Id*. at 61.

without their consent, to participate in EEO mediations despite the generally accepted mediation standard that participation in mediations must be voluntary.[209] However the agency is technically *the* party in every case and thus the agency's "consent" to mediate EEO cases, and even assent to the individual mediator however selected or assigned, is considered sufficient to manifest the requisite self-determination in federal sector EEO mediations without regard to whether the involved agency management is actually amenable.[210]

Finally, there is the question of whether or not ombuds are "neutrals" within the meaning of ADRA. Under the Act, a neutral need only be someone who is acceptable to the parties and who assists in the resolution of issues in controversy. As the ABA Ad Hoc Committee noted, under ADRA "a neutral need not even be 'neutral'" so long as the parties agree.[211] Inasmuch as the constituent chooses to seek assistance from the federal ombuds, and the agency as another party employs (or contracts with) the ombud for purposes, *inter alia*, of resolving agency issues, both parties can be deemed thereby to have indicated consent. Hence, the ombud is a neutral under the Act's limited requirements.

We are left, then, contemplating the nexus of statutory interpretation with practical and policy considerations. The policy concerns surrounding ombuds and confidentiality tend to be

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[209] *See, e.g.*, *Mandatory ADR for Managers? Minutes of the Council of Federal EEO & Civil Rights Executives*, MEDIATE.COM, Oct. 2002, http://www.mediate.com/articles/fedcouncil.cfm. The article begins by noting that "[a] major issue facing federal ADR programs is managerial participation. Should it be voluntary or mandatory?" The author, paraphrasing the statements of Jorge Ponce, co-chair of the Council of Federal EEO and Civil Rights Executives, wrote: "Mr. Ponce stressed that the parties in the EEO process were the aggrieved employee and the agency. Management officials were just witnesses in a complaint. Thus, the voluntariness part of ADR was fulfilled when an agency designed its own ADR Program and selected those instances in which ADR would not be appropriate or feasible."

[210] This is reflected in EEOC guidance to federal agencies, which states: "What role does the responsible management official have in ADR? Once the agency has determined that a matter is appropriate for ADR, it can decide who should represent the agency and can require the responsible management official (RMO), or the agency official directly involved in the case, to cooperate in the ADR process." *See* ADR QUESTIONS AND ANSWERS, EEOC, https://www.eeoc.gov/federal/adr/qanda.cfm; *see also* A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS, *supra* note 202, at 5 ("These programs do not violate th[e] self-determination standard, because the agency, as one of the parties, has elected voluntarily to participate in the mediation, with the manager or supervisor attending as the agency party's representative.").

[211] *ABA Guide to Confidentiality*, *supra* note 113, at 60.

distinct from that of other ADR professionals in one key aspect. In many, if not most, ADR processes, the dispute has already surfaced and is on its way to becoming a "case" by the time "ADR" is invoked. Therefore the identity of the parties and the nature of the dispute are known (at least to the parties), and confidentiality becomes critical primarily to protect the process — to encourage frank discussion without fear that what is said during the ADR process will later be used against the party offering the communication in question. With an ombuds, however, confidentiality is of paramount importance as an incentive to get the constituent "in the door" and the issue raised in the first place, thereby affording the ombuds the opportunity to assist the constituent and the agency in resolving it before it escalates or festers with negative consequences for all concerned. Moreover, ombuds often are able, without breaching confidentiality, to ensure that the agency is apprised of serious issues brought by constituents for whom anonymity is a necessary inducement. This would not be possible were ombuds unable to make credible pledges of confidentiality.

As manifest elsewhere in this study, the typical ombuds approach includes a variety of techniques and practices for providing assistance that may range from merely discussing and referring the visitor to other informal or formal channels, all the way to looking into the matter, shuttle diplomacy or mediation, or beyond. Moreover, the ombuds' dispute resolution process is a fluid one. There is no set sequence of practices and, in fact, an ombuds may go back and forth among them. In other contexts, some have questioned the inclusion under ADRA coverage of certain techniques used by ombuds and others. One example is conflict management coaching. It has been argued that when practiced in and of itself by a conflict management coach, coaching is excluded from ADRA's coverage because by definition it deals with only one party to a

conflict for the duration.[212] At the same time, other ombuds practices would be considered as included under ADRA by most commentators. Given this parsing of different techniques under ADRA, one could theorize that an ombuds should discuss confidentiality with the constituent visitor at every shift back and forth in technique as it occurs throughout the resolution process, if the shift might conceivably affect confidentiality, and even when the distinctions in the moment are less than clear. As a practical matter, however, it is difficult to envision how the purposes of ombuds confidentiality under ADRA § 574 could be served were confidentiality to attach, detach, and then reattach at uncertain intervals during a dynamic dispute resolution process, depending on what practice is being deployed at a given time.[213] The uncertainty, confusion and the necessity for the ombuds to stop and explain the nuances of confidentiality at every step could well dissuade reluctant constituents from raising or pursuing sensitive issues, even those that the agency would most benefit from having the opportunity to address.

Accordingly, and in light of all of the above, a practical and reasonable interpretation of the addition of "use of ombuds" to ADRA would entail a reading that would look at the ombuds dispute resolution process as a whole, having the coverage of § 574 begin when the visitor first approaches the ombuds with a concern, and ending when the ombuds has ceased to be involved by virtue of resolution of the issue, the visitor's withdrawal from the ombuds process, or when the ombuds remains involved but with the visitor's consent, or under a § 574 exception, breaches confidentiality. Moreover, this would be so without regard to which techniques are used in the interests of resolving the issue. As noted above, those ombuds functions that are not a part of

[212] *See, e.g.*, UNITED STATES AIR FORCE, CONFLICT MANAGEMENT COACHING POLICIES AND GUIDANCE 1 ("CMC is not Alternative Dispute Resolution."), http://www.adr.af.mil/shared/media/document/AFD-130926-019.pdf.
[213] *Cf.* Jennifer M. Gartlan, *The Collaborative and Facilitative Processes Committee: The Cutting Edge of Government ADR*, 4 RESOLVING CONFLICT 2 (2016).

assisting in the resolution of agency conflicts broadly construed would, however, not come within the coverage of § 574.

In sum, those who mandate and create ombuds offices should be mindful of how they are structured and maintained. Further each ombuds office should consider for itself the office's standards, the full gamut of roles it plays and functions it performs in light of ADRA's definitional requirements and § 574's limitations. Some, and in most cases many but not all, office functions will likely be covered by ADRA. It is important to understand what these are, what this means for constituents, the agency and the ombuds, and what options the ombuds has given the legal environment in its entirety. For those functions covered by ADRA, § 574 imposes obligations and requirements with specified exceptions. Compliance with these obligations and requirements, along with whatever professional or office standards are adhered to by the office, may be challenged as the ombuds attempts to balance them with other unrelated statutory, regulatory and agency requirements. These challenges are discussed below.

III. Federal Ombuds and the Affirmative Duty to Report

Generally accepted ombuds standards of practice require that ombuds not voluntarily disclose or be required to disclose any confidential information, except when the ombuds determines it is necessary to warn of an imminent risk of serious harm.[214] By the same token, ADRA § 574(a) bars disclosure of confidential dispute resolution communications by a neutral

[214] *See, e.g.*, ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § (C)(3) (2004) [hereinafter *2004 ABA Standards*] ("An ombuds does not disclose and is not required to disclose any information provided in confidence, *except to address an imminent risk of serious harm*."); IOA STANDARDS OF PRACTICE (2009) ("The only exception to th[e] privilege of confidentiality is where there appears to be an imminent risk of serious harm, *and where there is no other reasonable option*. Whether this risk exists is a determination to be made by the Ombudsman.") (emphasis added). Although the two standards are similar, the IOA's proviso expressly gives the ombuds discretion to determine when there is a potential threat. *See also* UNITED STATES OMBUDSMAN ASSOCIATION (USOA), MODEL SHIELD LAW FOR OMBUDSMAN § 3(b) (1997) (stating that confidentiality "privilege" does not apply where an "imminent risk of serious harm is communicated directly to the Ombudsman or his/her staff[.]").

except, *inter alia,* in cases where a communication is required *by statute* to be "made public." While both protect confidentiality, the definitions of their respective exceptions to the rule are not the same, and accordingly there may be occasions in which one conflicts with the other. Moreover, in addition to statutory duties to report certain information, for the majority of federal ombuds who are federal employees, there are regulations and agency policy directives that impose obligations to report different kinds of information. Because non-statutory duties to disclose do not come within the exception in § 574(a)(3) for statutory requirements, the general prohibition against disclosure in § 574 potentially poses a challenge to some reporting obligations ombuds have as federal employees.[215] Nevertheless, with forethought, federal employees' duties to disclose, ombuds professional standards and the requirements of ADRA may be substantially harmonized.

There are few statutes that clearly fall within ADRA § 574(a)(3)'s exception for information that "is required by statute *to be made public*."[216] At one point, the "made public" language in ADRA seemed to be interpreted literally, often in connection with the Clean Air Act, which requires that "[a]ny records, reports or information obtained under . . . this section shall be made available to the public."[217] The evolving consensus appears to be that the exception relates more to the use of the word "statute" in § 574(a)(3) than to the "to be made public" language.[218]

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[215] Some commenters have noted the potential for conflict between ADRA and other sources giving rise to a duty to disclose. *See, e.g.*, *Confidentiality in Federal Alternative Dispute Resolution Programs*, *supra* note 19, at 83,093–94 ("In summary a tension among these authorities exists. The issues of statutory interpretation between these differing authorities have not yet been considered in an appropriate forum."); The Coalition of Federal Ombudsmen (COFO) and Federal Interagency ADR Working Group Steering Committee, *A Guide for Federal Employee Ombuds*, at 8 (2006) [hereinafter *COFO Guide*] ("A federal Ombuds thus may be presented with a conflict between (1) his/her confidentiality obligations and (2) his/her obligations to report . . . .").

[216] 5 U.S.C. § 574(a)(3) (emphasis added).

[217] 42 U.S.C. § 7414(c). *See, e.g.*, *Confidentiality in Federal Alternative Dispute Resolution Programs*, *supra* note 19, at 83,093–94 (citing the Clean Air Act as an example of one of the "handful of statutes which require certain classes of information to be made public" under 5 U.S.C. §§ 574(a)(3) and 574(b)(4)).

[218] *See, e.g., IADRWG Confidentiality Guide*, *supra* note 19, at 52–3 ("In addition, there are other statutes that may be read to impose an affirmative obligation on federal employees to disclose certain classes of information. These include, but are not limited to, 18 U.S.C. § 4 . . . and 28 U.S.C. § 535 . . . .").

The two statutes, other than possibly the Inspector General Act, most commonly assumed to fall within ADRA's exception are 18 U.S.C. § 4, which makes it unlawful for any person — including federal employees — to fail to report knowledge of a felony to appropriate authorities,[219] and 28 U.S.C. § 535(b), which requires executive branch employees to report the crimes of other government officers and employees.[220] Agency-specific statutes requiring disclosure, such as the Clean Air Act quoted above, would also fall within this exception under ADRA. The same can be said for statutes that impose disclosure obligations on particular kinds of ombuds, so ombuds that have been created by statute should be mindful of any requirements specific to them.[221]

In addition to statutory conflicts there are also non-statutory sources that create a duty to disclose certain information. These include various regulations such as 5 C.F.R. § 2635.101(b)(11),[222] providing that all federal executive branch employees "shall disclose waste,

[219] "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other civil or person in military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both." 5 U.S.C. § 4. Note that an affirmative act of concealment is required – mere failure to report the felony is not sufficient to support a conviction under the statute. *See* Branzburg v. Hayes, 408 U.S. 665, 696 n.36 (1972).

[220] "Any information, allegation, matter, or complaint witnessed, discovered, or received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, or the witness, discoverer, or recipient, as appropriate . . . ." 28 U.S.C. § 535(b). The D.C. Circuit has interpreted the § 535(b) to suggest that "all government employees . . . are duty-bound not to withhold evidence of federal crimes." *See* In re Lindsey, 158 F.3d 1263, 1274 (D.C. Cir. 1998).

[221] For example, 42 U.S.C. § 7261c provides elliptically that the Technology Partnerships Ombudsman: "shall report quarterly on the number and nature of complaints and disputes raised, along with the ombudsman's assessment of their resolution, consistent with the protection of confidential and sensitive information." The Technology Partnership Ombudsman was created as part of the Technology Transfer Commercialization Act of 2000, Pub. L. 106-404 (codified at 15 U.S.C. §§ 3701–3722). The office functions according to the principles of "independence, impartiality, confidentiality and informality as defined by the International Ombudsman Association (IOA)." *See* Technology Partnership Ombudsman, *Roles, Responsibilities, Authorities, and Accountabilities*, at 2 (2011).

[222] Note that Executive Order 12647, § 101(k) (as amended by Executive Order 12731) (1989), authorized the Office of Government Ethics (OGE) to establish uniform standards of ethical conduct for executive branch employees. In 1992 OGE published the Standards, codified at 5 C.F.R. § 2635.

fraud, abuse, and corruption to appropriate authorities."[223] Reinforcing this government-wide regulation, some agencies have promulgated their own regulations containing reporting requirements concerning similar conduct.[224]

Other regulatory disclosure requirements may be agency-specific. For example, under regulations applicable to the Department of Veterans Affairs (VA): "All VA employees with knowledge or information about actual or possible violations of criminal law related to VA programs, operations, facilities, contracts, or information technology systems shall immediately report such knowledge or information[.]"[225] Similarly, Department of Health and Human Services (HHS) employees have a duty to report information relating to any "possible offense against the United States by an employee of [HHS][.]"[226]

In lieu of, or in addition to, regulations, some federal agencies have established a duty to disclose through management directive, policy manual, employee handbook, or a combination

[223] Another example is the duty to disclose "suspected violations" of the federal Gratuities Clause as specified in the Federal Acquisition Regulations. *See* 48 C.F.R. § 3.203 ("Agency personnel shall report suspected violations of the Gratuities clause to the contracting officer or other designated official in accordance with agency procedures.").

[224] *See, e.g.*, 18 C.FR. § 3c.3(a) (Federal Energy Regulation Commission: "Employees shall, in fulfilling the obligation of 5 CFR 2635.101(b)(11), report fraud, waste, abuse, and corruption in Commission programs . . . ."); 5 C.F.R. § 6701.107 ("General Services Administration: "[E]mployees shall disclose immediately any waste fraud, abuse, and corruption to appropriate authorities, such as the Office of Inspector General."); 28 C.F.R. § 0.29b (Department of Justice: "Employees shall report evidence and non-frivolous allegations of waste, fraud, or abuse relating to the programs and operations of the Department . . . ."). We note in this regard that it is not always clear what constitutes waste, fraud, abuse, or corruption within the meaning of the regulation; nor is it obvious what the penalties are for willfully or negligently failing to disclose such conduct. *Cf.* United States v. White Eagle, 721 F.3d 1108, 1118 (9th Cir. 2013) ("[a]lthough [5 C.F.R. § 2635.101(b)(11)] discusses reporting 'fraud' and 'corruption,' ... it does not provide specifics on what kind of information should be reported or to whom. Nor does it discuss criminal liability for failing to abide by its provisions.").

[225] *See* 38 C.F.R. § 1.201.

[226] *See* 45 C.F.R. § 73.735-1301 ("Responsibility for reporting possible criminal violations."). The full text of the regulation provides:

> An employee who has information which he or she reasonably believes indicates a possible offense against the United States by an employee of the Department, or any other individual working on behalf of the Department, shall immediately report such information to his or her supervisor, any management official, or directly to the Office of the Inspector General. Offenses covered by the preceding sentence include, but are not limited to, bribery, fraud, perjury, conflict of interest, misuse of funds, equipment, or facilities, and other conduct by a government officer or employee, grantee, contractor or other person which is prohibited by title 18 of the United States Code. Employees and supervisors should refer to chapter 5-10 of the Department's General Administration Manual for procedures regarding the reporting and handling of such information.

thereof. For example, Federal Aviation Administration (FAA) employees must disclose instances of government wrongdoing pursuant to an administrative order, FAA Order 3570.7.[227] Expanding on the Order, the FAA's employee manual requires employees to "immediately report known or suspected violations of law, regulations or policy[,]" including: "operational error or deviation[,]" and "threats of violence, violent incidents, dangerous horseplay, irrational or other inappropriate behavior[.]"[228]

As noted, many federal ombuds offices adhere to ethical and professional standards allowing an exception to confidentiality to warn of a threat of imminent risk of serious harm.[229] Generally, in the United States there is no common law duty to warn others of a foreseeable risk of harm. However, it should be noted that although ombuds may not be under a legal obligation, as such, to warn, there is some legal authority finding an obligation when there is a "special relation"[230] and a specific threat. The most widely cited case on this issue is *Tarasoff v. Regents of University of California*,[231] in which the California Supreme Court held that a psychotherapist has a duty to warn third parties who are the targets of a patient's credible, specific threat of violence, notwithstanding the therapist's professional confidentiality obligations. The court reasoned that the "special relation between a patient and his doctor or psychotherapist . . . may support affirmative duties for the benefit of third persons[.]"[232] The holding in *Tarasoff* has become the basis for a number of state court cases and for some state statutes codifying the duty to warn for therapists and other health care professionals, and has been credited as the "origin of a duty to disclose otherwise confidential communications, such as the rule that is embodied in

[227] *See* Federal Aviation Administration, *Ethical Conduct and Financial Disclosure Order 3750.7*, at 11 (1998) ("Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.").
[228] *See* Federal Aviation Administration, Human Resources Policy Manual (HRPM) Volume 4: Employee Relations ER-4.1, at 2–3, 10 (effective July 2008; updated March 2011).
[229] *See supra* note 213 and accompanying text.
[230] *See also* RESTATEMENT (SECOND) OF THE LAW OF TORTS § 315 (1965).
[231] 551 P.2d 334, 340 (1970).
[232] *Id*. at 343.

the IOA Code of Ethics."[233] A discussion of the extent to which liability attaches to federal employees is beyond the scope of this study and, in any event, it is unlikely that such a special relationship would be found between federal ombudsmen and their visitors. However, these cases serve to underline the gravity of the ombuds' responsibility when information brought to them in confidence might suggest a threat of serious harm, imminent or otherwise.

Conclusions and Recommendations for Agency Officials and Ombuds Offices on the Affirmative Duty to Report

To the extent that ombuds communications are covered under ADRA, where a *statutory* duty to report information conflicts with confidentiality, the duty to report prevails under § 574(a)(3) even if it conflicts with professional standards on confidentiality, and whether or not there is an imminent risk of serious harm.[234] The same would be true for many of the reporting obligations found in non-statutory sources that merely echo the statutory duties to disclose criminal or potentially criminal behavior. However, where the duty to report is not contained in a statute, the prohibitions in ADRA *against* disclosure arguably would prevail. In this regard, some regulations and management policies are not reflected in statutory requirements. For example, not all "waste" is potentially criminal, and the federal employee duty to report fraud, waste and abuse is not "required by statute."

Congress indicated the notably high value it placed on confidentiality in dispute resolution processes by, *inter alia*, restricting the exception at issue to statutory conflicts and, therefore, agencies should not attempt to impose additional agency specific obligations on ombuds to report information obtained during communications that would otherwise be

[233] *See* HOWARD, *supra* note 1, at 356, 359–60.
[234] Note that the statutes requiring federal employees to report criminal activity similarly apply to government attorneys notwithstanding the attorney-client privilege. *See* James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633, 636 (2005).

confidential. However, given that some non-statutory obligations to report are of general application across the government and not insignificant, it is important to consider how these obligations might be harmonized with prohibitions against disclosure under ADRA. Ombuds should consider with counsel and agency leadership what non-statutory legal and ethical reporting obligations are applicable in light of the standards and exigencies of the office and other pertinent factors. Any discussion should, for most ombuds, include the caveats that where possible at the outset all efforts will be made to encourage the visitor to report the information him or herself through appropriate channels and that, should the visitor decline and the ombuds affirmatively be obligated to report, it will be done by the ombuds in a manner that protects confidentiality to the fullest extent possible. In the end if there is a clear mutual understanding with the agency on the parameters of confidentiality, and this understanding is shared in a timely fashion with constituents and visitors, an argument can be made that the parties have implicitly agreed to "alternative confidential procedures for disclosure" under ADRA § 574(d)(1)[235] rendering a subsequent consistent disclosure by the ombuds permissible under § 574.

IV. The Federal Ombuds' Representative Status and the Question of Notice to the Agency

The concept of notice to an organization, and the related question of agency between the ombuds receiving the information and his or her agency, are important for federal ombuds in a number of respects. The confidentiality and both the perceived and actual impartiality and independence of the ombuds office may depend on the extent to which the ombuds is, or is not, deemed to be an agent for purposes of notice to the agency. If a disclosure to an ombuds *is*

[235] 5 U.S.C. § 574(d)(1) ("The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding . . . .").

considered notice to the agency, the ombuds' failure to transmit the information acquired may result in negative consequences to the agency. It may have implications both for notice with respect to time limits for initiating formal legal process against the organization and for liability. Moreover, even when an ombuds does not transmit information consistent with a pledge of confidentiality, the ombuds' knowledge might be imputed to, and considered notice to, the organization. Conversely, if the ombuds does transmit the information without the consent of the constituent who has shared it, the ombuds may be breaching a pledge of confidentiality. Additionally, any uncertainty on the part of the constituent about the status of the ombuds as an agent for purposes of notice to the agency may have legal consequences should the constituent assume that disclosure to the ombuds tolls the filing period for legal action or otherwise serves as legal notice.

As with other issues of legal consequence, the specific analysis of these questions for a given ombuds office depends on the nature and functions of the individual ombuds office at issue. The following analysis applies to the majority of federal ombuds who depend on their independence, impartiality and respective approaches to confidentiality to establish their credibility with constituents and effectively accomplish their missions.

Both the ABA and the IOA have weighed in on the question of ombuds agency. The Coalition of Federal Ombudsmen (COFO) has been more circumspect in articulating its position, but essentially agrees that ombuds generally should not be considered agents of the organization that employs them.

The ABA Standards state that "no one, including the entity in which the ombuds operates, should deem the ombuds to be an agent of any person or entity, other than the office of

the ombuds, for purposes of receiving notice . . ."[236] The Report accompanying the 2004 Standards explains that when an ombuds operates with the confidentiality and independence required by the Standards, then communications with the ombuds are not transmitted to the employing entity, and "it would not be appropriate or accurate to impute it to the entity — that is holding the entity responsible for knowing something it cannot know."[237] The Report stresses that the standards are designed "to ensure that the person approaching the ombuds office . . . understands that protecting rights may depend on just when formal action is initiated and whether notice is given to the entity. Working with the ombuds does not change that requirement or the specific time when the action must be started. In addition, the ombuds should advise persons that communications to the ombuds will not constitute notice to the entity *unless the ombuds contacts the entity.*"[238]

With regard to Standard F(2), the ABA thus qualifies its conclusion that ombuds typically lack agency by noting that if an ombuds communicates the facts of "a specific allegation and the identity of the complainant," the ombuds may be providing actual notice to the entity. The ABA expands on this concept by stating that an entity can be put on notice when an ombuds communicates with sufficient detail to the entity "allegations by multiple complainants" that may reflect a pattern of unlawful or inappropriate behavior.[239] Significantly, at § F(2)(b) the Standards provide that "whether or not the communication constitutes notice to the entity is a question that should be determined by the facts of the communication."

