



COALITION OF FEDERAL OMBUDSMAN

December 5, 2016

Neil R. Eisner
Chair, Committee on Rulemaking
Administrative Conference of the United States
1120 20th Street, NW
Suite 706 South
Washington, DC 20036

Dear Chair Eisner:

I submit comments today on behalf of the Coalition of Federal Ombudsman (COFO) Executive Committee concerning the Administrative Conference's project, *The Ombudsman in Federal Agencies*. COFO is the principal interagency forum providing collaboration, advice, and guidance on professional standards, skills development, and effectiveness for ombuds practitioners in the federal government space. We would in particular like to express our appreciation for the extensive work of ACUS staff, the Committee on Rulemaking, and chiResolutions in bringing this project to fruition.

As noted in the project report, the ombuds profession has experienced explosive growth in the federal sector since ACUS' previous ombuds study in 1990. This study, therefore, arrives at a key moment in the development of federal ombuds practice and its recommendations have the potential to be highly consequential.

COFO recognizes that these recommendations were developed via extensive discussions in committee, discussions in which some of our members had the opportunity to participate, and does not seek to reopen debate on them. However, COFO is concerned that specific terminology or phrasing used in a few of the recommendations do not capture the spirit of what was agreed to during the committee meetings and could thus be interpreted in unintended ways by future decision-makers.

In light of their heightened importance to federal ombuds, COFO suggests that the following edits be made to ensure that the recommendations fully capture the committee's intentions and have a positive impact on the profession moving forward.

Recommendation 4(a) – Independence

This project cites independence as one of the three core ombuds standards of practice and, therefore, the language in the recommendation on independence is among the most crucial in the entire document. While subparts (b), (c), and (d) of Recommendation 4 contain appropriately definitive language concerning ombuds access to senior leadership, agency communication about offices, and retaliation, respectively, subpart (a) is concerningly lax regarding ombuds office structure, stating “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” (underlining added).

Independence is cited as a core ombuds standard of practice by this very project and all relevant ombuds professional organizations. It does not follow that ACUS would affirm independence as a core standard of practice and then undercut the goal of its own project by pivoting to a recommendation that agencies “consider” structuring offices to ensure the perception of independence.

COFO believes the current dichotomy in the recommendation language can be interpreted to offer decision-makers improper leeway on this core standard, putting future ombuds programs in danger of being established in a manner that compromises their independence. We do not believe that this is ACUS’ intent, and thus request in the strongest possible manner that the language in subpart (a) be brought in line with the definitive language utilized in the other subparts of Recommendation 4. Suggested language is below, with bolding used for new or changed language and strikethrough for removed language

4. Independence.

(a) To promote the effectiveness and independence of ombuds offices, agencies should ~~consider structuring~~ **structure** 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.

Recommendation 10 – Access to Counsel

This recommendation states that counsel available to the ombudsman “should be free of conflicts of interest” but does not further define what that means. Based on both the discussion in committee and the