The IOA also provides at Standard 3.8 of IOA's Standards of Practice:

> Communications made to the Ombudsman are not notice to the organization. The Ombudsman neither acts as agent for, nor accepts notice on behalf of, the organization

[236] *See 2004 ABA Standards*, *supra* note 213, at § (F)(3)(a).
[237] *Id*. at 18.
[238] *Id*. at 17 (emphasis added).
[239] *Id*. at 18.

> and shall not serve in a position or role that is designated by the organization as a place to receive notice on behalf of the organization.

In its response to the ABA standards, however, the IOA specifically takes issue with the ABA's Standard and accompanying Report to the extent that the ABA is "suggesting that circumstances may exist in which an Ombuds places an organization on notice other than by disclosing a specific allegation and the identity of the complainant or allegations by multiple complainants" and that this question should be determined by "the facts of the communication."[240] In the IOA's view, this "imprecise catch-all provision" could "inadvertently invite courts to more closely examine communications to the ombuds" thereby threatening ombuds confidentiality and effectiveness.[241] Accordingly, the IOA takes the position that communication to the ombuds *never constitutes notice to the organization.*[242] However, the ombuds may choose to take action to put the entity on notice, in which case the communication between the ombuds and the entity may serve as notice. In that instance, the notice is strictly limited to the substance of the communication between the ombuds and the entity and never includes communications between the constituent and the ombuds. It is not the constituent's "privilege to waive."[243]

In its guide for federal ombuds, COFO states that "[i]t is recognized that, in more instances than not, if the complainant remains anonymous, the communication by the Ombuds to the agency/entity may not have the effect of placing the agency/entity on notice."[244] The COFO

[240] *Guidance for Best Practices and Commentary on the American Bar Association Standards for the Establishment and Operation of Ombuds Offices, Revised February 2004,* International Ombudsman Association (IOA), 2006, at 12.
[241] *Id*.
[242] *Id*. at 13 (emphasis in original).
[243] *Id*. at 14.
[244] *See COFO Guide, supra* note 214, at 12–13. Additionally, on its website, the CFO states that ombuds: "[D]o[] not provide notice to the agency, except generically." *See* COFO, Frequently Asked Questions, http://federalombuds.ed.gov/federalombuds/ombuds_FAQs.html.

guidance advises ombuds to "direct" employees who "do[] not wish to remain anonymous" to the appropriate office so that they can "provide his/her own notice" to the agency.[245]

The Restatement (Second) of the Law of Agency, which is frequently used as guidance on the question of notice, summarizes the common law of agency. Section 1 ("Agency") of the Restatement outlines three factors for determining who is an agent: (1) manifestation by the principal that the agent shall act for him; (2) acceptance by the agent of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking.[246] On the subject of notice, Section 268 ("Notice through Agent") provides:

> (1) [A] notification given to an agent is notice to the principal if it is given:
> (a) to an agent authorized to receive it;
> (b) to an agent apparently authorized to receive it;
> (c) [to an agent who usually receives such notice], unless the one giving the notification has notice that the agent is not authorized to receive it. . . .
> (2) The rules as to the giving of notification to an agent apply to the giving of notification by an agent.[247]

Relatedly, Section 275 ("Agent Having Duty to Reveal Knowledge") of the Restatement states: "[T]he principal is affected by the knowledge which an agent has a duty to disclose to the principal or another agent of the principal to the same extent as if the principal had the information."[248] According to the Restatement, imputed notice turns on whether the agent has a duty to disclose, or on whether it appears that the agent is an official conduit of notice to the organization.[249] Note as well that notice may *not* be imputed if is shown that the agent is not authorized to receive notice.

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[245] *Id*. at 12. *See also generally* memorandum by Sharan Lee Levine and Paula A. Aylward as participants in a conference entitled "Does a Report to an Ombuds Constitute Notice to an Entity?", August 9, 2002.
[246] RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 1 (1958). Although the American Law Institute published a new Restatement of Agency in 2006, the sections relevant to this analysis do not differ in substance from the Restatement Second. *See, e.g.*, Restatement (Third) of the Law of Agency §§ 1.101, 5.03 (2006).
[247] *Id.* § 268.
[248] *Id*. § 275.
[249] *See also* HOWARD, *supra* note 1, at 195–97 (discussing agency law).

Therefore, knowledge may be provided directly by an ombuds who discloses it to agency officials, or it may be imputed when an ombuds is considered an agent under a duty to disclose and has knowledge of the relevant facts. Further, notice may be imputed if an ombuds has "apparent" authority to receive it, i.e., is perceived as an official conduit of notice.

Concern for and awareness of these common law principles of agency, in particular a concern about imputed notice, is reflected in the ABA and IOA Standards. They recommend that ombuds offices be chartered so that they have no official management duties or responsibilities such that they might be or be perceived to be an official conduit for notice, and suggest that ombuds publicize through literature and other disclaimers that they are independent from, and do not receive notice on behalf of, the organization. In the strongest case, visitors would expressly agree that they have sought the ombuds' services voluntarily and with the knowledge that the ombuds is *not* an agent, authorized to receive notice on the agency's behalf or in any sense a conduit of information absent the visitor's permission to pass on confidential information.

Turning to the case law on notice, research has revealed few cases that have directly, or even indirectly, addressed whether an ombuds is an agent of the employing entity or whether communications with an ombuds should be imputed to the employing organization. In *Ault v. Oberlin*,[250] the U.S. District Court for the Eastern District of Ohio appeared to find that the ombuds had given actual notice to Oberlin in a discrimination case involving two Oberlin College employees who met with the college's ombuds to discuss allegations of sexual harassment. After speaking with the employees, the ombuds contacted an Oberlin administrator

[250] 2014 WL 4245991 (N.D. Ohio), *aff'd on other grounds*, 620 Fed. Appx. 395 (2015).

in order to arrange a meeting between the parties to discuss the allegations.[251] However, at some point prior to that meeting, the employees canceled and decided to retain private counsel.

At trial Oberlin argued that the plaintiffs' contact with the ombuds — and no other Oberlin employees by virtue of having canceled the meeting with administration — was not sufficient to put Oberlin on notice of the harassment. In support of its contention, Oberlin presented evidence from an independent report which stated that the ombuds "enjoys independence and has a duty to confidentially preserve information it receives from faculty, staff and students."[252] The court disregarded that evidence, stating that it was "likely hearsay, as the author merely repeats [the ombuds'] description of her office in the report."[253] The court went on to say: "Oberlin offers no evidence or legal authority establishing that the independence of the ombudsperson's office was such that plaintiffs' complaints to [the ombuds] were insufficient to put Oberlin on notice . . . ."[254] However, the court went on to find that, in arranging the meeting between the employees and Oberlin, the ombuds arguably "notified the individuals at Oberlin who were charged with responding to sexual harassment."[255]

Turning to the question of imputed notice, in *Holly D. v California Institute of Technology*,[256] the Ninth Circuit Court of Appeals refused to impute to the university an ombuds' knowledge of claims of sexual harassment. In that case, the plaintiff had mentioned the harassing conduct in a "confidential meeting" with a Caltech ombuds.[257] Subsequently, the plaintiff filed a formal complaint with the EEOC, and the EEOC issued a right-to-sue letter

[251] *Id*. at *2.
[252] *Id*. at *14. The report was filed as part of an investigation into the plaintiffs' allegations and contained "a general description of the ombudsperson's duties and roles at Oberlin, as related by [the ombuds] to the author of the report."
[253] *Id*.
[254] *Id*.
[255] *Id*.
[256] 339 F.3d 1158 (2003).
[257] *Id*. at 1164.

against Caltech. In its recitation of the facts, the court stated that Caltech was put on notice of the harassment allegations "by way of the EEOC letter."[258] Although it is not express, an inference might be drawn that the court chose not to impute the ombuds' knowledge of the harassment to Caltech.

Similarly, in the 2006 case of *Grother v. Union Pacific Railroad Co.*,[259] a federal district court in Texas declined to impute to the company claims allegedly made to a company ombuds. The plaintiff in *Grother* claimed that he had been retaliated against for engaging in protected conduct after meeting with the ombuds to discuss several workplace-related complaints. The two supervisors responsible for Grother's negative performance evaluation stated that they were unaware of the employee's meeting with the company ombuds. The court took the statements at face value and found that there could not have been retaliation for protected activity inasmuch as the employer had no knowledge of the plaintiff's complaints made to the ombudsman. Again, without explanation, the court did not impute the ombuds' knowledge to the employer for purposes of notice although it is unclear how convincing an inference might be drawn from this.[260]

Also of uncertain import, in *Norden v. Samper*,[261] the plaintiff sued the Acting Secretary of the Smithsonian Institution for failing to accommodate her disability, which was acquired after the plaintiff contracted a rare, near-fatal disease while conducting business for the Smithsonian Institution abroad. An issue in the case was whether the plaintiff had exhausted the administrative procedures required under EEOC regulations before filling the EEOC complaint — specifically whether the plaintiff had complied with 29 C.F.R. § 1614.105(a), which requires

[258] *Id*. at 1165.
[259] 2006 U.S. Dist. LEXIS 38415 (S.D. Texas, Houston Div., June 9, 2006).
[260] *See also* Palomo v. Trustees of Columbia University, 2005 U.S. Dist. LEXIS 14428 (S.D.N.Y. July 20, 2005).
[261] 503 F. Supp. 2d 130 (D.D.C. 2007).

an aggrieved person to contact an agency EEO counselor within 45 days of the alleged discriminatory conduct. Prior to filing the complaint, the plaintiff had met with the Smithsonian ombuds, and sent emails to numerous agency employees regarding her need for accommodations. The plaintiff argued that these various discussions satisfied the § 1614.105(a) requirement that an employee provide notice of allegations to an EEO counselor before filing a formal EEO complaint. The court did not agree, stating, "[i]nformal efforts to resolve employment disputes outside the EEO process do not satisfy the requirements of § 1614.105(a)."[262] The Court additionally found:

> This argument is also unavailing. In order to satisfy the exhaustion requirement, an employee must contact an EEO Counselor. . . . There is no dispute that none of the individuals who Dr. Norden contacted before April 2003, including [the ombuds], was designated as an EEO counselor. . . . Moreover, *the substance of the contacts in question was insufficient to put the Smithsonian on notice that Dr. Norden was raising an EEO claim*; the evidence shows only that Dr. Norden and the Smithsonian employees were engaged in the interactive process required by the Rehabilitation Act to determine what, if any, reasonable accommodations would allow Dr. Norden to return to work.[263]

As quoted above, the court in *Norden* found the *substance* of the communications with the ombuds insufficient to put the agency on notice because the employee and the agency "were engaged in the interactive process" required to resolve the issue short of a claim being filed.[264] Thus the court was focused somewhat narrowly on the interplay of the interactive process required to explore reasonable accommodations under the Rehabilitation Act in finding that this process did not constitute the required legal notice under § 1614. Additionally, the court relied on its finding that the individuals consulted were not "counselors" under § 1614. However, *Norden* has some relevance to federal ombuds in that the court also found that informal

[262] *Id*. at 147.
[263] *Id*. at 147 (emphasis added).
[264] *I.e*., required by the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of the 29 U.S.C. and 31-41c U.S.C.), which is administered under Title VII.

employment dispute resolution processes outside EEO processes did not "put the Smithsonian on notice that Dr. Norden was raising an EEO claim . . . ."[265]

There are, in addition, several federal cases[266] that do not involve ombuds but may be relevant to the extent that they indicate that plaintiffs who voluntarily and knowingly avail themselves of confidentiality cannot subsequently argue that communications made during confidential conversations constitute notice to the entity. In September 1988, the plaintiff in *Karibian v. Columbia University*[267] consulted a member of Columbia University's Sexual Harassment Panel and an employee at the university's EEO office to discuss allegations of sexual harassment against her supervisor. The university's policies provided that these discussions would be kept confidential, and the plaintiff specifically requested in both conversations that the allegations not be investigated.[268] Subsequently the plaintiff complained to a higher-level manager, at which point the university investigated the complaint and took disciplinary action against the plaintiff's supervisor. Shortly after, the employee filed a lawsuit claiming the existence of a hostile work environment. The plaintiff alleged the university had knowledge of the unlawful conduct because of her conversations with the Sexual Harassment Panel and EEO office.[269] The court stated:

> The information which certain Columbia employees learned in September 1988 was obtained in the course of consultations which were intended to be completely confidential. It cannot be said that this was "knowledge" on the part of Columbia of the kind that gave Columbia the duty to inquire and take remedial action. . . . Columbia could

[265] *Id*. at 148.
[266] These cases, discussed *infra* notes 267, 271, as well as several other federal and state cases where reference is made to the implications of a request for confidentiality on notice or the obligation to take action were identified by HOWARD, *supra* note 1, at 198–202.
[267] 812 F. Supp. 413 (S.D.N.Y. 1993), *vacated on other grounds*, 14 F.3d 773 (2d Cir. 1994).
[268] *Id*. at 415.
[269] *Id*. at 416–17.

> hardly be expected to act against [the plaintiff's supervisor] as a result of the confidential communications of September 1988.[270]

In *Torres v. Pisano*,[271] the plaintiff alleged to Pisano, a supervisor in a different unit, in writing and orally that her own supervisor engaged in racial and sexual harassment. The plaintiff repeatedly had asked that Pisano keep these complaints confidential. In describing the question before it the court stated: "we are called upon to determine whether the employer can be held liable despite the fact that the victim specifically asked the person to whom she reported the harassment to keep the matter confidential and to refrain from taking action for the time being."[272] While the court found that Pisano's knowledge of the harassment could be imputed to the university,[273] it held that, in light of plaintiff's repeated requests that her complaints be kept confidential, "as a matter of law . . . Pisano behaved reasonably in honoring Torres' request for confidentiality and in failing to act immediately to end the harassment."[274] Notably, the court discussed the right of Title VII complainants to "make reasonable decisions to delay — at least for a time — pursuing harassment claims, perhaps for privacy or emotional reasons, until they are ready to do so."[275]

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[270] *Id.* at 417.
[271] 116 F.3d 625 (2d Cir. 1997).
[272] *Id.* at 628.
[273] The court listed three situations where an employee's knowledge will be imputed: 1) An official is at a sufficiently high level in the management hierarchy to qualify as a proxy for the entity; 2) the official is charged with a duty to act to stop harassment; 3) the official is charged with a duty to inform the entity of the harassment. *See id*. at 636–37.
[274] *Torres*, 116 F.3d at 639; *accord* Hooker v. United Parcel Servs., 77 F. Supp. 2d 753 (S.D. W. Va. 1999).
[275] *Id.* at 639. This proposition has also been relied on by at least one state's highest court. *See, e.g.*, Elezovic v. Ford Motor Co., 472 Mich. 408 (2005) ("[I]f an employee is sexually harassed in the workplace, it is that employee's choice whether to pursue the matter . . . the victim of harassment 'owns the right' whether to notify the company and start the process of investigation.").

Conclusions and Recommendations for Agency Officials and Ombuds Offices on Ombuds Agency Status and Notice to the Employer

Turning first to the Restatement and generally recognized black letter law on agency, there may be few, if any, situations in which federal ombuds are clearly authorized by statute or charter to receive notice on behalf of the employing agency. Moreover, there is usually some effort to avoid the appearance of apparent authorization, whether through disclaimers on the part of the ombuds or by communications from the agency and the ombuds, affirming the ombuds' independence from the agency's management structure. Communications disavowing the ombuds' authority to accept notice should be explicit and effectively disseminated. Most importantly, the ombuds should not be assigned to a position or given collateral responsibilities that would be inconsistent with such disavowals of agency. If these conditions are met, the ombuds can be fairly confident that, under the Restatement, he or she will be found to have neither actual or apparent authority.

Nonetheless, echoing the cautions expressed by the ABA and IOA, federal agencies and their ombuds should be extremely cautious when they articulate to constituents and at large about their standards, mission and functions. Subtle variations may make a difference. Communications about most ombuds offices stress that they are safe, confidential places to raise issues of concern. It has also been suggested that ombuds may be part of an organization's effort to provide safe avenues for potential whistleblowers. However, in touting these beneficial and sometimes unique attributes, it is very important to avoid any implication that the ombuds has authority to receive complaints or otherwise serve as an official conduit of information (assuming that to be the case). Likewise, when communicating about the scope and benefits of the confidentiality offered by the ombuds office, it is important that constituents understand the

trade-offs of this feature, that if confidentiality is sought and maintained it will not put the agency on notice. Concomitantly, ombuds must be informed themselves, and inform the constituent, about what other options there might be for reporting a concern and seeking formal investigation and/or redress if the ombuds cannot provide these services.

As noted above, the directly relevant case law is scant and inconclusive. There is some case law of interest indicating, by inference, that courts might decline to find agency on the part of some ombuds and that courts may entertain a "you can't have it both ways" argument when employees seek confidentiality in a given conversation or conversations and then attempt to rely on these conversations as legal notice to the employer and/or as imposing an obligation to act. These cases may be useful in fashioning defensive arguments should a litigant allege either actual or apparent agency on the part of the ombuds. Such arguments would be reinforced were there evidence that the visitor was asked to agree that the ombuds is not an agent or conduit of communication with the agency as a condition of the visitor's voluntary use of the ombuds office.

Federal ombuds differ widely in purpose and structure and these differences may have particular significance with respect to agency. While most federal ombuds will be able to make the case that they are not agents, it is possible that some offices bearing the ombuds title, particularly among those that serve external constituents, are situated, structured and promoted as a conduit of information to their respective agencies or may reasonably be perceived as such absent effective communications articulating facts that would negate agency status.

V. Federal Ombuds and Federal Sector Labor Law[276]

Federal sector labor law is relevant not only to internal ombuds but also to those external ombuds who may have cause to engage represented employees as well as management in the course of looking into issues. Further, to the extent that employment case law discusses confidentiality under ADRA § 574 in the employment context, it may shed light on its interpretation generally.

The Coalition of Federal Ombudsman (COFO) cautions in its guidance to federal ombuds that they should be aware that certain "statutory provisions and . . . regulatory provisions or internal agency guidance . . . may impact on the Ombuds' functions in dealing with bargaining-unit employees, in particular those under the [FSLMRS] . . . ."[277] COFO identifies in particular § 7114(a) of the Federal Service Labor-Management Relations Statute (FSLMRS).[278] Section 7114(a) affords to an exclusive bargaining representative the right to be represented at "formal discussion[s]" between one or more representatives of the agency and one or more represented employees concerning any grievance or other terms and conditions of employment[279] and during "any examination" of a represented employee if (1) the examination is conducted by a "representative" of the employing agency and (2) the employee requests representation and

[276] We note that research has revealed no cases in which the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB) has considered ADRA § 574 on confidentiality with respect to ombuds.
[277] *See COFO Guide*, *supra* note 215, at 6.
[278] 5 U.S.C. § 7114(a)(2) (2012).
[279] 5 U.S.C. § 7114(a)(2)(A). Note that the right inherent in § 7114(a)(2)(A) is not the employee's right to representation but rather the union's right to represent the interests of the entire bargaining unit inasmuch as these interests may be affected by resolutions in individual cases. Relatedly the FLRA has determined that the FSLMRS does not grant unions a right to represent individual employees in EEO proceedings. Individual employees may select their own representative who may or may not be a union official. FLRA, GUIDANCE ON APPLYING THE REQUIREMENTS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE TO PROCESSING EQUAL OPPORTUNITY COMPLAINTS 29 n.83 (1999) [hereinafter FLRA Guidance on EEOC Complaints].

reasonably believes that the meeting may result in disciplinary action, the so-called *Weingarten* right.[280]

Should the ombuds be found to be an agency representative as defined under the FSLMRS and the other threshold factors for the union's right to be present under §7114(a)(2)(A) be met, then the nexus between the union's right to be present and ombuds confidentiality comes into play. However, importantly even if the ombuds is *not* deemed to be a representative for purposes of § 7114, its strictures may be applicable when in the course of an ombuds' work both management and unit employees are engaged. Therefore, in order to understand the union's rights pursuant to § 7114(a)(2)(A), it is important to consider cases in which courts have addressed the union's rights with regard to confidential conversations whether the confidentiality originates under ADRA § 574 or under confidentiality provisions in, for example, EEOC regulations and management directives. Under ADRA, the impact on confidentiality may depend on whether or not the union is deemed a "party" for purposes of the constraints on parties in § 574.

[280] 5 U.S.C. § 7114(a)(2)(B). There is a difference of opinion between the ABA on the one hand, and the IOA and COFO on the other as to whether or not federal ombuds should handle issues brought to them by represented constituents that might also be cognizable within an existing collective bargaining relationship or may arise under any federal or state labor or employment laws. The ABA Standards suggest that ombuds refrain from dealing with *any* issues that fall within a collective bargaining agreement or which may arise under any federal or state labor or employment laws. *See 2004 ABA Standards*, *supra* note 214, at § D(6). In contrast, the IOA states that ombuds should be able to address employment-related issues — regardless of the union's potential interests in the matter — and notes that ombuds routinely deal with such issues in day to day practice. *See* GUIDANCE FOR BEST PRACTICES AND COMMENTARY ON THE AMERICAN BAR ASSOCIATION STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES 7-9 (Int'l Ombudsman Ass'n 2006). Similarly, COFO advises that: "Many federal Ombuds are chartered specifically to deal with employment concerns. Consistent with collective bargaining obligations and agreements, Ombuds' charters also may authorize Ombuds to participate in the resolution of bargaining-unit employee disputes. In this regard, the collective bargaining agreements should address the Ombuds role in employment dispute resolution." *See COFO Guide*, *supra* note 215, at 6. Although we offer no opinion on this disagreement, we note that this study confirms that there are numerous federal ombuds that do handle employment issues in represented environments without evident injury to employee or union rights and obligations. We echo COFO, however, in urging federal ombuds, particularly organizational ombuds, to explore with bargaining representatives who represent their constituents how their respective legal and ethical requirements might be met and the interests of these constituents best be served by both entities.

Turning first to the question of whether or not an ombuds might be considered a "representative" of an agency for purposes of union representation or participation under §7114, we note that while the question of representative status under the FSLMRS is analogous to that of agency and notice discussed in the previous section, the analysis is not identical. Typically, the individual conducting the meeting or investigation involving a bargaining unit employee is someone within the same management unit or chain as the employee and, accordingly, the representative status of that individual is not under question. However, there are a number of cases that have examined the representative status of individuals who the union argues are agency representatives but are separate from that employee's management structure. In this regard, the FLRA (Federal Labor Relations Authority) has developed a "function and control" test to determine whether an individual is an agency "representative." The FLRA administers the Federal Service Labor-Management Relations Statute (FSLMRS), which sets forth the labor management system for federal employees and their collective bargaining representatives. It decides representational issues in the federal sector and has jurisdiction over unfair labor practice (ULP) charges brought against federal agencies or unions.[281] The FLRA will find an individual to be a "representative" of the agency where the individual: 1) performs an agency function; and 2) operates under the control of the agency.[282]

In *NASA v. FLRA*,[283] the Supreme Court considered whether an investigator employed in NASA's Office of Inspector General (NASA-OIG) was a "representative of the agency" within the meaning of the FSLMRS. Although this case should be read skeptically given the immense and relevant differences between ombuds and Inspector General offices, the court's dicta is of some significance. In *NASA*, the NASA-OIG investigator permitted a union representative to

[281] *See* 5 U.S.C. § 7116.
[282] *See* NTEU v. FLRA, 754 F.3d 1031, 1037 (D.C. Cir. 2014).
[283] 527 U.S. 229 (1999).

attend the interview of a NASA employee being investigated for suspect activities, but limited the union representative's participation in the interview. The union subsequently filed a charge with the FLRA, alleging that NASA-OIG's investigator committed an unfair labor practice by limiting the representative's participation in the interview. Defending against the charge, NASA argued that its OIG was not a "representative of the agency" within § 7114(a)(2)(B)'s meaning and thus the union had no statutory right to participate in the interview. The Administrative Law Judge (ALJ) found that the OIG investigator was a "representative" of NASA and held that NASA had violated the employee's right to union representation. The FLRA agreed with the ALJ on review, and the Eleventh Circuit affirmed.

In a 5-4 decision, the Supreme Court held that NASA-OIG investigators are "representatives" of NASA within the meaning of § 7114 when acting within the scope of their employment. The Court disagreed with NASA's assertion that the term agency "representative" referred only to a "representative of agency management — '*i.e.*, the entity that has a collective bargaining relationship with the employee's union,'" finding instead that, "[b]y its terms, § 7114(a)(2)(B) is not limited to investigations conducted by certain 'entit[ies]' within the agency in question."[284] The Court noted that "[a]s an organization, an agency must rely on a variety of representatives to carry out its functions and, though acting in different capacities, each may be acting for, and on behalf of, the agency."[285] Thus, the Court determined that the term "representatives" is not limited to those who "represent[] an 'entity' that collectively bargains with the employee's union."[286]

NASA and NASA-OIG further had claimed that the result of the conflict between the two statutes, the Inspector General Act and the FSLMRS, is that OIG personnel are precluded from

[284] *Id*. at 233–34.
[285] *Id*. at 236.
[286] *Id*. at 237.

being treated as "representative[s]" of the agencies they audit and investigate under the FSLMRS.[287] Nevertheless, while the Court recognized that "Congress certainly intended that the various OIG's would enjoy a great deal of autonomy," it went on to state that, "an OIG's investigative office, as contemplated by the IGA, is performed with regard to, and on behalf of, the particular agency in which it is stationed. . . . In common parlance, the investigators employed in NASA's OIG are unquestionably 'representatives' of NASA when acting within the scope of their employment."[288]

NASA and NASA-OIG also had raised confidentiality concerns about permitting union representation at employee investigations. The Court did not downplay the risk to confidentiality but rather explained:

> NASA and its OIG are no doubt correct in suggesting that the presence of a union representative at an examination will increase the likelihood that its contents will be disclosed to third parties. That possibility is, however, always present: NASA and NASA-OIG identify no legal authority restricting an employee's ability to discuss the matter with others. . . . Though legitimate, NASA and NASA-OIG's confidentiality concerns are not weighty enough to justify a non-textual construction of § 7114(a)(2)(B) . . . .[289]

In contrast, in *NTEU v. FLRA*,[290] the D.C. Circuit affirmed the FLRA decision below finding that covered Internal Revenue Service (IRS) personnel are not entitled to union

[287] *Id*. at 237.
[288] The dissent disagreed: "In light of the IG's independence — guaranteed by statute and commonly understood as a practical reality — an investigator employed within NASA's OIG will not, in the usual course, represent NASA's management within the meaning of § 7114(a)(2)(B). Perhaps there are exceptional cases where, under some unusual combination of facts, investigators of the OIG might be said to represent agency management, as the statute requires." *Id*. at 262.
[289] *Id*. at 243–244. Thus the Court appears to rely chiefly on its textual construction of § 7114(a)(2)(B). Although the Court did not discuss the law of agency, its reasoning may have some basis in common law agency principles — the Court's language, referring to OIG work as being performed "with regard to, and on behalf of" the agency, is suggestive of the agent/principal relationship. Note also that the D.C. Circuit Court of Appeal's decision in Dover Air Force Base v. FLRA, 316 F.3d 280, 286–87 (D.C. Cir. 2003) (*Dover AFB*) discussed further *infra*, note 358, rejected allegations that union representation at formal discussions under § 7114(a)(2)(A) violates an employee's expectations of confidentiality under ADRA § 574, Title VII, and EEOC regulations. The *Dover* court found that whatever potential confidentiality issues there might be were not substantial enough to warrant proscribing the union's right to be present.
[290] 754 F.3d 1031 (D.C. Cir. 2014)

representation at suitability interviews conducted by the Office of Personnel Management (OPM) investigators because OPM investigators do not act as "representatives" of the IRS during the interviews. The court considered whether the FLRA "properly applied" its function and control test and summarized the FLRA's application of its test to the facts in the case, stating:

> [T]he Authority first concluded that OPM investigators 'were performing an OPM function' (and not any IRS function) when 'interviewing and investigating covered [OPM personnel] . . . . The Authority also determined that OPM investigators do not operate under agency control during interviews of covered personnel because . . . OPM investigators are "legally independent" of the IRS and the IRS has "no basis or authority . . . to tell OPM how its investigators should go about conducting their investigatory interviews."[291]

The D.C. Circuit rejected the union's argument that the FLRA's function and control test was "unreasonably at odds" with the Supreme Court's holding in *NASA* "that investigators can be 'representatives' of an agency even when they are operating under their own legal authority and insulated from agency interference or control." In distinguishing *NASA* from the facts of *NTEU*, the D.C. Circuit Court stated that "[d]espite the considerable autonomy enjoyed by the NASA-OIG investigators, they were nonetheless employed by NASA and supervised by the NASA Administrator. . . . Here, the OPM investigators are not IRS employees and are not supervised by the IRS Commissioner."[292]

The court also considered whether the FLRA acted arbitrarily in finding that OPM investigators do not perform an IRS "function" or operate under IRS "control" during suitability interviews of covered IRS employees. On the first point, the court found that the OPM investigators did not perform an IRS "function" because of federal regulations that "expressly entrust[] to OPM the role of conducting suitability investigations of covered personnel."[293] On the second point, the court held that the IRS did not "control" the investigators because the

[291] *Id*. at 1037.
[292] *Id*. at 1044.
[293] *Id*. at 1046.

agency neither "tell[s] OPM how its investigators should go about conducting their investigatory interviews," nor has the authority to "alter OPM's decision to not permit union participation at the interviews."[294] Thus, the court concluded that that the FLRA "reasonably construed the 'representative of the agency' language in 5 U.S.C. § 7114(a)(2)(B) to support a function and control analysis in determining its applicability *vel non* . . . and that the Authority's application of its interpretation to OPM-conducted suitability interviews of covered IRS personnel is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'"[295]

In another FLRA case, *Pension Benefit Guaranty Corp., Washington D.C.* (*PBGC*),[296] the Authority considered whether a "neutral" EEO investigator could be a "representative of the agency" when interviewing unit employees. In *PBGC,* the agency had used a contractor to investigate an employee's formal EEO complaint. During the course of the investigation, the contractor interviewed 11 unit employees. The union was not notified of or given the chance to participate in any of the interviews, and subsequently filed an unfair labor practice charge with the FLRA claiming that the agency had violated its formal discussion right under § 7114(a)(2)(A).

The PBGC argued that the EEO investigator could not be a "representative of the agency" within the meaning of § 7114 because all employees in its EEO office must be "neutral."[297] Conversely, the union claimed that the case was analogous to *SSA Boston,*[298] in which the FLRA had held that contract EEO investigators are "agency representatives" when interviewing covered employees during the course of an EEO investigation. In both *SSA Boston*

[294] *Id*. (internal quotations and citation omitted).
[295] *Id*. at 1047 (citing Nat'l Treasury Emps. Union, 414 F.3d 50 (D.C. Cir. 2005) (internal citation omitted); Am. Fed'n of Gov't Employees, Local 2343, 144 F.3d 85 (D.C. Cir. 1998) (internal citation omitted)).
[296] 62 FLRA 219 (2007) (*PBGC*).
[297] *Id*. at 220.
[298] Soc. Sec. Admin. Office of Hearings & Appeals, Boston Region, 59 FLRA 875 (2004) (*SSA Boston*), *recon. granted* 60 FLRA 105 (2004).

and *PBGC*, the contractors were appointed under memorandum agreements with identical language, which required agency employees "to 'provide complete cooperation in the investigation[]' and . . . 'to furnish testimony under oath, without a pledge of confidence, about matters pertaining to the complaint.'"[299] Further, the memoranda directed the respective contractors to provide weekly reports to the agency EEO Manager and to submit the completed investigative file to the agency. The FLRA concluded that its finding in *SSA Boston* applied in *PBGC* to the effect that "Respondent had an official obligation to investigate these EEO complaints, and the fact that a contractor, rather than an agency employee, was designated by the agency to conduct these investigations does not diminish the relationship with the Respondent.'"[300]

Although in *SSA Boston* the FLRA had not commented on whether neutrality affects an employee's status as an agency representative, it analyzed the issue at length in *PBGC*. The FLRA began its discussion of neutrality in *PBGC* by noting that "neutrality" is not relevant to the status of a contractor as an agency "representative." In *PBGC*, the FLRA explained that, in *SSA Boston*, "[t]he fact that the contractor . . . was required to remain neutral did not preclude or otherwise affect the Authority's finding that he served as a representative of the agency."[301]

The FLRA rejected the Administrative Law Judge's (ALJ's) conclusion that a "neutral" agency employee "is quite different" from one serving in a "prosecutorial role" or performing a "personnel function" and therefore as the EEOC investigator in *PBGC* "was acting essentially as a neutral[,] . . . the Union's presence at the . . . [investigative] interviews [was] neither beneficial to the EEO process nor required by [the FSLMRS]."[302] In its decision, the FLRA countered that

[299] *PBGC*, 62 FLRA at 223 (citing *SSA Boston*, 59 FLRA at 880).
[300] *Id*.
[301] *Id*. at 223.
[302] *Id*. at 238 (opinion of Richard A. Pearson, A.L.J.).

"the Judge's acknowledgement that unions have a right to attend discussions involving 'personnel functions' undercuts the [PBGC's] claim that the neutrality of a representative insulates an agency from this statutory requirement, as personnel functions may, in many instances, be characterized as neutral."[303]

Additionally, the FLRA rejected the contention that EEO investigators cannot be "representatives" under § 7114 because EEOC guidance expressly prohibits EEO investigators from being "representatives" of the agencies they serve. In concluding that the investigators could be representatives within meaning of the FSLMRS, the FLRA stated:

> EEOC guidance requires that each agency set up independent lines of authority for its EEO and personnel programs to assure the independence of the EEO process and to avoid "intrusion on the investigations and deliberations of EEO complaints by agency representatives and offices responsible for defending the agency against EEO complaints." The guidance thus uses the term "representative" in a particular context, that of agency advocate, and does not imply that employees serving under the EEO function are not, in a general sense, representing an agency's interests. As the regulations that govern EEO investigations make clear, these investigations are "conducted by the Agency," in accordance with EEOC directives.[304]

Many of the cases that consider the form and substance of interactions to which the union's rights under § 7114 attach as they relate to confidentiality under ADRA involve workplace discrimination or harassment. It is therefore important to understand the EEO (equal employment opportunity) complaint process in the federal sector as it differs from that in the private sector in several pertinent respects.

The EEO complaint process for the federal sector places specific emphasis on informal resolution of complaints. To that end, federal employees must try to resolve their allegations of discrimination during a "pre-complaint" process before filing a formal complaint with the EEOC (Equal Employment Opportunity Commission). The process begins when an employee contacts

[303] *Id*. at 224.
[304] *Id*. (internal citations omitted).

an agency EEO counselor. The EEO counselor will meet with the employee about the allegations and explain the EEO process. At this point, the employee must attempt to resolve the complaint informally either through "traditional" counseling with the EEO counselor or by participating in the agency's EEO Alternative Dispute Resolution program. If the matter cannot be resolved at the completion of counseling or ADR, the EEOC issues to the employee a notice of the right to file a formal complaint, at which point the employee has 15 days either to file a formal complaint or to choose not to pursue the matter further.

Filing a complaint begins the "formal complaint process." Once notified by the EEOC that a formal complaint has been filed, the agency has 180 days to assign an EEO investigator to investigate the incident and issue a report on its findings.[305] After the investigation is completed, the complainant may request a hearing before an EEOC Administrative Judge or elect to receive a final agency decision without a hearing. In either event, the agency will issue a final order based on its findings and the decision of the EEOC Administrative Judge, if there was a hearing. The employee may appeal the agency's final order to the EEOC within 30 days of receiving it. If the complainant is not satisfied with the EEOC's appellate decision, the complainant may file a request for reconsideration with the EEOC or may file suit in the appropriate federal district court within 90 days of receiving the decision.

Significantly, the pre-complaint stage is known as the "informal" stage, contrasting with the "formal" stage, once the complaint is filed.[306] Title VII itself provides for confidentiality by prohibiting unauthorized disclosure of information obtained by employees of the EEOC or its

[305] Note that an EEO investigator is not the same as an EEO counselor. An EEO investigator acts as a neutral fact finder who collects and discovers information relating to the claim (or claims) in the complaint under investigation and prepares an investigative report for submission to the agency. On the other hand, an EEO counselor is an agency or contracted individual who, serving as a neutral, provides an environment for open discussion leading to an attempt at informal resolution prior to the filing of a complaint. *See* MD 110, *infra* note 316, at Ch. 2 §§ I.A, D.

[306] As indicated in some of the case law discussed *infra*, the use of "informal" and "formal" to denominate the two stages of federal sector EEO processing may in some instances have distorted the analysis for tribunals attempting to interpret "formal" in FSLMRS § 7114(a)(2)(A).

agents in the federal government at the "informal" pre-complaint stage. Under Title VII, the Commission:

> [S]hall endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. . . .[307]

In addition, Title VII's confidentiality provisions impose criminal penalties on any EEOC employee who discloses information obtained in an EEOC investigation to the "public."[308] Although Title VII protects against unauthorized disclosure of EEO information by the government, it does not otherwise guarantee confidentiality in the EEO process.[309]

The EEOC has implemented Title VII's nondisclosure provisions through its regulations.[310] For example, 29 C.F.R. § 1601.26 ("Confidentiality of endeavors") provides:

> **(a)** Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. This provision does not apply to such disclosures to the representatives of Federal, State or local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under title VII, the ADA, or GINA: *Provided, however,* That the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosures will not serve the purposes of the effective enforcement of title VII, the ADA, or GINA.

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[307] 42 U.S.C.A. § 2000-5(b) (2012). Interpreting the provision on non-disclosure in the text of Title VII, the court in Mosley v. General Motors Corp., 1975 WL 437160 (E.D. Mo. July 21, 1975) stated: "Congress felt that confidentiality was important where charges of employment discrimination are concerned. . . . The clearest and most absolute prohibition is . . . in [§ 2000e-5] which prohibits the disclosure of the charges [of discrimination] themselves."

[308] *See* 42 U.S.C. §§ 2000e-5(b), 2000e-8.

[309] *See* Sofio v. Sec'y of Treasury, EEOC Appeal No. 01873285 (1988) ("[N]othing in [Title VII] . . . guarantees federal employees confidentiality in pursuing complaints brought thereunder.").

[310] *See* 29 C.F.R. § 1601.26 (repeating the language in Title VII: "Nothing that is said or done during and as a part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information . . . .").

> **(b)** Factual information obtained by the Commission during such informal endeavors, if such information is otherwise obtainable by the Commission under section 709 of title VII, for disclosure purposes will be considered by the Commission as obtained during the investigatory process.

In the federal "pre-complaint" process EEOC rules provide: "The [EEO] counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter."[311] Further, EEOC hearings conducted as part of the formal complaint process are "part of the investigative process and are thus closed to the public."[312] In addition, EEOC rules prohibit public disclosure of certain records.[313]

The EEOC's 1614 regulations mandate the use of Alternative Dispute Resolution (ADR) in the federal EEO process and require that all federal agencies, "establish or make available an alternative dispute resolution program."[314] ADR must be offered "for both the pre-complaint and the formal complaint process."[315] The EEOC's mandatory guidance for federal agency EEO programs, Management Directive 110 (MD 110), includes the EEOC's ADR "core principles," which provide that any agency EEO ADR program must include confidentiality.[316]

Significantly, MD 110 refers to the provisions of ADRA § 574 at Chapter II.A.3 ("Confidentiality"):

> Confidentiality is essential to the success of all ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in § 574 of ADRA, specifically exempting qualifying dispute resolution communications from disclosure

[311] 29 C.F.R. § 1614.105(g) (2010).
[312] 29 C.F.R. § 1614.109(e).
[313] *See* 29 C.F.R. § 1610.17. The Commission has stated in this regard: "EEOC will not disclose to the public charges of employment discrimination, charge conciliation information or unaggregated EEO survey data. Federal sector complaint files are not disclosable to third parties . . . ." *See FOIA Frequently Asked Questions*, EEOC, https://www.eeoc.gov/eeoc/foia/faq.cfm#q15.
[314] 29 C.F.R. § 1614.102(b)(2).
[315] *Id*.
[316] EEOC MANAGEMENT DIRECTIVE 110, Ch. 3 § II(A)(3) (emphasis added) [hereinafter MD 110].

> under the Freedom of Information Act. Parties who know that their ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of ADR information. . . . Confidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution, and by any neutral third party involved in the proceeding. The EEOC encourages agencies to issue clear, written policies protecting the confidentiality of what is said and done during an ADR proceeding.[317]

In light of these robust confidentiality requirements in federal EEO ADR proceedings, the treatment of this confidentiality under federal labor law may be instructive for ombuds who also offer confidentiality. The FLRA has interpreted § 7114(a)(2)(A) concerning the union's right to notice and an opportunity to be present at "formal" discussions with employees in the context of both the formal and informal stage of EEO proceedings and, to a lesser extent, in the context of agency investigations of cases before the Merit Systems Protection Board (MSPB).[318]

To defend against a charge alleging that the union was denied its right to be present at formal discussions under § 7114(a)(2)(A), an agency must show that not all of the required statutory elements were present at the time of the meeting at issue in the charge. Two elements, in addition to the question of representative status discussed above, in particular merit closer analysis here.[319] The first is whether or not a meeting constitutes a "formal" discussion within the meaning of § 7114(a)(2)(A). Although the FLRA examines the totality of circumstances in

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[317] *Id*. at Ch. 3 § II.A.3. In addition to confidentiality, MD 110 cites to the provisions of ADRA defining ADR "Neutrals."

[318] The MSPB is an independent, quasi-judicial agency charged with protecting federal merit systems. It adjudicates allegations of partisan political and other prohibited personnel actions within the civil service and provides federal employees with an opportunity to appeal alleged abuses by agency management. *See* ABOUT MSPB, www.mspb.gov/About/about.htm.

[319] With respect to the "discussion" element, the FLRA has stated that the term "discussion" is synonymous with "meeting." *See* 149th TAC Fighter Group, Kelly Air Force Base, 15 FLRA 529, 532 (1984) (*Kelly AFB*). Virtually any meeting involving unit employees and management will satisfy the discussion element — there does not have to be an actual dialogue, debate, or conversation. *See* FLRA, GUIDANCE ON MEETINGS 2 (2015), https://www.flra.gov/system/files/webfm/OGC/Guidances/MEETINGS%20GUIDANCE%208-28-15%20final.pdf; *see also, e.g.*, U.S. Veterans Admin., Wash., D.C. and VA Med. Ctr., Brockton Div., Brockton, Mass., 37 FLRA 747, 754 (1990) (finding that a meeting held by management to distribute copies of new work schedules to employees satisfied the "discussion" element.)

each case to determine formality, it has identified a number of relevant factors to aid in this analysis. Such factors include:

> (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.[320]

These factors are meant to be illustrative and other factors may be persuasive in a particular case.[321] The FLRA's Office of General Counsel has stated in guidance: "In general, the more significant the subject matter of the discussion, the less the Authority will rely upon the enumerated factors to establish formality. Thus, in some situations, the 'purpose of the discussion [is] sufficient in itself to establish formality.'"[322]

The FLRA has found a range of discussions, including some that might be considered in the vernacular to be informal, to be "formal" discussions. Additionally, it has determined that discussions held in the context of alternative dispute resolution procedures under § 7114 can be *formal* discussions.[323] With respect to mediations and other facilitated discussions, the FLRA has stated that formality is *not* diminished when the format of the discussion consists of private caucuses between the parties and the neutral.[324] Further in *Luke I*, the FLRA rejected the

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[320] General Servs. Admin., Region 9, 48 FLRA 1348, 1355 (1994).
[321] *See, e.g.*, F.E. Warren Air Force Base and AFGE, Local 2354, 52 FLRA 149 (1996) (*Warren AFB*). In *Warren AFB* the FLRA concluded it was "highly implausible" that the agency would hold an informal meeting to inform employees that they were targets of a reduction-in-force because of the "gravity" of such an important announcement. *Id*. at 156.
[322] *See* GUIDANCE ON MEETINGS, *supra* note 319, at 3 (quoting *Warren AFB*, 52 FLRA at 156).
[323] *See, e.g.*, *Dover AFB*, 316 F.3d 280 (holding that mediation session to resolve employee's EEO complaint was a "formal" discussion).
[324] *See* Luke Air Force Base, Ariz., 54 FLRA 716, 725-26 (1998) (*Luke I*), *rev'd sub nom.* Luke Air Force Base, Ariz. v. FLRA, 208 F.3d 221 (9th Cir. 1999) (unpublished table decision) (*Luke II*), *cert. denied* 121 S.Ct. 60 (2000) (*Luke AFB*). Three Luke cases are discussed in this analysis. In *Luke I*, the FLRA determined that a mediation of a formal EEO complaint was a formal discussion concerning a grievance within the meaning of § 7114(a)(2)(A). In *Luke II*, the Ninth Circuit overturned the FLRA's earlier decision in *Luke I*, holding that EEO complaints are not grievances under § 7114 because they are governed by separate and distinct statutory procedures. In Luke Air Force Base, Ariz., 58 FLRA 528 (2003) (Luke III), the Authority, relying on the D.C. Circuit's 2003 decision in *Dover*

contention "that a facilitated discussion in general, or a mediated negotiation in particular, can never be 'formal' under section 7114(a)(2)(A) . . . ."[325] The FLRA stated there that "a union's statutory right to notice and an opportunity to be present during a discussion is not diminished when the discussion between employees and agency representatives is conducted in a non-confrontational manner through a neutral third party."[326]

Illustratively, the FLRA has found the following to be "formal" meetings[327]:

- A mediation of an employee's formal EEO complaint; attendance was voluntary; the agency representative present was outside the employee's chain of command; the session lasted several hours; and notes from the meeting were destroyed.[328]
- A 20-minute phone interview conducted by an EEO investigator of a unit employee to obtain information about another employee's EEO complaint; the employee was notified in advance of the call and informed it would be tape-recorded.[329]
- A meeting to advise an employee of his workplace duties, held in accordance with an MSPB settlement, and which was attended by the second-level supervisor; the

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AFB, held that a mediation of a formal EEO complaint was a formal discussion concerning a grievance which the union had a right to attend pursuant to § 7114(a)(2)(A).

[325] *See Luke I*, 54 FLRA at 729.

[326] *Id*. In *Luke I*, the agency's representative was not present at the mediation and the parties communicated solely through the EEO counselor who attempted to mediate the case. The FLRA stated:

> [I]t is clear that [the parties] were engaged in responding to each other's settlement positions, and that they were no less engaged than if they had been speaking face-to-face. . . . The Union's interest and right to be represented at face-to-face negotiations of a grievance . . . applies as well, in our view, to a negotiation conducted through a mediator. Under these circumstances, the [agency representative] was effectively present at the January 19 mediation/investigation session. Thus, the nature of the communication during the mediation/investigation session on January 19 does not undermine the overall formality.

[327] Ample FLRA authority exists on this subject, and the FLRA has noted that variations in factual circumstances affect its analysis of formality. *See Warren AFB*, 52 FLRA at 157. For further discussion and examples of cases, see generally the FLRA's GUIDANCE ON MEETINGS, *supra* note 319.

[328] U.S. Dep't of Agric., Forest Serv., Los Padres Nat'l Forest, Goleta, Cal., 60 FLRA 644, 651-53 (2005).

[329] Soc. Sec. Admin., Office of Hearings and Apps., Bos. Reg'l Office, 59 FLRA 875, 878-79 (2004).

meeting lasted approximately one hour and the employee's attendance was mandatory.[330]

In contrast, meetings are less likely to be "formal" if they are short in duration,[331] unscheduled,[332] employee-initiated,[333] conducted within the employee's workspace,[334] without a formal agenda,[335] or there was no transcript or notes taken of the meeting.[336] In addition, the FLRA has stated that certain "highly personal" meetings — such as routine employee counseling sessions — would not constitute "formal" discussions.[337]

The second important element of § 7114(a)(2)(A) relates to the "subject matter" of a discussion as described by the statute: a "grievance, personnel policy or practice, or general condition of employment." The term "conditions of employment" is defined in the FSLMRS as "personnel policies, practices, and matters . . . affecting working conditions."[338] Authority precedent has established that the term "conditions of employment" is effectively synonymous with the term "working conditions," which would cover most if not all internal employment issues that are likely to come to an ombuds.[339] Despite the breadth of "conditions of employment," the FLRA and the courts have struggled to define the scope of the term

[330] U.S. Dep't of Labor, Office of the Assistant Sec'y for Admin. & Mgmt., Chi., Ill., 32 FLRA 465, 470 (1988).
[331] *See* Def. Logistics Agency, Def. Depot Tracy, Cal., 14 FLRA 475, 477 (1984) (meeting held to announce changes in sick leave policy; lasted "no more than" 10 minutes); Marine Corps Logistics Base Barstow, Cal., 45 FLRA 1332, 1335-36 (1992) (meeting held to request volunteers for overtime assignment; lasted 10 minutes).
[332] *See* U.S. Dep't of Energy, Rocky Flats Field Office, Golden, Col., 57 FLRA 754, 755 (2002) (Employee "just dropp[ed] by" desk of EEO representative to discuss employee's pending EEO complaint).
[333] *Id*.
[334] *See* Soc. Sec. Admin., Balt., Md., 15 FLRA 525, 527 (1984) (meeting lasted less than 5 minutes).
[335] *See* Def. Logistics Agency, Def. Distrib. Region West, 48 FLRA 744, 745 (1993).
[336] *See* Immigration & Naturalization Serv., N.Y. Office of Asylum, Rosedale, N.Y., 55 FLRA 1032, 1034 (1999).
[337] *See* Soc. Sec. Admin., 14 FLRA 28, 28 (1984). The FLRA reached this conclusion based on its review of the legislative history of the FSLMRS, in which the word "formal" was added before "discussion" in the "Udall substitute" — enacted into law as § 7114(a)(2)(A) — "in order to make clear [Congress's] intention that this subsection does not require that an exclusive representative be present during highly personal, informal meetings such as counseling sessions . . . ." *Id*. (citing 124 Cong. Rec. 29187 (1978)).
[338] 5 U.S.C. § 7103(a)(14).
[339] *See* Davis Monthan Air Force Base and AFGE Local 2924, 64 FLRA 85, 90 (2009).

"grievance" in the context of determining whether and to what extent EEO dispute resolution processes are covered by § 7114.[340] A "grievance" is described in § 7103 of the FSLMRS as:

> (9) "grievance" means any complaint —
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning —
>
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
>
> (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment . . . .

The D.C. Circuit has construed the term "grievance" to include complaints brought under statutory appeal processes and negotiated grievance procedures,[341] and the FLRA later adopted this position.[342] However, the Ninth Circuit has held that complaints of discrimination brought under EEO procedures do *not* constitute grievances within the meaning of the FSLMRS.[343]

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[340] *See* Nuclear Regulatory Comm'n, 29 FLRA 660, 662-63 (1987); *see also* U.S. Dep't of Health and Human Servs., Dall., Tex., 23 FLRA 104 (1982) (meeting to discuss implementation of group performance standards); Dep't of the Army, New Cumberland Army Depot, New Cumberland, Pa., 38 FLRA 671 (1990) (meeting to discuss implementation of compressed working schedule); Veterans Affairs Med. Ctr., N.Y., 47 FLRA 1072 (1993) (meeting to announce change in the procedures for shipping and receiving) in which the Authority found these discussions concerned grievances. In contrast, the Authority has also found a "grievance" can involve a "particularized application" of a policy to one employee and still be covered under § 7114(a)(2)(A). *See* NTEU v. FLRA, 774 F.2d 1181, 1186 (1985) (*NTEU*).

[341] *See NTEU*, 774 F.2d at 1184–89 ("The impact of these individual complaints on the bargaining unit will be felt regardless of whether the aggrieved employee opts to pursue a negotiated grievance procedure or an alternative statutory procedure."); *Dover AFB*, 316 F.3d at 287 ("With support from our precedent in *NTEU*, 774 F.2d at 1186–87, we read section 7103(a)(9)'s broad definition of 'grievance' as encompassing both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures.").

[342] *See* Bureau of Prisons, Fed. Corr. Inst., Ray Brook, N.Y., 29 FLRA 584, 590 (1987) (*FCI Ray Brook*) ("[C]onsistent with the rationale in the D.C. Circuit's decision in NTEU v. FLRA, we conclude that a "grievance" within the meaning of section 7114(a)(2)(A) can encompass a statutory appeal."); *see also Luke III*, 528 FLRA at 533 ("We reaffirm the Authority's previous view set forth in *Dover*, as affirmed by the D.C. Circuit in *Dover AFB v. FLRA*, that the broad definition of 'grievance' under the [FSLMRS] encompasses complaints filed under a N[egotiated] G[rievance] P[rocedure] as well as complaints filed under alternative statutory procedures of the EEOC.").

[343] *See infra* note 353 and accompanying text; *see also Luke II*, 208 F.3d 221 ("[C]omplaints brought pursuant to EEOC procedures . . . are discrete and separate from the grievance process to which 5 U.S.C. [§] . . . 7714 [is] directed." (internal quotations omitted)).

In *Internal Revenue Service, Fresno, Cal. v. FLRA*,[344] the Ninth Circuit Court of Appeals considered whether the union had the right under §7114(a)(2)(A) to attend a conciliation conference held to resolve an employee's pre-complaint allegations of discrimination. The employee in *IRS Fresno* contacted the agency's EEO counselor to complain of gender discrimination after being informed that she would be forced to accept a grade reduction if she accepted a new training position. The counselor held a conciliation session between the employee and an IRS representative in an attempt to resolve the matter informally.

Notwithstanding the fact that the conciliation occurred at the EEO "informal" pre-complaint stage, the union filed an unfair labor practice charge (ULP) with the FLRA, alleging that the IRS violated section 7114(a)(2)(A) by conducting "a formal discussion concerning a grievance or condition of employment" without providing the union an opportunity to be present.[345] The FLRA below had determined that the conciliation was "formal" because "it was held in an IRS conference room, was scheduled in advance and so was not impromptu, and was attended by [the employee's] supervisor."[346] The FLRA also found that the meeting concerned a "grievance" based on the term's definition in § 7103(a)(9) of the FSLRMS, "which defines a grievance as 'any complaint by . . . an employee concerning any matter relating to the employment of the employee . . . .'"[347] In light of its findings, the FLRA held that the IRS violated the union's right under § 7114(a)(2)(A) by failing to provide the union with notice and an opportunity to attend the conciliation.[348]

On appeal to the Ninth Circuit the IRS contended that the FLRA erred in finding that the meeting was "formal" and concerned a "grievance," and claimed that the union's presence at the

[344] 706 F.2d 1019 (9th Cir. 1983) (*IRS Fresno*).
[345] *Id*. at 1022.
[346] *Id*. at 1023.
[347] *Id*. at 1024.
[348] *Id*. at 1022. The parties did not dispute the fact that the meeting was a "discussion" and attended by a "representative" of management.

conciliation would violate EEOC regulations requiring confidentiality in the pre-complaint EEO process. In reversing the FLRA, the court held that "[t]he union representation requirements of 5 U.S.C. § 7114(a)(2)(A) do not apply to an EEO precomplaint conciliation conference . . . ."[349]

The court first addressed whether the meeting was "formal," noting that under EEOC regulations governing the pre-complaint process an EEO counselor is required to seek a resolution of the matter on an informal basis. "This opportunity for informal resolution is clearly a key element in the EEOC complaint procedure; the EEOC requires employees alleging discrimination to exhaust the precomplaint procedures of [29 C.F.R. § 1614.105] before filing a formal complaint and activating formal steps in the EEOC process."[350] The court went on to state:

> [W]hile the Authority acknowledged that the purpose of the meeting was to resolve *informally* a discrimination dispute in which a formal complaint had not yet been filed with the EEOC, it failed to give adequate consideration to this *most critical circumstance*. The meeting was convened by [the EEO counselor] under the EEOC procedure . . . by

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[349] *Id*. 1022.

[350] *Id*. at 1024. But see Timothy J. Tuttle, *Three's a Crowd: Why Mandating Union Representation at Mediation of Federal Employees' Discrimination Complaints is Illegal and Contrary to Legislative Intent*, 62 A.F. L. REV. 127, 161 (2008) in which Air Force Major Timothy J. Tuttle, argues that in the EEO context federal courts have failed "to differentiate between an 'informal' complaint and an 'informal process' of dispute resolution . . . ." He states:

> Congress intended for "informal methods of conference, conciliation, and persuasion" to be used to resolve discrimination complaints after "investigation," which takes place after a formal complaint has been filed. Thus, the mandate directing government agencies to engage in informal methods of resolution clearly continues to be in force after a charge has been filed. The *IRS Fresno* court seemed to recognize this as it analyzed the facts and discussed how the attempt at settling the dispute using mediation is resolving it on an "informal basis."

But Tuttle goes on to say:

> Later in the [*IRS Fresno*] opinion, however, the court seems to get confused about the difference between a formal complaint and informal resolution of the dispute. . . . While the Civil Rights Act requires an attempt at informal resolution of a discrimination complaint after a formal charge has been filed, the court in *IRS Fresno* seems to be saying that after a formal complaint is filed, the "formal steps in the EEOC process" are activated, implying that all steps from there on are "formal." In actuality, the Civil Rights Act mandates an "opportunity for informal resolution" throughout the process, even after the complaint is filed. . . . Had the *IRS Fresno* court's decision focused on the text of [Title VII], it could have established that informal settlement processes are to be attempted throughout the complaint cycle and created a more useful precedent.

> which an EEO counselor seeks to resolve discrimination charges in the precomplaint stage on an "*informal basis*."[351]

In light of the "basis and purpose of the meeting," the court held that the discussion was informal rather than formal.[352]

Second, the court addressed whether the meeting involved a "grievance." In holding that *pre-complaint* allegations of discrimination do not concern a grievance, the court found:

> The union's interest in the statutory EEOC procedure is not the same as its interest in the contractual grievance process. It has duties and obligations under the negotiated grievance mechanism, for example, but it has no such institutional role in the EEOC process. Similarly, there is no reason it should have the same rights in the EEOC procedure as it does in the contractual grievance process. . . . [W]e decide that the EEOC claim of discrimination in this case did not constitute a "grievance" within the meaning of 5 U.S.C. § 7114(a)(2)(A).[353]

Turning to confidentiality, the *IRS Fresno* court acknowledged that EEO regulations "prohibit[] an EEO counselor from revealing the identity of a person consulting him before the person files a formal complaint of discrimination," and stated that "[r]equiring such confidentiality during early stages of an employment discrimination claim serves to facilitate informal resolution of disputes and to encourage employees with discrimination complaints to pursue and explore their claims without fear of retribution."[354] The court noted that the comparable provisions of Title VII governing private sector EEO procedures support its interpretation:

> Those provisions, and their legislative history, stress voluntary compliance with [Title VII] and prohibit public disclosure of discrimination complaints prior to the institution of formal proceedings. . . . Although these provisions relate to discrimination in the private sector rather than in federal employment, they illustrate Congress' concern with the

[351] *Id*. at 1023.
[352] *Id*. at 1023–24.
[353] *Id*. at 1025.
[354] *Id*. at 1023.

> confidentiality of EEOC investigations and its belief that confidentiality is important in achieving voluntary compliance with the goals of Title VII.[355]

Almost twenty years after *IRS Fresno*, in an unpublished decision the Ninth Circuit in *Luke II*[356] considered whether the union had a statutory right to be present at a mediation of a covered employee's EEO complaint of discrimination, *i.e.*, a mediation during the EEO "formal stage." Relying on its earlier precedent in *IRS Fresno*, the court found that the topic of the meeting — the EEO complain — did not concern a "grievance" within the meaning of the FSLMRS. Thus, the court held that because the union failed to establish all four elements of § 7114(a)(2)(A) it had no right to be present at the mediation even after a complaint had been filed.[357]

The FLRA and the D.C. Circuit have declined to follow the Ninth Circuit. In 2003, the D.C. Circuit Court of Appeals decided *Dover Air Force Base v. FLRA*,[358] on the union's right under § 7114(a)(2)(A) to notice and an opportunity to attend discussions of formal EEO complaints. *Dover AFB* involved a complaint of discrimination filed by Jones, an Air Force employee and member of the bargaining unit at Dover AFB. Jones requested mediation of his complaint pursuant to EEOC regulations, and the Air Force assigned a mediator to the dispute. Prior to the mediation, Jones and the agency representative, an Air Force Judge Advocate General attorney, signed a confidentiality agreement that applied to the mediation. The

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[355] *Id*. at 1024.
[356] *Luke II*, 208 F.3d at 221.
[357] In a one-page analysis, the *Luke II* court stated:

> Under *IRS, Fresno Serv. Ctr. v. FLRA* . . . "grievances" within the meaning of Section 7114(a)(2)(A) do not include [the employee]'s complaints because they were brought pursuant to EEOC procedures, which are "discrete and separate from the grievance process to which 5 U.S.C. [§] . . . 7114 [is] directed." The fact that the collective bargaining agreement explicitly excludes discrimination claims from the grievance procedure also suggests that these claims are not "grievances." *See id*. Because the January 19 meeting did not concern "grievances" within the meaning of Section 7114, the meeting did not satisfy the fourth element of Section 7114. The union therefore had no right of representation at the meeting. As such, Luke did not violate Section 7114 when it failed to give the union notice of the January 19 meeting.

Id.
[358] 316 F.3d at 280.

mediation was conducted by a mediator between Jones and the agency attorney and lasted approximately six hours, the majority of which was spent in individual caucuses between the parties and the mediator. The union was not given notice or the opportunity to attend the mediation. Subsequently, Jones' union filed an unfair labor practice complaint with the FLRA, alleging that the Air Force had violated the union's § 7114 rights.

The FLRA found below that the EEO mediation was a "formal discussion" that concerned a "grievance" within the meaning of §7114(a)(2)(A). On the grievance issue, the FLRA held that the "broad definition" of grievance in the FSLMRS "include[s] *any* employment-related complaint, regardless of the forum chosen."[359] The FLRA rejected the Ninth Circuit's decision in *IRS Fresno*, which held "that the formal discussion right does not apply during EEOC proceedings because those complaints are 'discrete and separate from the grievance process'" to which the FSLMRS is directed.[360] Instead the FLRA relied on the D.C. Circuit's precedent in *National Treasury Employees Union v. FLRA*.[361] In *NTEU* the court had held that "section 7121 [of the FSLMRS] provides that a grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures."[362]

Importantly, the FLRA concluded that there was "no conflict" in the case between the union's formal discussion right under § 7114 and confidentiality provisions in ADRA § 574 or EEOC regulations and guidance, including MD 110. The Air Force had argued that the union, which was not acting as Jones's personal representative in the EEO matter, was not a "party" to

[359] *Id*. at 319.
[360] *Id*. (quoting *IRS Fresno*, 706 F.2d at 1024).
[361] 774 F.2d at 1181.
[362] *Id*. at 1187.

the EEOC proceedings as defined under ADRA.[363] Noting that the confidentiality provisions of ADRA apply only to the "parties" and to the "neutral" in an ADR proceeding, the Air Force contended that allowing the union to participate in the EEO mediation would undermine confidentiality and harm the EEO ADR process.

The FLRA disagreed with the Air Force, holding that the union "was a party under the ADR Act because it was 'entitled as of right to be admitted[]' [to the mediation] . . . pursuant to its formal discussion rights under section 7114(a)(2)(A) of the [FSLMRS]."[364] The FLRA noted, in the alternative, that ADRA contemplates the attendance and participation of "nonparty participants."[365] Lastly, the FLRA dismissed the Air Force's arguments as premature and "conjectural" in the absence of any actual disclosure of confidential information.[366]

The Air Force appealed to the D.C. Circuit Court and the court affirmed the FLRA's decision. With respect to the grievance question, the court turned to its *NTEU* precedent for its "holding that a grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures."[367] The D.C. Circuit also cited *NTEU* for its holding that "section 7114(a)(2)(A) provides that an exclusive representative has the right to be present at *any* formal discussion of a grievance between management and a

[363] *See* 5 U.S.C. §§ 551(3), 571(10) (A), (B). ADRA provides that a "'party' includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes[,]" as well as persons who "will be significantly affected by the decision" and who participate when the proceeding is without named parties.
[364] 316 F.3d at 284 (citing 5 U.S.C. § 551(3)).
[365] *Id.* (citing 5 U.S.C. § 574(a)(1), (e)). Section 574(a)(1) provides that a neutral shall not disclose any communication without written consent of all the parties, or, "if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing[.]" Note also that Section 574(e) states that, "[i]f a demand for disclosure . . . is made upon a neutral . . . the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants . . . . Any party or affected nonparty participant who receives such notice and . . . does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure."
[366] *Id*. at 285. *Cf. NASA*, 527 U.S. at 243 ("NASA and its OIG are no doubt correct in suggesting that the presence of a union representative at an examination will increase the likelihood that its contents will be disclosed to third parties.").
[367] *Id*. (citing *NTEU*, 774 F.2d at 1185–88).

bargaining unit employee."[368] Although the Air Force attempted to distinguish *NTEU* because it involved an MSPB proceeding rather than an EEO proceeding, the *Dover AFB* court stated: "[O]ur analysis in *NTEU* relied upon the text, structure, and legislative history of the [FSLMRS] and did not rest on the type of grievance in question. . . . We find no reason to distinguish *NTEU*; we will read the term 'grievance' as we did in that case."[369]

After determining that the mediation concerned a grievance, the court addressed the Air Force's argument that union attendance at EEO proceedings would conflict with confidentiality provisions of ADRA and the Privacy Act. The court explained:

> This argument fails because neither of the statutes cited by the Air Force prohibits union attendance at ADR proceedings. The provisions of the ADR Act cited by the Air Force concern only the confidentiality of communications made at an ADR proceeding and do not address what persons or parties may attend an ADR proceeding. 5 U.S.C. § 574. Similarly, the Privacy Act concerns the confidentiality of records rather than what parties may attend an ADR proceeding, 5 U.S.C § 552a, and this case does not present a situation where the presence of a union representative in an ADR proceeding would result in the revelation of confidential information in violation of the Privacy Act. In other words, neither the ADR Act nor the Privacy Act creates a conflict (much less a direct conflict) with section 7114(a)(2)(A).[370]

Further the court considered the Air Force's argument that the EEOC's "ADR core principles" require that "[c]onfidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution."[371] The Air Force had contended that "union presence at [EEO] ADR proceedings would undermine the confidentiality of the process."[372] The court disagreed:

> This argument amounts to nothing more than the Air Force's doubt that union representatives can keep confidential matter confidential. Union representatives are often in the position of having to maintain confidentiality. More importantly, even assuming that an inconsistency between an agency manual and a statute constitutes a conflict, the

[368] *Id*. at 285–86.
[369] *Id*. at 285.
[370] *Id*. at 286–87 (internal citations omitted).
[371] *Id*. at 287 (citing MD 110, Ch. 3 § VII.A.3).
[372] *Id*.

> Air Force again fails to show a conflict with the FLRA's construction of section 7114(a)(2)(A).[373]

With regard to the Air Force's argument that the FLRA's construction of § 7114(a)(2)(A) conflicts with EEOC regulations and MD 110 and that under EEOC regulation 29 C.F.R. §1614.109(e), attendance at EEOC hearings "is limited to persons determined by the administrative judge to have direct knowledge relating to the complaint," the court stated that "this regulation says nothing about what happens at ADR proceedings."[374]

Of possible additional interest to some ombuds, the FLRA and circuit courts have found that the term "grievance" under the FSLMRS extends to interviews of employees by agencies preparing for MSPB and other hearings and that such interviews are also "formal" meetings under §7114(a)(2)(A).[375] "The Authority and the courts have consistently held . . . that when agencies interview unit employees in preparation for arbitration, unfair labor practice and MSPB hearings, they must allow the union to participate."[376]

These interviews were deemed to fall within § 7114(a)(2)(A)'s "formal discussions" even though they were not an "examination" of unit employees under § 7114(a)(2)(B). Section 7114(a)(2)(B) provides that represented employees have the right to union representation at "any examination" of a represented employee if (1) the examination is conducted by a "representative" of the employing agency and (2) the employee requests representation and reasonably believes that the meeting may result in disciplinary action, the so-called *Weingarten* right. This provision would only apply to a federal ombuds should he or she possess statutory or other formal

[373] *Id*.
[374] *Id*. (internal quotations omitted).
[375] Dep't of Veterans Affairs Med. Ctr., Long Beach, Cal. v. FLRA, 16 F.3d 1526 (9th Cir. 1994). The Tenth Circuit and D.C. Circuits have adopted this position as well. *See* Dep't of Veterans Affairs Med. Ctr., Denver, Col. v. FLRA, 3 F.3d 1386 (10th Cir. 1993) (finding that interviews of covered employees by agency attorney in preparation for MSPB hearing constituted formal discussions concerning a grievance); *NTEU*, 774 F.2d at 1185–88 (finding that interview of employee who was scheduled to testify on behalf of another employee at an upcoming MSPB hearing was in connection with a grievance).
[376] *PBGC*, 62 FLRA at 235–36 (opinion of Richard A. Pearson, A.L.J.) (citations omitted).

authority on behalf of the employer to "investigate" and report on issues that could result in potential discipline of a bargaining unit employee and then interviews said employee in the course of the investigation. Study data indicates that such a circumstance is unlikely to exist among current federal ombuds.

Conclusions and Recommendations for Agency Officials and Ombuds Offices on Federal Sector Labor Law

It goes almost without saying that ombuds are not a substitute for collective bargaining any more than they are a substitute for the MSPB or even informal EEO processes. Visitors to the ombuds office should be informed by the ombuds office of other options, both formal and informal, and their requirements and the ombuds office should not engage in behavior that could mislead employees about the respective roles of the ombuds and these other entities. While not interchangeable, however, the ombuds can complement these other processes when a visitor raises internal issues. Moreover, the question of the application of § 7114 is not relevant solely to internal ombuds dealing primarily with employee issues. Rather, it is relevant for all those ombuds that either have represented employees among their constituents or may have cause to engage with represented employees as well as management on issues affecting the terms and conditions of the bargaining unit in the course of resolving issues that have been brought to them.

The FSLMRS cases under § 7114 owe much to the particular features of federal sector labor law generally and are bound to the FLRA's interpretation of its own statute and the courts' deference to this interpretation.[377] Accordingly their implications beyond the confines of that statute are not obvious or inevitable. Moreover, the variability of federal ombuds as to structure

[377] *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing rules for judicial review of federal agency interpretations of statutes).

and function dictates that determination of the applicability of § 7114 must be made on a case by case basis. The question is not an either/or proposition. Even given the FLRA's broad interpretation of § 7114, some but far from all of what the subset of ombuds who may be dealing with represented employees do will require union notice and an opportunity to be present.

Of interest in itself and by way of analogy are the cases involving representative status under the FSLMRS. For internal ombuds or those external ombuds who may talk to represented federal employees in the course of gathering facts about cases, this precedent may give some hint of where an ombuds might fall on the spectrum of representatives under the FSLMRS. Although *NASA* and the other cases are distinguishable on their facts, their parsing of the significance of "independence" (the OIG at issue in the Supreme Court's decision in *NASA)* and "neutrality" (the EEO investigators at issue before the FLRA in *PBGC* and *SSA Boston)* is of interest. In neither instance were these attributes, even when originating in statute or regulation, found in themselves to preclude a finding of representative status with regard to the union's right to notice and an opportunity to be present at meetings with bargaining unit employees.

In its guidance to federal ombuds COFO limits its consideration of the impact of FSLMRS § 7114 on federal ombuds to those circumstances in which an ombuds serves as a mediator. Noting that both the FLRA and the DC Circuit Court of Appeals have found EEO mediations at the "formal" stage to constitute formal discussions under § 7114(a)(2)(A), COFO advises that federal ombuds "should consult" with an appropriate labor official or counsel when "confronted with an issue of union attendance in a federal mediation pursuant to its [§7114(a)(2)(A)] 'formal discussion' rights and to assure compliance with all such statutory, regulatory or other requirements."[378]

[378] *COFO Guide*, *supra* note 215, at 6.

Widening that analysis to consider the full range of federal ombuds functions, while it is not clear as to which ombuds, if any, would be considered agency representatives under § 7114, it is evident that even if an ombuds is not deemed to be a representative under § 7114, the statute's strictures may apply when, in the course of an ombuds' dispute resolution process, both management representatives and unit employees are engaged whether or not the technique being employed is mediation within the most precise definition of the word. Therefore, it is necessary to consider which ombuds functions might meet other criteria under the statute. Most significant is the distinction between formal and informal discussions.[379]

While courts differ as to the threshold for "formal discussions," the FLRA has been consistently expansive in its interpretation. The Authority looks to the totality of the circumstances, examining a variety of facts and factors in deciding whether or not a discussion is formal. Under FLRA law, the initial contact with a constituent, especially if initiated by the employee and "highly personal" in nature, is unlikely to be found to be a formal discussion by the Authority even if that particular ombuds might be deemed to be an agency representative under FSLMRS § 7114. If and as the process managed by the ombuds moves further toward resolving the constituent's issue, however, if the resolution directly or indirectly affects the terms and conditions of employment of other bargaining unit employees and if a given discussion includes both bargaining unit employees and management officials (whether or not it is face-to-face in an actual mediation), the Authority is more likely to find that the union has a right to notice and an opportunity to be present at the discussion. In this regard, the Authority discounts the contention that the presence of a union representative threatens confidentiality under ADRA

[379] The statute's language describing the requisite subject matter — grievance or any personnel policy or practices or other general condition of employment — is broad enough to include any employment related issue. It should be noted that the potential impact on the bargaining unit of resolution rather than the genesis of the issue or whether the concern could be grieved under the collective bargaining agreement appears to be the key factor relevant to the Authority's criteria for finding a "grievance" under 5 U.S.C. § 7114.

§ 574. In the first instance the FLRA has concluded that the union representative is a party bound by the confidentiality constraints in § 574. Alternatively, it opines that ADRA contemplates the participation of non-parties in confidential dispute resolution proceedings without offering a theory as to how the actual presence of a non-party unbound by § 574's constraints might be accountable to them.

The union's right to notice and an opportunity to be present at certain discussions involving covered employees pursuant to § 7114 may have consequences for the anonymity and confidentiality of ombuds discussions, although once management is engaged and the discussions advance toward "formal discussions," it is less likely that the constituent will have remained anonymous and his or her concern still undisclosed. Any threat to confidentiality would therefore have been diminished.

While the case precedent makes clear that the factual and legal circumstances in which the union's right is triggered are complex and multivariate, it is unlikely that most discussions involving an ombuds and bargaining unit employees satisfy the statutory requirements of § 7114 such that union representation is required. As a practical matter whether or not ombuds are found to have representative status, many if not most meetings with ombuds will not qualify as meetings at which a bargaining representative has a right to be present. Most conversations with ombuds will not meet the criteria for "formal discussion[s]" under § 7114 (a)(2)(A). Moreover, unlike an Inspector General, most ombuds do not "examine" employees in investigatory interviews under § 7114 (a)(2)(B). Nevertheless, ombuds who might be subject to § 7114 should work with legal counsel to develop office protocols for determining when the interactions of the ombuds with the represented constituent and management on an issue might be seen as more

formal efforts at resolution, triggering the union's right to notice and right to be present on behalf of the bargaining unit it represents.

VI. The Inspector General Act and Ombuds

The IADRWG Guide on the confidentiality of dispute resolution proceedings notes that "[e]xperience — and anecdotal reports — suggests that few ADR program administrators have ever received a request for information protected by the ADR Act based on statutory authority, and it is anticipated that formal requests will continue to be rare."[380] In this regard, the evidence of an actual conflict occurring between the confidentiality offered by a federal ombuds, whether under ADRA or pursuant to professional standards, and the responsibilities of an Inspector General (IG) under the Inspector General Act of 1978[381] appears to be essentially anecdotal and difficult to substantiate. Nevertheless, the possibility of conflict[382] is certainly there and the ramifications of such a conflict are potentially significant.

The purpose of the IG Act is to "create independent and objective units"[383] within the Executive Branch that promote the integrity and performance of executive agencies by keeping executive officials and Congress informed about agency operations. IG's can perform audits on particular programs and operations and investigate waste, fraud and abuse in agency programs and processes. They investigate allegations of criminal wrongdoing and misconduct on the part of agency employees or others whose actions have a direct impact on the agency. The ambit of their inquiries may include the activities of outside entities, such as contractors, who do business with the government or obtain a benefit from it. IG's make reports to agency leadership and

[380] *See IADRWG Guide*, *supra* note 19, at 52.
[381] Pub. L. No. 95-452 (Oct. 12, 1978) (codified as amended at 5 U.S.C. app (2015)) ("IG Act").
[382] *See IADRWG Guide*, *supra* note 19, at 52–57. The ABA Ad Hoc Committee (which included representatives from Inspector General offices) noted in its Confidentiality Guide that some commentators had expressed concern about potential conflicts between the IG Act and ADR confidentiality. *ABA Guide to Confidentiality*, *supra* note 113, at 40 n.39.
[383] *See* 5 U.S.C. § 2 (2015).

Congress and make recommendations for corrective action concerning any deficiencies or problems they have identified. At § 6(a)(1), the IG Act very broadly authorizes Inspectors General "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available" to the agency and relevant to the programs and operations that the IG is reviewing.

Two facets of the IG Act are of particular interest here. First, while IG's can ask for information from federal employees, and agencies often have policies mandating cooperation, IG's cannot presently[384] use their administrative subpoena authority against federal employees as they can with someone who is not a federal employee. Second, at § 7(b) the IG Act states: "[t]he Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation." As a practical matter, while IG's often attempt to protect the identity of individuals who raise issues to them and those who provide information in the course of their investigations, they are not always able to do so consistent with their obligations to investigate and report. Hence, the confidentiality that attaches to the IG is not coextensive with that promised by many federal ombuds, nor entirely consistent with it.

As discussed above, at least some and possibly much of what most ombuds in the federal government do is covered by § 574 of ADRA on confidentiality. Section 574(a)(3) includes an exception to its prohibition on disclosure of dispute resolution communications by neutrals when

[384] This is so even in pending legislation. The Inspector General Empowerment Act of 2016, H.R. 2395, 114th Cong. § 6A (as passed by House, June 21, 2016), includes a provision stating that "[a]n Inspector General may not require by subpoena the attendance and testimony of any *current* Federal employees, but may use other authorized procedures." (emphasis added). The companion to the House bill, Inspector General Empowerment Act of 2015, S. 579, 114th Cong. § 6A (as reported by S. Comm. on Homeland Sec. and Gov't Affairs, May 5, 2015) would authorize IGs to subpoena federal government contractors, federal grant recipients, and former federal employees, but not current Federal employees. As of this writing, no further action has been taken on either bill.

"the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication . . . ." While ADRA specifically provides an exemption, at § 574(j), from disclosure pursuant to the Freedom of Information Act,[385] it provides no similar exemption from disclosure under the IG Act. Hence the potential for conflict between the imperatives of the two statutes exists.

The meaning of the language in § 574(a)(3) "required to be made public" has been discussed earlier in this analysis with respect to the relationship of ombuds confidentiality to the affirmative duty of federal employees to report certain kinds of information. Here we are discussing instead the question of the relationship between ombuds confidentiality and a request for confidential information from an IG. A literal reading of "to be made public" would suggest that an IG request for information under the IG Act made in the course of an investigation would not likely be seen as equivalent to making the information *public* and therefore would not come within the exception to ADRA for statutory conflicts. "Nor does the legislative history of the ADR Act provide an apparent solution, as it does not appear to contain any mention of this conflict" between ADRA and the IG Act.[386] The *ABA ADRA Confidentiality Guide*, however, does note this exchange between two of ADRA's sponsors with the USDA's Office of Inspector General:

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[385] Specifically, 5 U.S.C. § 552(b)(3).

[386] The Department of Justice's Federal Alternative Dispute Resolution Council discussing the comments received on the draft of *Confidentiality in Federal Alternative Dispute Resolution Programs*, *supra* note 19, at 83,086, in response to its publication in the Federal Register:

> There does not appear to be an easy answer to the tension between these authorities. While the ADR Act's confidentiality provisions are clear, the access provisions of other statutes are equally clear. Standard techniques for resolving statutory conflicts do not provide a ready answer in this situation. For example, arguments have been made on both sides as to which statute is more specific. While the ADR Act specifically addresses the types of processes to which it applies, some have argued that other acts, such as the Inspector General Act, do the same by specifically describing the types of information that may be requested and the purposes for which a request can be made. Nor does the legislative history of the ADR Act provide an apparent solution, as it does not appear to contain any mention of this conflict.

> Senators Grassley and Durbin wrote to USDA's Office of Inspector General (OIG) in 1995 concerned that allowing access to DR communications could create doubts and concerns that would extend far beyond any single mediation program. They stated, "During last year's debate over the re-authorization of the ADR Act, a great deal of consideration and effort was extended to strengthening the confidentiality provisions of the act. We, therefore, question your authority under sec. 574 of the Act to request mediator neutrals to release the names and addresses of mediation participants and documentation of the mediation services provided to them, including the final disposition of their cases... Indeed, misguided precedents set under this particular program could undermine the entire administrative dispute resolution process." Letter to James R. Ebbitt, Assistant Inspector General for Audit, OIG/USDA, dated July 16, 1997, from Senators Charles Grassley and Richard Durbin.[387]

A recent controversy[388] in another arena may shed some light on the potential reach of IG access to information under IG Act § 6(a)(1). In a July 20, 2015 Memorandum Opinion for the Deputy Attorney General, the Department of Justice's Office of Legal Counsel addressed the question of whether the Department of Justice might lawfully provide access to the Office of Inspector General (OIG) to documents containing certain kinds of statutorily protected information.[389] Specifically, the query concerned certain categories of information protected by the Federal Wiretap Act;[390] Rule 6(e) of the Federal Rules of Criminal Procedure; and section 626 of the Fair Credit Reporting Act[391] ("FCRA").[392]

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[387] *ABA Guide to Confidentiality*, *supra* note 113, at 17 n.7. *Cf. In re Grand Jury Subpoena*, 148 F.3d at 487, discussed *supra* note 59 and in the section generally addressing ADRA. That case involved a USDA OIG investigation and related grand jury subpoena of a mediation program in Texas. As the court found ADRA inapplicable and the subpoenas were issued by a grand jury, the case is not particularly instructive with regard to the issues discussed in this section.

[388] *See, e.g.*, Charles S. Clark, *Inspectors General Win a Round in Fight Over Access*, GOVERNMENT EXECUTIVE, (May 5, 2016), http://www.govexec.com/management/2016/05/inspectors-general-win-round-fight-over-access/128075/; Eric Lichtblau, *Justice Dept. Takes Steps to Restore Watchdogs' Access to Records*, N.Y. TIMES, (May 3, 2016), http://www.nytimes.com/2016/05/04/us/justice-dept-restoring-inspectors-access-to-records.html?_r=0.

[389] *Dep't of Justice Inspector General's Access to Info. Protected by the Fed. Wiretap Act, Rule 6(e) of the Fed. Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act*, 35 Op. O.L.C. __ (July 20, 2015) [hereinafter *Memorandum*], https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/07/23/2015-07-20-doj-oig-access.pdf. The *Memorandum* notes: "[W]e do not address in this opinion whether and, if so, under what circumstances the Department could lawfully withhold information it is legally permitted to disclose." *Id*. at 4 n.3. As with § 574 in ADRA, the statutes considered in the *Memorandum* prohibited disclosure.

[390] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510–2522) ("Title III").

[391] Pub. L. No. 91-508, 84 Stat. 1127 (Oct. 26, 1970) (codified at 15 U.S.C. § 1681u).

[392] *Memorandum*, *supra* note 389, at 1.

The Department of Justice OIG had argued that § 6(a)(1) grants an unqualified right of access to information relevant to its audits, investigations and reviews notwithstanding the limitations on disclosure under the other statutes.[393] While acknowledging for varying reasons that much of the information sought by the OIG could lawfully be proffered by the Department, the *Memorandum* concluded that § 6(a)(1) would not override all of the prohibitions on disclosure in the other statutes. In this regard, "[u]nder longstanding interpretive principles, general access provisions like section 6(a)(1) are generally construed not to override specific, carefully drawn limitations on disclosure" like those found in the other statutes "unless Congress has clearly indicated that it intends the general access provision to have that effect."[394] The *Memorandum* concludes that "[t]he Act's legislative history, moreover, affirmatively indicates that Congress expected an inspector general's right of access to be subject to statutory limits on disclosure."[395]

The *Memorandum's* statutory analysis is lengthy and detailed and worth considering in the context of ADRA. Ombuds should rely on its conclusion with caution, however. First, as a matter of statutory construction, the prohibitions on disclosure at issue were particularly compelling as they prohibited agency disclosure on pain of contempt, administrative and civil sanctions and, in some instances, criminal penalties. Additionally, the IG Act itself at § 8E includes special provisions pertaining to certain sensitive information possessed by the Department of Justice indicating an understanding of the particular constraints of its law enforcement and other functions.[396]

[393] OIG also disputed the scope of the statutory exceptions at issue. *See id*. at 2.
[394] *Id*. at 3.
[395] *Id*.
[396] *See* 5 U.S.C. app. § 8E(a)(1).

Further, the *Memorandum* was challenged in a letter from the Council of the Inspectors General on Integrity and Efficiency dated August 3, 2015 and addressed to the chairmen of, respectively, the House Committees on Homeland Security and Governmental Affairs and on Oversight and Government Reform and their ranking members.[397] The Council asserts that the language in IG Act §6(a) is "unequivocal."[398] It urges Congress to "immediately pass legislation" that would affirm the authority of Inspectors General to access all information and data in an agency's possession deemed necessary for the IG's oversight functions notwithstanding any law or provisions restricting access to information unless that law or provision expressly restricts IG access.[399]

Subsequently, Congress enacted the Consolidated Appropriations Act, 2016.[400] Division B of that statute, the CJS Appropriations Act, appropriates funds to the Department of Justice and OIG, as well as several additional entities, "for the fiscal year ending September 30, 2016," commonly referred to as fiscal year 2016.[401] Section 540 of the CJS Appropriations Act provides that no funds under that appropriations bill might be used by the Department to deny the OIG access to agency information except where a statute prohibiting disclosure expressly denies such access to the Inspector General.[402]

On April 27, 2016, the Office of Legal Counsel issued a supplementary memorandum opinion for the Deputy Attorney General in response to the appropriations bill.[403] The

[397] Letter from the Council of the Inspectors General on Integrity and Efficiency, to House Comms. on Homeland Sec. and Governmental Affairs and Oversight and Govt. Reform (Aug. 3, 2015), https://www.ignet.gov/sites/default/files/files/CIGIE%20Letter%20to%20HSGAC%20HOGR%20-%208-3-15.pdf.
[398] *Id*. at 2.
[399] *Id*. at 1.
[400] Pub. L. No. 114-113 (Dec. 18, 2015).
[401] *See* Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, 129 Stat. 2286–2333.
[402] *See* § 540, 129 Stat. 2332.
[403] *Authority of the Dep't of Justice to Disclose Statutorily Protected Materials to Its Inspector General in Light of Section 540 of the Commerce, Justice, Sci. and Related Agencies Appropriations Act, 2016*, 35 Op. O.L.C. __, at *8

memorandum acknowledges that "an appropriations act may be construed to override the limitations on disclosure" in the other statutes given the clear and unambiguous statement in the law.[404] It therefore concludes that it "may (and must) disregard the limitations in those statutes in making disclosures to OIG for the remainder of the year."[405]

Conclusions and Recommendations for Agency Officials and Ombuds Offices on Ombuds and the Inspector General Act

While the long-term outcome of this controversy involving the Department of Justice is unclear,[406] it should be considered a cautionary tale for federal ombuds. Therefore, ombuds should make every effort, proactively, to develop a positive working relationship with the Inspector General's office having jurisdiction over their agency. It is important that the OIG understand the purposes, functions and ethical standards of the ombuds office. In particular, it is helpful to illustrate in what ways the OIG and the ombuds office are complementary and distinct, the importance of ombuds confidentiality to realizing the ombuds mission, and the prohibition applicable to neutrals under ADRA of disclosing dispute resolution communications even if considered to be pursuant to statutory compulsion unless "no other person is reasonably available to disclose the communication."[407] 5 U.S.C. sections 574(a)(4) and (b)(5) which, respectively, set out for neutrals and parties the key substantive considerations for courts when considering compulsory disclosure under ADRA (preventing a manifest injustice, establishing a violation of the law, preventing harm to the public health and safety outweighing the integrity of dispute resolution proceedings in general) also may be a helpful starting point for mutual understanding.

(Apr. 27, 2016), https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/04/28/2016-04-27-disclosure-to-ig.pdf.

[404] *Id*.

[405] *Id*.

[406] No additional legislation on the question of IG access to agency information has been enacted as of this writing.

[407] 5 U.S.C. § 574(a)(3); *see also IADRWG Guide*, *supra* note 19, at 52–55.

VII. Ombuds Records and Confidentiality — The Impact of the Federal Records Act, FOIA and the Privacy Act

There are several statutes that have an impact on how federal ombuds create and manage documents — the Federal Records Act of 1950 as amended,[408] the Privacy Act,[409] and the Freedom of Information Act.[410] As federal ombuds differ markedly in their missions and functions, there is no one-size-fits-all prescription for how to approach and comply with these statutes. Nonetheless, ombuds should be cognizant of the requirements of each of these statutes in order to be in compliance and because of their potential impact on whatever confidentiality commitments the office makes to constituents. Depending on how an ombuds manages documentation pertaining to confidential communications, they may be more or less vulnerable to compulsory or even inadvertent disclosure. Ombuds offices should be actively engaged with legal counsel and records management officials in their agency to establish a workable recordkeeping system for the office consistent with the law and office standards and practices.[411]

The Federal Records Act of 1950, as amended, establishes a system for the management of government records. It requires every agency to determine what types or "series" of government records are created in the course of agency business, how long each series must be retained for agency business needs and legal requirements, and then which series are of permanent value and should therefore be transferred to the National Archives and Records Administration (NARA). Each series of agency records must have a "schedule" that includes

[408] 44 U.S.C. Chapters 21, 22, 29, 31, and 33.
[409] 5 U.S.C. § 552a (2012).
[410] 5 U.S.C. § 552 (2012).
[411] It is beyond the scope of this study to address the implications for records retention and disclosure of the advent of electronic communications. Suffice to say that federal ombuds who offer confidentiality should be particularly sensitive to who might have access to electronic communications and documents and how such items might best be backed up and stored. *Cf.* Craig B. Mousin, *Ombuds in a Cloud of Exabytes — Understanding the Ombuds' Digital Trail*, 4 J. OF THE INT'L OMBUDSMAN ASS'N, no. 2, 2011, at 19.

time frames after cut off[412] for those records to be retained and then either transferred or destroyed.

Only documents that are deemed federal records must be retained under this system so it is important for an ombuds office to determine what documents created within the office constitute "agency records" within the meaning of the Act. Federal records are documentary materials that agencies create and receive while conducting business that provide evidence of the agency's organization, functions, policies, decisions, procedures, and operations, or that otherwise contain information of value. A federal record is defined broadly in the Act as follows:

> Records include all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.[413]

The above definition is the one contained in the 2014 amendment to the Act that was intended, *inter alia*, to shift the emphasis from physical media to information being stored in any form.[414]

While it would seem that much of the documentation, in whatever form, that resides in an ombuds office would be an agency record, there is an exception that would apply to certain

[412] To "cut off" records in a file means to break, or end, the record at regular intervals to permit disposal or transfer in complete blocks and, for correspondence files, to permit the establishment of new files. Cutoffs are needed before disposition instructions can be applied because retention periods usually begin with the cutoff, not with the creation or receipt, of the records. In offices that keep case files, the cutoff is typically when the case is resolved or at lease closed insofar as that office's action is required. For some documents, the cutoff may be when the document is published, superseded or otherwise becomes obsolete.
[413] 44 U.S.C. § 3301 (2012), *amended by* Pub. L. No. 113–187, § 5(a), 128 Stat. 2009 (2014). Federal records are created and maintained by government employees and in appropriate circumstances, federal contractors.
[414] *See* S. REP. NO. 113-218, at 5 (2014).

informal notes on cases taken by the ombuds in connection with a case. Thus 36 C.F.R. § 1222.12(c) states:

> (c) *Working files and similar materials.* Working files, such as preliminary drafts and rough notes, and other similar materials shall be maintained for purposes of adequate and proper documentation if:
>
> (1) They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and
>
> (2) They contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

The inverse of this provision is generally interpreted to mean that the rough notes of a neutral would *not* be considered to be agency records *unless they are circulated* and used for the purposes noted above.[415]

If a document has been determined to be an agency record, then the agency must either manage the record in accordance with a general record retention 'schedule' already crafted by NARA, or the agency must fashion a schedule covering that series of records to submit to NARA for its approval. A schedule in essence defines the series (category) of a record, determines whether it is a permanent[416] or temporary record[417] and what the cutoff is for purposes of

[415] *See, e.g.*, *ABA Guide to Confidentiality*, *supra* note 113, at 71; *IADRWG Guide*, *supra* note 19, at 39. The Interagency ADR Working Group cautions that a neutral's notes that appear to be formal and detailed may be deemed agency records even if not circulated. *See IADRWG Guide*, *supra* note 19, at 40.

[416] The definition of permanent records in agency regulations is somewhat circular: *Permanent record* means any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives of the United States, even while it remains in agency custody. *See* 36 C.F.R § 1220.18. In their "Strategic Directions Appraisal Policy" memorandum of September 2007, NARA adds that permanent records include those documenting the rights of citizens, documenting the actions of Federal officials and documenting the national experience. U.S. NAT'L ARCHIVES AND RECORDS ADMIN., DIRECTIVE 1441, APPRAISAL POLICY OF THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (2007).

[417] The definition of temporary records in agency regulations is similarly unenlightening: *Temporary record* means any Federal record that has been determined by the Archivist of the United States to have insufficient value (on the basis of current standards) to warrant its preservation by the National Archives and Records Administration. This determination may take the form of:

initiating the retention period. If it is a permanent record, then the schedule articulates how soon after cutoff it must be transferred to the National Archives. If it is a temporary record, then the schedule determines when it must be destroyed. Critical in both instances is the determination of how long retention of the record is necessary for agency needs and the protection of individual rights before the document is either transferred or destroyed. It is important to note, however, that a requirement to retain a record is not the same thing as an obligation to disclose it.

NARA has issued one General Records Schedule for Alternative Dispute Resolution Files, General Records Schedule 1.27. It mirrors the definitional language from ADRA and thus includes "use of ombuds" as an alternative dispute resolution process:

> **Alternative Dispute Resolution (ADR) Files.**
>
> Alternative Dispute Resolution (ADR) is any procedure, conducted by a neutral third party, that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration and use of ombuds. The records covered by this schedule relate to techniques and processes used in an agency's ADR program in resolving disputes with or between its own employees.
>
> [**NOTE**: This schedule does not apply to: 1. Administrative grievance files, 2. Adverse action files, 3. Formal and informal equal employment opportunity proceedings, 4. Traditional EEO counseling or other records included in the EEO file when a person chooses to go directly to ADR, or 5. Private party claims or EEOC's involvement with federal sector claims of non-EEOC employees against other federal agencies. These records are covered by other items in GRS 1. This schedule does not apply to ADR records that are produced as part of an agency's primary mission.]
>
> a. General Files: General correspondence and copies of statutes, regulations, meeting minutes, reports, statistical tabulations, evaluations of the ADR program, and other records relating to the agency's overall ADR program.

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(1) Records designated as disposable in an agency records disposition schedule approved by NARA (SF 115, Request for Records Disposition Authority); or

(2) Records designated as disposable in a General Records Schedule.

36 C.F.R. § 1220.18.

Destroy when 3 years old. Longer retention is authorized if records are needed for agency business. (N1-GRS-03-2 item a)

b. Case Files: Records documenting ADR proceedings. These files may include an agreement to use ADR, documentation of the settlement or discontinuance of the ADR case, parties' written evaluations of the process and/or the neutral third party mediator, and related correspondence.

Destroy 3 years after settlement is implemented or case is discontinued. (N1-GRS-03-2 item b)[418]

An ombuds office may choose to use this schedule if it determines that its stipulations, particularly with regard to the length of the retention period, are consistent with office needs and maintenance of office standards. However, it should be noted that this schedule applies only when neutrals are utilized by an agency to resolve disputes "with or between its own employees."

Alternatively, an ombuds office may elect to work with counsel and agency records management officials to submit an agency and office specific schedule to NARA for approval. In doing so, the ombuds office will want to differentiate between those records that are statistical, administrative and fiscal or relate to the establishment and function of the office on the one hand and, on the other hand, those records that are sensitive and relate to confidential discussions attempting to resolve issues that are raised to the ombuds by constituents or agency leadership. In the event that an agency elects to propose its own ombuds record retention schedule to NARA, its request would do well to take advantage of the opportunity provided by NARA to offer background information, such as a clear description of what the ombuds does, the nature of the confidentiality offered by the office and the reasons therefore.

As an example, one ombuds office has obtained NARA approval for a schedule characterizing records concerning the "establishment, mission and function" of the ombuds

[418] National Archives & Records Admin., General Records Schedule 1.27 (2015).

office as permanent records with a cutoff when published, superseded, obsolete or no longer required for business purposes, and a transfer date to the National Archives at twenty-five years from cutoff. The same ombuds office has obtained approval for a characterization of records that relate to "the identification and information on concerns, disputes, and issues, presented to the . . . Ombudsman" as temporary with a cutoff upon resolution of the matter and a retention period requiring destruction immediately upon cutoff. This schedule, though describing series similar to those in the NARA general schedule for ADR, includes a far shorter period for retention of case records thereby reducing the potential for compulsory or inadvertent disclosure. At least two other ombuds offices have received approval for similar retention schedules providing for destruction of case records immediately upon cutoff.[419]

It should be noted that there is not yet unanimity on the question of whether and to what degree ombuds' notes might constitute agency records for purposes of the FRA. In its 2006 *Guide for Federal Ombuds*, the Coalition of Federal Ombudsmen (COFO) along with the Federal Interagency ADR Working Group Steering Committee, stated that ombuds' offices should draw a distinction among three categories of records: programmatic records, statistical data on conflicts and issue trends, and notes made in the context of work on specific issues brought to the ombuds office by constituents. COFO added that of the three solely the "[o]mbuds' case notes ordinarily would not be regarded as 'federal records' pursuant to NARA

[419] These three ombuds offices are at the National Geospatial-Intelligence Agency, the National Security Agency and the Federal Bureau of Investigation. The latter included emails as well as handwritten notes, and supporting documentation related to confidential communications as temporary case records requiring destruction upon cutoff. Note also that the schedule NARA approved in March 2016 for the National Security Agency ombudsman provoked allegations to the effect that the foreshortened retention schedule for documents related to preliminary issues raised to the ombudsman could help suppress information about retaliation against personnel. *See* Alliya Silverstein, *NSA Plan to Trash Employee Complaint Files Raises Concerns for Some*, NEXTGOV (May 4, 2016), http://www.nextgov.com/cio-briefing/2016/05/nsa-plan-trash-employee-complaint-files-raises-concerns-some/128050/. The role of the NSA ombudsman may not be well understood outside the agency and it is likely that those questioning such a records retention schedule lack understanding of both the role of this ombudsman and the general principles of and reasons for ombuds confidentiality.

regulations[,]" with the exception of those notes circulated for official purposes *and* containing unique information that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions or responsibilities.[420] Similarly, the IADRWG Steering Committee *Guide on Confidentiality* suggests that neutrals take only rough notes on cases and the notes should not be shared by them with the parties or other neutrals. In the event that the neutral determines that the notes should be shared in a given instance or the notes otherwise rise to the level of agency records, the notes should be marked as sensitive documents and retained under a schedule requiring retention only until the dispute resolution process is terminated. As noted, NARA has approved such a schedule for at least three agency ombuds.

In contrast, Professor Krent states "[r]ecords made by an ombud within the course of his or her official duties plainly fall within the [Federal Records] Act."[421] He notes that the form of the record is irrelevant to the determination and therefore argues that the neutral's notes as well as written information provided by the constituent bringing the issue to the ombuds or provided by a third party would also become an agency record. Krent allows for the possible exception of personal papers such as calendars or journals but cautions that this exception would not include notations or summaries inasmuch as these would be documents created in the course of conducting agency business. Krent warns that federal recordkeeping requirements, inasmuch as they increase the risk of disclosure, have a profound impact on ombuds conduct.

Aside from the requirements of the Federal Records Act, the Privacy Act[422] should be considered when planning ombuds records management. The Privacy Act, with certain exceptions, bars disclosure of agency records of a personal nature kept within a system of records that are retrievable by the name of the individual or some other kind of identifier unless

[420] *See COFO Guide*, *supra* note 214, at 9.
[421] Krent, *supra* note 179, at 26 *passim*.
[422] 5 U.S.C. § 552a.

the individual consents. In this respect, it could be argued that the Privacy Act provides an additional measure of confidentiality for ombuds records stored in this fashion.

Yet the Privacy Act also requires that records that are retrievable by the name of the individual or some other kind of identifier be provided to that individual should that person request them.[423] Thus ombuds offices that assist individuals with issues of a personal nature face a dilemma. Logic would suggest that dispute resolution related documents would be most easily retrievable if filed under the name of the constituent who raised the issue to the ombuds or another appropriate identifier. However, the Privacy Act does not contain any general exemption that protects a third party's privacy or any specific exemption for alternative dispute resolution communications.[424]

Some ombuds have eschewed filing records under the names of constituents or other identifiers or opted to take only informal, rough notes concerning the constituent's issue that are not shared and that are destroyed without ever being placed in a system of records. These ombuds are affording their dispute resolution communications the maximum protection possible, though at some potential cost to effectiveness and efficiency. When cases are ongoing or complex, multiple conversations with multiple individuals may take place. Rough notes may not suffice and more extensive or more formal documentation may be essential for purposes of resolving the issue or as an *aide de memoire*. However, disclosure of such a case file pursuant to a request under the Privacy Act has the potential to undermine the confidentiality of the office in

[423] "Each agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence." 5 U.S.C. § 552a(d)(1).

[424] Moreover, ADRA § 574(3) includes an exception to confidentiality when "the dispute resolution communication is required by statute to be made public[,]" indicating that where the Privacy Act and § 574 conflict, the Privacy Act would prevail. Note that agencies do have a limited ability to redact information that would "constitute a clearly unwarranted invasion of personal privacy" of third parties. *See* 5 U.S.C. § 552(b)(6).

general and may well affect the level of candor the ombuds can expect from individuals the ombuds approaches to seek resolution in future cases.

Thus case related documents containing personal information under the Privacy Act that are maintained by an ombuds in a system of records under the name of the constituent or other identifier, may be accessible to that constituent under the Privacy Act. This might appear to be an anomalous result inasmuch as the same file, to the extent it is deemed to contain confidential dispute resolution communications under ADRA, is exempted from disclosure pursuant to FOIA[425] given that requests for personal information are often considered under the Privacy Act and FOIA in tandem.[426] That said, clearly ombuds should carefully consider if and how any case related documents are created, identified and stored in light of the extent of confidentiality they offer to constituents and others they might approach as part of the resolution process, and how this confidentiality might be affected by the interplay between the Federal Records Act and the Privacy Act.

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[425] ADRA specifies at § 574(j) on confidentiality that "[a] dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3)."

[426] *But see* 5 U.S.C. § 552(a)(t):

> (1) Effect of other laws.—
> No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.
> (2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

In this regard, courts have held that documents that come within an exemption under either FOIA or the Privacy Act may still be accessible under the other. *See, e.g.*, Greentree v. U.S. Customs Serv., 674 F.2d 74, 77-79 (D.C. Cir. 1982) ("[T]he Privacy Act and FOIA substantially overlap. However, . . . the two statutes are not completely coextensive; each provides or limits access to material not opened or closed by the other. . . . [S]ection (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access."); Shapiro v. Drug Enforcement Admin., 762 F.2d 611, 612 (7th Cir. 1985) ("Congress intends that the court construe the Privacy Act and the Freedom of Information Act separately and independently so that exemption from disclosure under the Privacy Act does not exempt disclosure under the Freedom of Information Act and *vice versa*."); *see also* Vest v. Dep't of the Air Force, 793 F. Supp. 2d 103, 115-16 (D.D.C. 2011) ("[J]ust because access to information is restricted under the Privacy Act does not necessarily mean it is also restricted under the FOIA; in fact, the [*Greentree*] court clarified that the Privacy Act protects third-party material from public access, absent 'consent of the individual to whom the material pertains.'" (quoting *Greentree*, 674 F.2d at 80)).

The Freedom of Information Act (FOIA) is of additional relevance to this discussion. FOIA generally provides any person with the statutory right, enforceable in court, to obtain access to federal government information in executive branch agency records, provided that the information requested does not fall within any statutory FOIA exemptions. Unlike the Privacy Act, the request for access may come from any member of the public, regardless of citizenship. This includes individuals, corporations, associations, and state and local governments.

As noted previously § 574(j), added when ADRA was reauthorized in 1996, specifies that dispute resolution communications covered by § 574 are also barred from disclosure under FOIA.[427] The questions surrounding applicability of § 574 have been discussed above. Even under the more inclusive interpretation of § 574 suggested earlier in this analysis, it is clear that not all ombuds office documentation comes within the definition of dispute resolution communications, much less dispute resolution communications covered by ADRA. Accordingly, familiarity with FOIA is important for ombuds office organization and management.

Importantly, FOIA applies to existing agency records only. FOIA does not require agencies to create new records or to conduct research, analyze data, or answer questions when responding to access requests.[428] However, it is essential to be aware that the span of agency records under FOIA is not limited to the definition of agency records for purposes of retention and disposal under the Federal Records Act. Courts have been very reluctant to find any

[427] *See* § 574(j): "A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3)."
[428] For example, in *Forsham v. Harris*, 445 U.S. 169 (1980) petitioners requested under FOIA raw data from a study that had been funded entirely through federal grants. The data was available upon request to the agencies that had funded the study, but ultimately the data was "generated, owned and possessed by a privately controlled organization . . . ." The Supreme Court refused to compel the agency to access the data, finding that such an order would force the agency to "create" a record, thus overstepping the bounds of FOIA. *See also* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161-62 (1975) (concluding FOIA does not supply a duty on agencies to create records).

document created by an agency[429] and within its possession[430] to fall outside the ambit of agency records for purposes of FOIA.[431] There is some precedent for finding that "personal records" that are kept purely voluntarily and not circulated to, nor used by, anyone other than the authors, and are discarded or retained at author's sole discretion for their own individual purposes in their own personal files may not be agency records under FOIA.[432] This might apply to informal notes taken by an ombuds in the course of communications with a constituent and others about a case if they are not covered by ADRA § 574. It should also be considered when fashioning ombuds office records management.

[429] *See* U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144 (1989) ("[A]n agency must either 'create or obtain' the requested materials to qualify as 'agency records.'" (quoting *Forsham*, 445 U.S. at 182)). Note that under the test put forth by the Supreme Court in *Tax Analysts*, records that were not created by the agency still may fall under FOIA if the agency subsequently "obtains" them. *See Tax Analysts*, 492 U.S. at 144 ("To restrict the term 'agency records' to materials generated internally would frustrate Congress' desire to put within the public reach the information available to an agency in its decision-making processes." (citations omitted)). This could be relevant, for example, to ombuds who receive documents from members of the public bringing an issue to them absent other statutory protection or to ombuds who provide services to Federal agencies as independent contractors. In such a case, if the agency takes possession of records generated by the contractor-ombuds then those records might be subject to FOIA — despite the fact that the agency itself did not create them.

[430] *See id.* at 145 ("[T]he agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties.").

[431] *See* Consumer Fed'n of America v. Dep't of Agric., 445 F.3d 283, 287 (D.C. Cir. 2006) [hereinafter *CFA*] ("[R]ecords are presumptively disclosable unless the government can show that one of the enumerated exemptions applies." (quoting Bureau of Nat'l Affairs v. U.S. Dep't of Justice, 742 F.2d 1484, 1494 (D.C. Cir. 1984) (internal quotation marks omitted)); *Tax Analysts*, 492 U.S. at 142 ("Congress sought to open agency action to the light of public scrutiny.") (internal quotation marks omitted)). Notably, the President has issued a memorandum on FOIA directing all agencies to "adopt a presumption in favor of disclosure." *See* Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

[432] *See Tax Analysts*, 492 U.S. at 145 ("[T]he term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency." (citing *CFA*, 445 U.S. at 157)). *See also* Porter Cnty. Chapter of the Izaak Walton League of America, Inc. v. U.S. Atomic Energy Comm., 380 F. Supp. 630, 633 (N.D. Ind. 1974) (holding that untitled, undated and uncirculated handwritten personal notes are not subject to FOIA disclosure); *Bureau of Nat'l Affairs*, 742 F.2d at 1846 (concluding that appointment materials, including desk calendars and telephone logs, "created solely for an individual's convenience . . . [and] [which] may be disposed of at the individual's discretion" do not constitute "agency records" for purposes of FOIA); *but cf.*, Washington Post Co. v. U.S. Dep't of State, 632 F. Supp. 607, 610, 616 (D.D.C. 1986) (holding that typewritten logs chronicling the activities of Secretary of State Alexander Haig — which were created and used exclusively by aids and other staff and never personally by the Secretary — were "agency records" under FOIA).

FOIA includes a list of items that must automatically be disclosed by federal agencies including[433]:

1. Final opinions and orders made in the adjudication of cases;
2. Final statements of policy and interpretations which have not been published in the *Federal Register;*
3. Administrative staff manuals and instructions to staff that affect members of the public;
4. Copies of records that have been the subject of a FOIA request and that also are the subject of sufficient public interest or curiosity that the agency believes that other persons are likely to request (or already have requested) them; and
5. The agency's annual FOIA report — which includes such information as the number of FOIA requests received by the agency, the amount of time taken to process requests, the total amount of fees collected by the agency, information regarding the backlog of pending requests, and other information about the agency's handling of FOIA requests.
6. Any other records the agency deems appropriate for affirmative disclosure.

The Act also contains nine statutory exemptions to this right of access.[434] Described in brief these are:

1. classified documents;
2. documents related solely to the internal personnel rules and practices of an agency;
3. documents specifically exempted from disclosure by another statute;
4. trade secrets and privileged commercial or financial information;
5. inter-agency or intra-agency memos or letters that would be considered "privileged" for litigation purposes;
6. personnel and medical files (the "personal privacy" exemption);
7. records compiled for law enforcement purposes (but these are only exempt where they could reasonably be expected to interfere with enforcement proceedings, or would deprive a person of the right to a fair trial, or could reasonably be expected to endanger someone's life or physical safety, etc.);
8. reports made for regulatory purposes by financial institutions to the government; and
9. geological and geophysical information (including maps) related to oil and gas wells.

Most of these exemptions are not likely to be relevant to documents created in or obtained by an ombuds office. Three of them, however, Exemptions 3, 5 and 6 are worthy of consideration depending on the type of ombuds office at issue and the range of functions it performs.

[433] 5 U.S.C. § 552(a).
[434] 5 U.S.C. § 552(b)(1)–(9).

Exemption 3, referring to records exempted (or barred) from disclosure by another statute, comes into play to the extent that § 574 of ADRA on confidentiality covers documents created in connection with the ombuds' cases or other dispute resolution documents. To the extent it applies this merely serves to reinforce ADRA § 574(j) which, as noted, itself specifies that dispute resolution communications covered by § 574 are also barred from disclosure under FOIA. It also may come into play when the ombuds office is created by a statute which also contains confidentiality provisions.

FOIA exemption 5 exempts documents normally privileged in the civil discovery context.[435] Of particular relevance to ombuds that make recommendations or express opinions on legal or policy matters to decision makers in their respective agencies, Exemption 5 incorporates what is often referred to as the "deliberative process" privilege. The purposes of the exemption have been found to be to encourage open and frank discussions on matters of policy, to foreclose premature disclosure of proposed policies and to avoid public confusion that might result from disclosure of reasons or rationales that do not ultimately become part of the basis for agency action.[436] The documents reflecting opinions or recommendations must be predecisional[437] and

[435] United States v. Weber Aircraft Corp., 465 U.S. 792 (1984).

[436] *See Sears*, 421 U.S. at 151 ("Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions."); Missouri ex rel. Shorr v. U.S. Army Corps of Eng'rs, 147 F.3d 708, 711 (8th Cir. 1998) ("[I]t was not improper for the [agency] to conclude that open and frank intra-agency discussion would be 'chilled' by public disclosure."); Wolfe v. Dep't of Health & Human Servs., 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc) (holding that information may be protectable if its release could result in the premature disclosure of "the recommended outcome of the consultative process . . . as well as the source of any decision."); Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) ("[The deliberative process privilege] protects the public from the confusion that would result from premature exposure to discussion occurring before the policies affecting it had actually been settled upon.").

[437] I.e., "antecedent to the adoption of an agency policy." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) ("Pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take of the deliberative process by which the decision itself is made."). *Cf. Wolfe*, 839 F.2d at 772 (protecting records of agency decisions pending final approval of the decisions by the Secretary of HHS or OMB). The pre-decisional character of a record is not altered by the agency's final decision, *Fed Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979), nor by the fact that the materials relate to proceedings "which do not ripen into [final] agency decisions[,]" *Sears*, 421 U.S. at 151 n.18, nor is the character affected by the passage of time in general, see *AGS Computers, Inc. v. U.S. Dep't of Treasury*, No. 92-2714, slip op. at 13 (D.N.J. Sept. 16, 1993).

must be deliberative rather than merely factual.[438] It is sometimes difficult to separate or distinguish what is deliberative and what is factual and the latter may be exempt if so thoroughly integrated with the former that revealing one would likely disclose the other.[439]

Of particular interest to ombuds who do systems work that may not be covered by ADRA § 574, there is an additional question under Exemption 5 on which the courts diverge. This question is when the materials at issue involve a matter of "law or policy" such that they qualify as deliberative. On the one hand, the D.C. Circuit in *Petroleum Information Corp. v. United States Department of the Interior*[440] has held that the deliberative process privilege should be determined in part on the basis of whether or not the information relates to "some policy matter."[441] Although *Petroleum Info.* involved purely factual data found not to fall within the deliberative process privilege, some courts have applied this ruling to cases involving deliberative materials that were determined not to be sufficiently connected to an agency

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In *Sears* the Supreme Court illuminated the distinction between pre-decisional and post-decisional materials as they relate to the agency's deliberative process privilege. In that case certain memoranda written by NLRB staff attorneys were incorporated by reference into the General Counsel's decision not to pursue an unfair labor practice charge with an enforcement proceeding. Under NLRB procedures, the purpose of such memoranda was to provide "an explanation to the Regional Director of a legal or policy decision already adopted by the General Counsel." Finding that these materials were not protected, the Supreme Court held that "[d]isclosure of these memoranda would not intrude on predecisional processes . . . since when the memoranda are communicated to the Regional Director, the General Counsel has already reached his decision and the Regional Director who receives them has no decision to make — he is bound to dismiss the charge." *Id.* at 155.

[438] Purely factual materials generally are not covered under Exemption 5 because the release of such information does not expose the deliberations or opinions of agency personnel. *See*, EPA v. Mink, 410 U.S. 73, 91 (1973). Factual materials are those that would "generally be available for discovery," *id*.; they are neither "recommendatory in nature" nor do they constitute "a draft of what will become a final document." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Materials are not considered "factual" if their release would "stifle honest and frank communication within the agency." *Id*.

[439] Where the factual and deliberative components of a record are highly entangled, the basic proposition is that if revealing the factual information is tantamount to revealing the agency's deliberative process, then the facts are exempt. *See* Nat'l Wildlife Fed'n v. Forest Serv., 861 F.2d 1114 (9th Cir. 1988) ("Factual materials . . . would . . . be exempt from disclosure [under Exemption 5] to the extent that they reveal the mental processes of decision makers.").

[440] 976 F.2d 1429 (D.C. Cir. 1992).

[441] *Id*. at 1435.

"policy."[442] On the other hand, the Ninth Circuit in *National Wildlife Federation v. United States Forest Service*[443] expressly declined to impose a requirement that documents contain "recommendations on law or policy to qualify as deliberative," and other courts have since followed that approach.[444] Looking to the case law, it appears that the disparate treatment of this issue among the courts can be explained in part by differences among the courts as to what constitutes "policy," with some courts interpreting the term broadly to include almost anything related to an agency's deliberations, while others have limited the scope of the term to matters closer to the agency's core substantive mission.

Exemption 6 exempts "personnel and medical files *and similar* files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy"[445] and also may apply to some ombuds records. Assessment of a FOIA request implicating personal privacy then requires a balancing of the public's right to know with the individual's right to privacy once it has been established that the requested records constitute the kinds of files envisioned in the exemption.[446] Application of Exemption 6 entails a 4-step sequential analysis: 1) is the information sought a medical, personnel or similar file? 2) if so, is there a significant privacy interest in the requested information? 3) what is the requester's asserted FOIA public interest in disclosure? 4) what is the balance among these interests and would disclosure result in

[442] *See, e.g.*, People for the American Way Foundation v. Nat'l Park Serv., 503 F. Supp. 2d 284, 298 (D.C. Cir. 2007); Ethyl Corp. v. U.S. EPA, 25 F.3d 1241, 1248 (4th Cir. 1994) (holding that the "privilege does not protect a document which is merely peripheral to actual policy formulation.").
[443] 861 F.2d 1114 (9th Cir. 1988).
[444] *Id*. at 1118; Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1089, 1095 (9th Cir. 1997); Providence Journal Co. v. U.S. Dep't of the Army, 981 F.2d 552, 559 (1st Cir. 1992).
[445] 5 U.S.C. § 552(b)(6) (emphasis added).
[446] *See* Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (holding that Exemption 6 cases "require a balancing of the individual's right of privacy against the preservation of the basic purpose of [FOIA] to open agency action to the light of public scrutiny"); *see also* U.S. Dep't of Defense v. FLRA, 510 U.S. 487, 497 (1994) ("We must weigh the privacy interest of bargaining unit employees in nondisclosure of their addresses against the . . . extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)).

a clearly unwarranted invasion of personal privacy? In order to balance these interests, the agency must look to the nature and weight of the requestor's interest in disclosure,[447] the public's interest in disclosure,[448] the degree of invasion of personal privacy[449] and the availability of alternative means through which the requestor might obtain the information.[450]

Note that the privacy interest at stake belongs to the individual and not the agency holding the information.[451] Therefore the requestor's rights under the Privacy Act to documents pertaining to his or her own information would not fall under this exemption if otherwise obtainable under the Privacy Act.

The Supreme Court has made clear that the threshold test of whether or not the documents constitute part of a personnel, medical or similar file is to be interpreted broadly.[452] Nonetheless, the information must pertain to a specific individual and must be personal rather than business in nature.[453]

The application of the FOIA exemptions can be very nuanced and discussion of the considerable body of case law on the exemptions exceeds the scope of this study. However, there are two key factors that federal ombuds should bear in mind as they consider office operations. First, as with both the Federal Records Act and the Privacy Act, decisions that are

[447] *See* National Assoc. of Retired Fed. Employees v. Favish, 541 U.S. 157, 172 (2004) (holding that FOIA "requires the person requesting the information to establish a sufficient reason for the disclosure.").
[448] The Supreme Court has found that "the only relevant public interest in the FOIA balancing analysis . . . [is] the citizens' right to be informed about what their government is up to." *DOD v. FLRA*, 510 U.S. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773).
[449] *See, e.g.*, Consumers' Checkbook Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs., 554 F.3d 1046, 1050 (D.C. Cir. 2009) ("[W]e must determine whether 'disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest.'" (quoting Nat'l Ass'n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989)).
[450] *See* U.S. Dep't of Defense v. FLRA, 964 F.2d 26, 29-30 (D.C. Cir. 1992) (holding that although alternative means of disclosure "certainly are not a per se defense to a FOIA request," it is appropriate nonetheless to consider "the extent to which there are alternative sources of information available that could serve the public interest in disclosure.")
[451] *See Reporters Comm.*, 489 U.S. at 763–65.
[452] U.S. Dep't of State v. Washington Post, 456 U.S. 595 (1982)
[453] *Id*. at 602; Sims v. CIA, 642 F.2d 562, 574 (D.C. Cir. 1980) ("Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships.")

made as to what sensitive information is documented and how it is stored may have an impact on the degree to which confidentiality can be protected. Secondly, with regard to Exemption 6, the degree to which a privacy interest may be recognized by the courts may depend on the manner and degree to which an expectation of privacy has been created by the ombuds with regard to the individual whose information may be disclosed.

Conclusions and Recommendations for Agency Officials and Ombuds Offices on Ombuds and Records Management

In the end, the federal ombuds office must consider how best to protect office documentation from inadvertent or compulsory disclosure consistent with whatever confidentiality is offered and with these three statutes, even though these statutes may at times be at odds with each other or appear to put confidentiality in potential peril. Several practical measures should be considered. Ombuds office practices should ensure that no one is privy to ombuds confidential case records who does not need to know their contents and whose access to those documents is not consistent with the nature and scope of the confidentiality commitment of the office. Those engaged in intake and administrative functions for the ombuds office should be properly instructed on and bound by the office's confidentiality commitments. Further, tangible records should be maintained in a secure repository within the ombuds office and electronic records should, if at all possible, be generated and maintained on a separate server. Failing that, ombuds electronic records should be in a secure location on a shared server. At the very least, electronic records should be accessible only via password-protected workstations located in attended offices or through a secure remote access network. All confidential documents should be marked as such.

While the requirements under these three statutes pertaining to management and disclosure of agency records are clear, their application to federal ombuds is not, leaving room for thoughtfulness and creativity in collaboration with legal counsel and agency records officials as office record management practices are established. With regard to the FRA, there are a number of kinds of ombuds records that surely fall within standard categories of agency records and can be managed in accord with other agency records of the same type — office creation, enabling and evaluative documents, budgets, planning and so forth. As COFO suggests, statistical data on office caseloads (absent individual identifying information), and data on systemic issues also should be retained in a system of agency records. However, ombuds offices should work with legal counsel and records management officials to devise prudent policies for confidential case documentation and include in this discussion the question of electronic communications such as emails. For routine cases, ombuds use of only rough private notes that are not shared with others to the extent practical and appropriate should be considered. When and if case files in a system of records are deemed necessary, appropriate thought should be given to how such files are labeled or identified, and especially the duration of retention that will both comply with the requirements of the FRA and minimize the potential for inadvertent or compulsory disclosure of confidential documents to the fullest extent possible. For those offices currently lacking NARA's imprimatur on a records retention schedule, a detailed background on the office, it's purpose and standards and the reasons therefore should be included when approval is sought.

Finally, while ADRA's confidentiality provision, § 574 does not exempt dispute resolution communications from the requirements of either the FRA or the Privacy Act, it does contain an exemption from disclosure under FOIA. This is significant for "the use of ombuds" falling under the aegis of ADRA. For those ombuds functions falling outside of ADRA § 574 but still deemed

confidential, ombuds should consider the exemptions contained in FOIA itself should confidentiality be at stake. In particular, many ombuds responding to our survey have indicated that they have had a role in changes to agency policies and some ombuds engage in system reviews. These may fall within FOIA Exemption 5. For some ombuds, Exemption 6 for "personnel and medical files *and similar* files" may also be applicable in the event office records are requested under FOIA.

VIII. Legal Analysis — Conclusions and Recommendations to the Administrative Conference of the United States

While the issues discussed in this legal analysis are relevant to most federal offices bearing the ombuds title, the following recommendations to the Administrative Conference (ACUS) pertain primarily to those ombuds offices that adhere in large part to one of the three generally recognized sets of ombuds professional standards.

1. Practicing to Standards: Those legislative and agency officials who would create offices that assist designated constituents to raise and resolve issues should only attach the "ombuds" title to the office if the office adheres to the three core principles of confidentiality, independence and impartiality/neutrality as represented in at least one the three sets of professional standards (the IOA, ABA and USOA). Existing offices that do not reflect these principles should be modified to adhere to them, or renamed.

While federal ombuds — internals, externals, advocates — can and should serve many kinds of constituents and use many different techniques and processes, there are compelling reasons why there should be recognized core principles even as the government embraces other variations. Elsewhere in this study we have discussed the nature of ombuds professional ethical

standards, why they, in particular these three core standards, are critical to ombuds effectiveness and why they have come to be viewed as the *sin qua non* of ombuds practice. The evident lack of a clear definition of federal ombuds based on core principles makes a common set of expectations for federal ombuds more difficult to achieve and these principles, for those federal offices that have adopted them, more difficult to defend.[454]

Of equal importance, failure to establish and operate an ombuds office consistent with all three applicable ombuds core standards will undermine the ombuds' ability to defend a challenge to any one of them. For example, an ombuds or ombuds office that lacks sufficient indicia of independence, whether by virtue of where it is placed or how it is operated or collateral responsibilities assigned to the ombuds, will be hard-pressed to argue that it is neutral to a wary constituent. Nor will it be in a good position to protect confidentiality should it be challenged by litigants, labor unions, Inspectors General or even upper management. Likewise, should the ombuds' agency undermine or even chip away at confidentiality, it will be difficult for the ombuds to make the case for independence and neutrality and this, in turn, will undermine the ombuds' credibility with constituents, tribunals, agency officials and others.

Finally, from a legal perspective, while ADRA has since 1996 included "use of ombuds" in its definition of the means of alternative dispute resolution, as we have discussed its embrace of those with the ombuds title and their various practices is still not definitively resolved. A common understanding, at least, of the meaning of the ombuds title would render interpretation of this addition to the Act far less daunting.

[454] Moreover, the inconsistent and unpredictable definitions and standards for ombuds in the federal sector may well confuse the general perception of what an ombuds is and undermine attempts to build and secure the profession nationwide in both the public and private sectors.

Articulating and maintaining standards for ombuds would not inhibit legislative or executive efforts to create "complaint handling" offices that provide a combination of, for example, some of the following services to internal or external constituents: inquiry, dispute resolution, facilitation, coaching, communication, outreach, and training. However, if the architects of such offices want to claim the name and obtain the particular benefits of ombuds practice, those creating such offices must fully commit to the standards that have been shown to make those benefits possible. This means at a minimum placing the ombuds office where it might be, and be perceived to be independent, and permitting it to operate as independently as is possible consistent with law and accountability. Similarly, it means that ombuds confidentiality and impartiality under the standards must be broadly communicated, respected and supported from the top down.

Some agency leadership, particularly those in the public eye who are accountable for what transpires within their area of responsibility, may be uncomfortable with the notion of a largely independent office within the agency offering confidentiality in one of the forms recognized by ombuds standards. Accordingly, one best practice that characterizes some of the most effective ombuds offices is their ongoing efforts to forge strong relationships characterized by mutual understanding with agency leadership and management, legal offices, Inspector General offices, officials responsible for FOIA requests, records management and, if relevant, EEO, employee and labor relations. Such efforts build the trust necessary to inspire confidence in the confidentiality, independence and impartiality that are the lifeblood of ombuds effectiveness.

2. Legal Protection for Ombuds Confidentiality

A. New Ombuds Legislation: Suggestions have been made from time to time, including in our survey responses, that legislation should be enacted to provide a template for creation of federal ombuds offices.[455] Such legislation would be a drafting challenge inasmuch as fashioning definitions and standards must take into account at least the several principal classifications of current federal ombuds and three sets of recognized standards. The advantages would be twofold — uniform structural and ethical standards for ombuds within each principal classification, and protection of these standards from erosion and incursion by agency leadership or other entities whether under color of law or not.

B. Modification of ADRA: Should proposing new legislation be deemed inadvisable at this time, ombuds practicing to standard, and indeed the ADR community at large, would benefit from certain targeted amendments to ADRA. These would add needed clarity and remove much of the ambiguity as to who the Act covers and the scope of that coverage. These changes might include:

- **§ 571. Definitions**
    - (8) "issue in controversy" — broaden this definition to *expressly* include internal conflicts of the kind handled by workplace mediators, conflict management coaches and internal ombuds and to include issues for which the neutral directly engages with only one party in the course of providing assistance in resolution. The latter would also require modification of § 571(6) to the effect that both parties need not actively participate in a "dispute resolution proceeding."

[455] *See, e.g.*, 2009 Taxpayer Advocate Service Study of Ombuds Offices, at 114–116 (focusing primarily on the need for legislation for external ombudsmen).

- (9) "neutral" — to align with current thinking, clarify that this term denotes any individual acceptable to the parties who functions specifically to aid the parties in resolving an issue in controversy. This would align the definition in § 571 with the descriptive language in § 573(a).
- (10) "party" — clarify that this includes both named parties and any person or entity significantly affected by a potential resolution of the issue in controversy *and* specify additionally that when a federal neutral aids parties to resolve an issue in controversy the government is always, *de facto*, a party. In either case, the Congress or the agency has determined that the cost of establishing ADR programs is outweighed by the benefits to the government precisely because the government is significantly affected directly or indirectly by the conflicts these programs are designed to address. (This amendment to include the government as a party might not be necessary should the amendments recommended above for §§ 571(6) and (8) be enacted.)

- **§ 574. Confidentiality —** Note that if this provision is modified to more definitively embrace federal sector ombuds, allowance should be made for those ombuds offices: 1) that practice according to USOA standards which provide for confidentiality only at the discretion of the ombuds which is at variance with confidentiality as defined in the current § 574 and/or 2) that were created by statutes specifying the scope of confidentiality applicable to that office.
  - § 574(3) — the exception for communications "required by statute to be made public" should be modified to comport with its presently generally understood

meaning as applying to communications required *by statute* to be made public *or* reported to agency officials or other authorities.

- § 574(j) — consideration should be given to harmonizing the Privacy Act and the Federal Records Act with the confidentiality provisions in § 574 as has already been done with FOIA.
- An additional provision precluding access by Inspectors General to confidential ombuds communications should be considered. Barring that, a provision clarifying the relationship between ombuds and Inspector Generals might be added providing a test for access similar to that for courts found in § 574(a)(3).
- § 574 should also be modified to articulate what is now generally understood, i.e., that confidentiality begins to attach at the time of ADR intake. Further, it should be made clear that ADRA's confidentiality persists until the dispute resolution process concludes, regardless of the techniques employed or whether or not there is a resolution. If the government determines that offering alternative means of resolving issues is in its interest, it is also in the government's interest to encourage use of these options by protecting users from their first approach to the office offering the service. If formal settlement is reached, it should be disclosed if required by law.

C. Interpretation of ADRA: We further recommend that ACUS add clarity and coherence to the discussion of the relationship of ombuds to ADRA by confirming the view that Congress meant what it said when it added "use of ombuds" to the definition of "means of alternative dispute resolution" in 1996. We have explained earlier in this analysis the logic of

this interpretation and only underscore here the importance to the growing ombuds presence in the federal government of ACUS lending its imprimatur to it.

Whether there is a new ombuds statute, modification of ADRA or none-of-the-above, federal ombuds offices like any other government activity remain accountable for efficiency, effectiveness and probity. Confidentiality is the exception rather than the rule in government and therefore not all ombuds office documents, communications or functions warrant confidentiality protection. For example, when communications take place as part of training programs, systems work and some group work that are not connected to resolving issues in controversy they may not be protected by ADRA under any interpretation. Participants in these processes, however, might, agree to maintain confidentiality and documentation might be protected from disclosure under FOIA if it meets the criteria for the exceptions discussed earlier in this analysis. Further, statistics and many routine administrative documents (including those pertaining to budget and staffing even when ombuds independently manage these administrative prerogatives) should be subject to the typical agency rules of disclosure and accessibility to the extent that they do not reveal confidential case information.

3. Other defenses if ombuds confidentiality is subject to legal challenge: Unless and until the application of ADRA to ombuds is sufficiently settled, we recommend that agencies and their ombuds offices consider that they may have to complement arguments based on ADRA with other avenues to protect the confidentiality offered to constituents by their offices if it is subject to legal challenge. These avenues all require that ombuds offices be established according to recognized standards, including independence, neutrality/impartiality, and confidentiality, and that there be a meeting of the minds between the ombuds and agency officials on the extent and limits of each of these attributes.

As a best practice, these standards and any exceptions once agreed upon, should be broadly disseminated with suitable website provisions, posters, brochures and the like and specifically communicated to each visitor at intake. Upon a legal challenge to confidentiality, evidence of this dissemination as well as evidence of specific communication to the visitor and, if possible specific acknowledgement by the visitor should form part of the basis for a request to the tribunal to exercise its discretion to protect ombuds' communications.

Additionally, evidence about the office, its standards and the reasons therefore will be needed to bolster such a claim and to establish that an expectation of confidentiality has been created. To the extent that abiding by the ombuds office's confidentiality standard is presented to the visitor as a condition of his or her voluntary engagement with the office, an argument can also be made that the visitor is then bound by this commitment under a theory akin to implied contract (offer and acceptance) should the visitor try to obtain the ombuds' testimony in a later proceeding.

The same evidence and arguments that would support the judge's exercise of discretion might also go toward presenting a claim of privilege. Although given the precedent it is unlikely that this claim will be entertained, there is still some potential that a robustly litigated case with ample evidence of ombuds practice and policy might carry the day. The thoroughness with which all these defensive arguments are supported and documented is critical because the unique attributes of ombuds are not widely understood.

4. Recommended best practices: There are a number of best practices that agency officials and federal ombuds offices should consider that will put the ombuds office in the best legal posture to defend against threats to office standards, to enhance its credibility with constituents and

agency leadership alike and to maintain the integrity of the office. Many of these are discussed under the various headings in the body of this analysis. We emphasize several here.

A. Independent Counsel: With respect to agency counsel, there may be times when the interests of agency counsel and that of the ombuds may not be congruent, for example when a threat to confidentiality emanates from or involves another office within the agency that agency counsel also represents. Likewise, the demand for information may originate in litigation against the agency and counsel may be required to balance a variety of agency interests in deciding during negotiations which of the litigant's demands to accept. Agency counsel may also lack experience or expertise in addressing requests for disclosure of confidential ombuds communications.

For these reasons, and in the interests of reinforcing ombuds independence, every effort should be made to obtain independent counsel for federal ombuds when and as issues arise or when the ombuds wants to manage legal questions proactively. Recognizing that few agencies routinely use outside counsel, thought might be given by ACUS and/or COFO, to engaging the Department of Justice (possibly the Office of Federal Programs or the Office of Dispute Resolution) in identifying a niche in government where a cadre of lawyers might be educated on legal issues pertaining to ombuds and available for advice and/or litigation support should the need arise. Alternatively, COFO might identify those within their ranks who are lawyers and willing to act in, at least, an advisory capacity. The "Shared Neutrals" program administered by the Department of Health and Human Services might serve as model for such formalized sharing of expertise and services among agencies.

B. Affirmative Duty to Report: As discussed above, where a *statutory* duty to report information conflicts with confidentiality, the duty to report prevails under ADRA § 574(a)(3)

even if it conflicts with professional standards on confidentiality and whether or not there is an imminent risk of serious harm. The same would be true for many of the reporting obligations found in non-statutory sources that merely echo the statutory duties to disclose criminal or potentially criminal behavior. However, where the duty to report is not contained in a statute, the prohibitions in ADRA *against* disclosure arguably would prevail. In this regard, some regulations and management policies imposing an affirmative duty to report on federal employees are not reflected in statutory requirements.

Given the broad reach of existing government-wide statutes, regulations and policies imposing reporting obligations on federal employees combined with the importance of confidentiality in ombuds practice, it should not be necessary for agencies to add to agency specific obligations and they should not do so. However, although technically not within the exception to confidentiality under ADRA § 574, many government-wide non-statutory obligations to report have substantial weight and importance. Agencies and their ombuds should make every effort to reach an explicit understanding of which non-statutory legal and ethical reporting obligations must be applicable in spite of the standards and exigencies of the office and most importantly the express limitation in ADRA of this exception to statutory obligations. This conversation within the agency should include an understanding that all efforts will be made to encourage the visitor to report the information him or herself through appropriate channels and that, should the visitor decline and the ombuds affirmatively be obligated to report, it will be done by the ombuds in a manner that protects confidentiality to the fullest extent possible. Once an understanding is reached, the ombuds should communicate the parameters of confidentiality to visitors. If this limitation on confidentiality is shared in a timely fashion with constituents and visitors, an argument can be made that the parties have implicitly agreed to "alternative

confidential procedures for disclosure" under ADRA § 574(d)(1)[456] rendering a subsequent consistent disclosure by the ombuds permissible under § 574.

C. Ombuds and Notice to the Agency: Most federal ombuds created and practicing to standards specifying independence will not be agents of their employer for purposes of legal notice or authorized conduits of information and accordingly only the specter of implied agency would be a concern. The ombuds' knowledge of pertinent information might be imputed to the employer should appropriate measures not be taken by agency officials and the ombuds him or herself to clearly confirm the ombuds' independence and disavow any authority on the ombuds' part to receive notice or act as a conduit of information. In particular, the agency and the ombuds office should take great care when touting the office as a safe place to raise concerns to also include appropriate caveats concerning notice. It goes almost without saying that in order to make this assertion the ombuds should in fact be independent, unencumbered with management responsibilities outside the ombuds office itself and with the requisite independent decision-making and operational authority.

D. Ombuds and Federal Sector Labor Law: Federal sector labor law is relevant both to ombuds who deal with internal issues if some of their constituents are within collective bargaining units and to those ombuds who deal with external issues but may have cause to meet with employees within collective bargaining units. The critical provision is FSLMRS § 7114 requiring that the union be given notice and an opportunity to be present at certain meetings with represented employees. As set forth in great detail earlier in this analysis, the provision is most

[456] 5 U.S.C. § 574(d)(1). "The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding . . . ."

likely to apply to the ombuds' meetings with employees when the ombuds engages both the represented employee and management in attempting to resolve the issue at hand.

When the interactions of the ombuds with the represented constituent and management on an issue are seen as more formal efforts at resolution these might trigger the union's right to notice and right to be present on behalf of the bargaining unit it represents. Ombuds who might be subject to § 7114 should work with legal counsel to develop office protocols for determining if and when the union has a right to notice.

Relatedly, it should be stressed that best practices at the agency and office level include advising visitors to the ombuds office of other options, particularly formal rights-based options for resolving issues — and their requirements — so that no rights are unintentionally waived by virtue of seeking assistance in the ombuds office. Correspondingly, the ombuds office should not engage in behavior that could mislead employees about the respective roles of the ombuds and these other entities. Our understanding from this study is that most ombuds offices are aware of this requirement and careful to make it a routine part of their practice.

E. Ombuds and Inspectors General: Absent a legislative solution as suggested earlier in these recommendations, the interrelationship of Inspectors General and federal ombuds confidentiality remains unsettled. This makes it all the more important for OIG's to understand the purposes, functions and ethical standards of ombuds offices in advance of any issues that might arise between the two offices. Certainly ombuds can and should, proactively, work to develop a positive working relationship with the Inspector General's office having jurisdiction over their agency.

Further, if it has not already done so, COFO might consider engaging with the Council of the Inspectors General, if not to reach a mutual agreement on confidentiality at least to develop a

working relationship and to educate the Inspectors General about ombuds. This dialogue might include ways the two positions are complementary and distinct, the importance of ombuds confidentiality to realizing the ombuds' mission and the prohibition applicable to neutrals under ADRA of disclosing dispute resolution communications even if considered to be pursuant to statutory compulsion unless "no other person is reasonably available to disclose the communication." 5 U.S.C. sections 574(a)(4) and (b)(5) which, respectively, set out for neutrals and parties the key substantive considerations for courts when considering compulsory disclosure under ADRA (preventing a manifest injustice, establishing a violation of the law, preventing harm to the public health and safety outweighing the integrity of dispute resolution proceedings in general) also may be a helpful starting point for mutual understanding.

F. Ombuds and records management: Finally, with respect to ombuds records management, much of what ombuds write about cases can be considered "rough notes" as long as they are not shared and therefore would not be required to be maintained in a system of records. However, for those case records that are more formal and/or shared, the record schedules recently approved classifying confidential case records as temporary and providing for destruction upon closure of the case should be considered a best practice. Inasmuch as ombuds case records are confidential under ADRA and therefore largely foreclosed from disclosure, whatever might be gained by retaining them beyond closure of the case would be outweighed by the risk of inadvertent or compulsory disclosure as well as by the cost of defending against such compulsion.

For those ombuds functions falling outside of ADRA § 574 and its FOIA exemption but still deemed confidential, ombuds should consider the exemptions contained in FOIA itself if a FOIA request is made. In particular, many ombuds responding to our survey have indicated that

they have had a role in changes to agency policies, and some ombuds engage in system reviews. As discussed in more detail in the preceding analysis, these may fall within FOIA Exemption 5, the so-called deliberative process exemption. For some ombuds, Exemption 6 for "personnel and medical files *and similar* files" may also be applicable in the event office records are requested under FOIA.

Administrative Conference of the United States

A REAPPRAISAL – THE NATURE AND VALUE OF OMBUDSMEN IN FEDERAL AGENCIES

PART 4: THE RECOMMENDATION

Final Report: November 14, 2016

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A Reappraisal – The Nature and Value of Ombudsmen in Federal Agencies

Proposed ACUS Recommendation

The following draft constitutes the proposed recommendation of the Administrative Conference's Committee on Rulemaking, for consideration by the full Conference membership. It is based on the authors' suggested recommendations submitted to the Conference on September 19, 2016. The original draft was modified by the committee, with the assistance of the authors and the Conference staff, through a series of public committee meetings held on September 24, October 19 and November 3, 2016, as well as by consideration and review of comments received via the ACUS website. The authors have worked collaboratively with all concerned to understand the concerns raised and are in general agreement with this proposed recommendation as put forth by the Committee on Rulemaking.

The Use of Ombudsmen in Federal Agencies

Committee on Rulemaking

Proposed Recommendation for Council | November 17, 2016

This recommendation updates and expands on the Administrative Conference's earlier Recommendation 90-2, *The Ombudsman in Federal Agencies,* adopted on June 7, 1990. That document concentrated on "external ombudsmen," those who primarily receive and address inquiries and complaints from the public, and was formulated before "use of ombuds" was added to the definition of "means of alternative dispute resolution" in the Administrative Dispute Resolution Act (ADRA)[1] in 1996. In 90-2, the Conference urged "the President and Congress to support federal agency initiatives to create and fund an effective ombudsman in those agencies

[1] 5 U.S.C. §§ 571-84; *see* § 571(3).

with significant interaction with the public," believing that those agencies would benefit from establishing either agency-wide or program-specific ombudsman offices.

The present recommendation is based on a study of the far broader array of federal ombuds[2] that have been established since the Conference's earlier recommendation on this subject. Federal ombuds now include multiple variations of both primarily externally-focused and primarily internally-focused ombuds (i.e., those who receive inquiries and complaints from persons within the agency). These individuals and offices can and do make a distinct and beneficial contribution to government effectiveness. While all forms of alternative dispute resolution expressly embraced by the ADRA have the capacity to reduce litigation costs and foster better relationships, the ombuds alone affords the constituent and the agency the opportunity to learn about and address issues before, in effect, they have been joined. Constituents and the agency are served by the ombuds' skilled, impartial assistance in resolution, and the agency is served by the opportunity for critical early warning of specific and systemic issues.

The research conducted to support this recommendation, including quantitative and qualitative surveys, interviews, case studies and profiles, revealed that federal ombuds can add value to their agencies in a variety of ways.[3] Ombuds (1) identify significant new issues and patterns of concerns that are not well known or being ignored; (2) support significant procedural changes; (3) contribute to significant cost savings by dealing with identified issues, often at the

[2] The term *ombudsman* is Scandinavian and means representative or proxy. Variations on the term exist in the field (ombudsmen, ombudsperson, ombuds, etc.) In this recommendation, the term "ombuds" will be used as the predominant term to be as inclusive as possible. For historical background on the use of ombudsmen in other countries and their potential value in the United States, *see* Walter Gellhorn, OMBUDSMEN AND OTHERS: CITIZEN PROTECTORS IN NINE COUNTRIES (1966), and Walter Gellhorn, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES (1966).

[3] Houk et al., A Reappraisal — The Nature and Value of Ombudsmen in Federal Agencies, *available at* www.acus.gov/research-projects/ombudsman-federal-agencies-0

earliest or pre-complaint stages, thereby reducing litigation and settling serious disputes; (4) prevent problems through training and briefings; (5) serve as an important liaison between colleagues, units, or agencies; and (6) provide a fair process for constituents.

Externally-facing ombuds were more likely to report supporting the agency with specific mission-related initiatives; helping the agency to improve specific policies, procedures, or structures; making administrative decisions to resolve specific issues; helping within the agency to keep its organizational processes coordinated; and advocating on behalf of individuals. Internally-facing ombuds were more likely to report helping constituents by providing a safe way to discuss perceptions of unsafe or illegal behavior; promoting the use of fair and helpful options; helping to prevent problems by coaching one-on-one; and providing group training and briefings to constituents. Whistleblower ombuds and procurement ombuds—consonant with their particular focus on more narrowly defined responsibilities—described their accomplishments as providing specific information and education, and guidance about very specific matters of concern to their constituents.

Since the Conference last considered ombuds in the federal government, the milieu in which government operates has, by all accounts, become more polarized, with government itself often the target of suspicion and hostility. In a challenging environment in which many federal agencies struggle to maintain the trust of the public they serve and even of their own employees, the ombuds is uniquely situated to provide both pertinent information and assistance in resolving issues to constituents and the agency alike. The ability of the ombuds to provide a place perceived as safe — which can offer a ready, responsive, and respectful hearing and credible options — in itself builds trust. And trust is a commodity without which government in a democratic society cannot function effectively.

Accordingly, the Conference continues to urge Congress and the President to create, fund, and otherwise support ombuds offices across the government consistent with the recommendation articulated below. Further, the Conference urges those agencies that already have ombuds, and those that are contemplating creating ombuds offices, to align their office standards and practices with those included in this recommendation. In general, the Conference recommends these practices to the extent applicable in particular situations, regardless of whether an ombuds office or program is created by Congress or by an agency.

Although functionally the federal ombuds landscape is quite diverse, most federal ombuds share three *core standards of practice* — independence, confidentiality, and impartiality — and share common characteristics. The core standards are set forth in the standards adopted by the American Bar Association (ABA),[4] the International Ombudsman Association (IOA),[5] and the United States Ombudsman Association (USOA),[6] though with some variations, particularly with respect to confidentiality. These organizations' standards are generally followed, as applicable, and considered essential by the ombuds profession, both within and outside government. The further an ombuds office and the agency in which it resides deviate from the three core standards in practice, the more difficult it will be to defend whatever confidentiality the office does offer should it be subjected to legal challenge.

Most federal ombuds also share the following common characteristics: (1) Ombuds do not make decisions binding on the agency or provide formal rights-based processes for redress; (2) they have a commitment to fairness; and (3) they provide credible processes for receiving,

[4] ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004), *available at:* https://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf.
[5] IOA STANDARDS OF PRACTICE (2009), *available at:* https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf.
[6] USOA GOVERNMENTAL OMBUDSMAN STANDARDS (2003), *available at:* https://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf.

reviewing, and assisting in the resolution of issues. The three core standards and these common characteristics, taken together, are central to the ombuds profession.

Agencies have the authority to establish ombuds offices or programs. Although legislation establishing a generally applicable template and standards for federal ombudsmen has not been enacted, the 1996 addition of the words "use of ombuds" to the definition of "means of alternative dispute resolution" in ADRA clarifies that, when the ombuds office is assisting in the resolution of issues that are raised to it under its mandate, it is covered by the Act's provisions.[7] The Act's coverage attaches to communications that take place when the constituent first approaches the ombuds office with an issue and continues to cover communications that occur until the case is, in effect, closed.[8] While ADRA's definition of "alternative means of dispute resolution" includes use of ombuds, federal agency ombuds programs would benefit from certain targeted amendments to ADRA to clarify certain definitions (e.g., "issue in controversy," "neutral," "party") and other provisions as they apply to the work of ombuds, to expressly align them with current practice.

The research for this recommendation also identified three areas of potential conflict between (a) the requirements of ADRA § 574 and the scope of confidentiality that ombuds offer to constituents and (b) other legal requirements that may be applicable in certain situations.

[7] Further, ombuds are 'neutrals' within the meaning of the Act including those ombuds who, after impartial review, advocate for specific processes or outcomes. *See* ABA STANDARDS, *supra* note 4, at 14.

[8] The Act's coverage is generally understood to begin at intake in alternative dispute resolution offices and continue until closure even when the constituent's interaction with the office ends without a session process involving both parties. For example, guidance concerning ADRA confidentiality issued by the Federal Alternative Dispute Resolution Council in 2000 concluded that ADRA confidentiality applies to the intake and convening stages of ADR. *See* Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085, 83,090 (Dep't of Justice Dec. 29, 2000). Further, the Interagency ADR Working Group Steering Committee in its Guide states that ADR program administrators are "neutrals when they are helping the parties resolve their controversy by, for example, discussing ADR options with the parties, coaching, and preparing them to negotiate . . . ." *See* Interagency ADR Working Group Steering Comm., Protecting the Confidentiality of Dispute Resolution Proceedings 8 (2006). While ADRA covers dispute resolution communications occurring through the duration of the case, the neutral's obligation to maintain this confidentiality does not end with the closure of the case.

Federal ombuds should be aware of these matters and how they may affect particular ombuds programs:

(1) The relationships among their statutory duties to report information, the requirements of ADRA § 574(a)(3) on confidentiality, their agency's mission, and the professional standards to which they adhere. Any latitude they may have under ADRA § 574(d)(1) should be considered in reaching an understanding within the agency and with constituents of the breadth and limits of confidentiality consistent with statutory requirements.

(2) The requirements and interrelationship of the Federal Records Act,[9] the Freedom of Information Act,[10] and the Privacy Act,[11] with regard to agency records and other documentation.

(3) The effect on confidentiality of the Federal Service Labor-Management Relations Statute,[12] pursuant to which the union may be entitled to notice and an opportunity to be present at meetings with bargaining unit employees (for those ombuds that have employees with a collective bargaining representative among their constituents, or who may have cause, in the course of resolving issues that have been brought to them, to engage with represented employees as well as management on issues affecting the terms and conditions of bargaining unit employees).

In addition, this recommendation addresses standards applicable to federal agency ombuds offices and related issues involved in creating such offices. The practices included in this recommendation are intended to highlight some overarching beneficial practices observed

[9] 44 U.S.C. Chaps. 21, 22, 29, 31, and 33.
[10] 5 U.S.C. § 552.
[11] 5 U.S.C. § 552a.
[12] 5 U.S.C. §§ 7101-35; *see* § 7114.

among federal ombuds and to supplement the recommended practices and guidance available from various ombuds professional organizations.

To foster continual improvement and accountability of individual ombuds offices, the recommendation advises that each ombuds office arrange for periodic evaluation of its management and program effectiveness. Evaluation of ombuds by colleagues within the office can be useful if the office is of sufficient size to make this feasible. Otherwise, any external evaluation should be conducted by individuals knowledgeable about the roles, functions, and standards of practice of federal ombuds. For example, peer evaluation using the expertise of similar types of ombuds in other offices or agencies, or by outside ombuds professionals, may be suitable.

Finally, the recommendation urges the creation of an entity within the Executive Branch to serve as a government-wide resource to address certain issues of common concern among agency ombuds that transcend organizational boundaries. Such an office, perhaps modeled on the Council of the Inspectors General on Integrity and Efficiency (CIGIE), could develop, over time, a credible professional system for credentialing federal ombuds programs.

RECOMMENDATION

1. *Establishment and Standards.*

(a) Agencies should consider creating additional ombuds offices to provide places perceived as safe for designated constituents to raise issues confidentially and receive assistance in resolving them without fear of retribution. They should ensure that the office is able to, and does, adhere to the three core standards of independence, confidentiality, and impartiality, as these standards are described in generally recognized sets of professional standards, which include those adopted by the American Bar Association, the International Ombudsman

Association, and the United States Ombudsman Association, and they should follow, to the extent applicable, the procedural recommendations below. Existing offices with the ombuds title that do not adhere to these standards should consider modifying their title, where permitted, to avoid any confusion.

(b) Ombuds offices created by executive action should be established or governed by a charter or other agency-wide directive specifying the office's mandate, standards, and operational requirements, so that others in the agency and the public are aware of the office's responsibilities.

2. Legislative Considerations.

(a) Congress should consider creating additional ombuds offices. When Congress creates a new ombuds program, it should observe the procedural principles contained in this recommendation, to the extent applicable.

(b) Any action by Congress creating or affecting the operations of agency ombuds offices, whether through amendment of the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. §§ 571-84, or other legislative action, should reinforce the core standards of independence, confidentiality, and impartiality. Any such actions should maintain clarity and uniformity of definitions and purpose for federal agency ombuds, while allowing for differences in constituencies (whether primarily internal or external), type of office (advocate, analytic, organizational, etc.), and agency missions.

3. *Leadership Support.*

(a) Agency leadership should provide visible support, renewed as leadership changes, for the role of ombuds offices in the agency and their standards, including independence, confidentiality, and impartiality.

(b) Agency leadership should consider carefully any specific recommendations for improved agency performance that are provided by agency ombuds.

4. *Independence.*

(a) To promote the effectiveness and independence of ombuds offices, agencies should consider structuring ombuds offices so that they are perceived to have the necessary independence and are separate from other units of the agency. To ensure adequate support from agency leadership, ombuds offices should report to an agency official at the highest level of senior leadership. Ombuds offices should not have duties within the agency that might create a conflict with their responsibilities as a neutral, and their budgets should be publicly disclosed.

(b) The agency should ensure that the ombuds has direct access to the agency head and to other senior agency officials, as appropriate. Whether by statute, regulation, or charter, ombuds should expressly be given access to agency information and records pertinent to the ombuds' responsibilities as permitted by law.

(c) Ombuds and the agencies in which they are located should clearly articulate in all communications about the ombuds that the ombuds office is independent and specifically not a conduit for notice to the agency.

(d) Federal ombuds should not be subject to retaliation, up to and including removal from the ombuds office, based on their looking into and assisting with the resolution of any issues within the ombuds' area of jurisdiction.

5. *Confidentiality.*

(a) Consistent with the generally accepted interpretation of ADRA § 574, as applied to alternative dispute resolution offices, agencies should understand and support that the Act's requirements for confidentiality attach to communications that occur at intake and continue until the issue has been resolved or is otherwise no longer being handled by the ombuds, whether or

not the constituent ever engages in mediation facilitated by the ombuds office. Restrictions on disclosure of such communications, however, should not cease with issue resolution or other indicia of closure within the ombuds office.

(b) Agencies (or other authorizers) should articulate the scope and limits of the confidentiality offered by ombuds offices in their enabling documents (whether statute, regulation, charter or other memoranda) as well as on the agency website, in brochures and any other descriptions or public communications about the office utilized by the office or the agency.

(c) Agency leadership and management should not ask for information falling within the scope of confidentiality offered by the ombuds office.

(d) If information is requested from an ombuds during discovery in litigation, or in the context of an internal administrative proceeding in connection with a grievance or complaint, then the ombuds should seek to protect confidentiality to the fullest extent possible under the provisions of ADRA § 574, unless otherwise provided by law. Agencies should vigorously defend the confidentiality offered by ombuds offices.

6. *Impartiality.* Ombuds should conduct inquiries and investigations in an impartial manner, free from conflicts of interest. After impartial review, ombuds may appropriately advocate with regard to process. An ombuds established with advocacy responsibilities may also advocate for specific outcomes.

7. *Legal Issues.* Federal ombuds should consider potential conflicts in the following areas:

(a) The relationships among their statutory duties to report information, the requirements of ADRA § 574(a)(3) on confidentiality, their agency's mission, and the professional standards to which they adhere.

(b) The requirements and interrelationship of the Federal Records Act, the Freedom of Information Act, and the Privacy Act, with regard to agency records and other documentation.

(c) The effect on confidentiality of the provision in the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7114, where applicable, pursuant to which the union may be entitled to notice and an opportunity to be present at meetings with bargaining unit employees.

8. *Staffing.*

(a) Agencies should reinforce the credibility of federal ombuds by appointment of ombuds with sufficient professional stature, who also possess the requisite knowledge, skills, and abilities. This should include, at a minimum, knowledge of informal dispute resolution practices as well as, depending on the office mandate, familiarity with process design, training, data analysis, and facilitation and group work with diverse populations. Agency ombuds offices should also seek to achieve the necessary diversity of ombuds skills and backgrounds on their staffs to credibly handle all matters presented to the office.

(b) While the spectrum of federal ombudsmen is too diverse to recommend a single federal position classification, job grade, and set of qualifications, agencies and the Office of Personnel Management should consider working collaboratively, in consultation with the relevant ombuds professional associations, to craft and propose appropriate job descriptions, classifications, and qualifications, as set forth in the preceding subsection, covering the major categories of federal ombuds.

9. *Training and Skills.*

(a) To promote accountability and professionalism, agencies should provide training to ombuds with regard to standards and practice, whether offered by one of the ombuds professional organizations or working groups, or from within the government.

(b) Ombuds should identify steps to build general competency and confidence within the office and to provide specific support to ombuds when cases become highly emotional or complex. More generally, as a regular practice to support and improve their skills, federal ombuds should participate in relevant professional working groups or ombuds association training programs.

(c) Ombuds offices should consider the use of developmental assignments via details to other agencies or offices, as appropriate, supplemented by mentoring, which can be helpful as part of their training program.

10. *Access to Counsel*. To protect the independence and confidentiality of federal ombuds, agencies should ensure, consistent with available resources, that ombuds have access to legal counsel for matters within the purview of the ombuds, whether provided within the agency with appropriate safeguards for confidentiality, by direct hiring of attorneys by the ombuds office, or under an arrangement enabling the sharing across agencies of counsel for this purpose. Such counsel should be free of conflicts of interest.

11. *Physical Facilities.* To reinforce confidentiality and the perception of independence, to the fullest extent possible and consistent with agency resources, the agency should ensure that the physical ombuds office and telephonic and online communications systems and documentation enable discreet meetings and conversations.

12. *Evaluation.* Each ombuds office should, as a regular professional practice, ensure the periodic evaluation of both office management and program effectiveness for the purposes of continual improvement and accountability.

13. *Providing Information.*

(a) Ombuds offices should provide information about relevant options to visitors to the ombuds office, including formal processes for resolving issues, and their requirements, so

that visitors do not unintentionally waive these options by virtue of seeking assistance in the ombuds office. Correspondingly, ombuds offices should not engage in behavior that could mislead employees or other visitors about the respective roles of the ombuds and those entities that provide formal complaint processes.

(b) Agencies should disclose publicly on their websites the identity, contact information, statutory or other basis, and scope of responsibility for their ombuds offices, to the extent permitted by law.

(c) Agency ombuds offices should explore ways to document for agency senior leadership, without breaching confidentiality, the value of the use of ombuds, including identification of systemic problems within the agency and, where available, relevant data on cost savings and avoidance of litigation.

14. *Records Management.* Federal ombuds offices should work with agency records officials to ensure appropriate confidentiality protections for the records created in the course of the office's work and to ensure that ombuds records are included in appropriate records schedules.

15. *Agency-wide Considerations.*

(a) Ombuds offices should undertake outreach and education to build effective relationships with those affected by their work. Outreach efforts should foster awareness of the services that ombuds offer, to promote understanding of ombuds (and agency) processes and to ensure that constituents understand the role of the ombuds and applicable standards.

(b) To ensure that there is a mutual understanding of respective roles and responsibilities within the agency, ombuds offices should work proactively with other offices and stakeholders within their agencies to establish protocols for referrals and overlap, to build cooperative relationships and partnerships that will enable resolutions, and to develop internal

champions. Such initiatives also help the ombuds to identify issues new to the agency, as well as patterns and systemic issues, and to understand how the ombuds can use the resources available to add the most value. Outreach should be ongoing to keep up with the turnover of agency officials and constituents and should utilize as many communications media as appropriate and feasible.

16. Presidential Action. The President should create an entity within the Executive Branch to serve as a central resource for agency ombuds to address matters of common concern and to support federal ombuds integrity, effectiveness, and professionalism by developing policies, technical standards, and standards for evaluation.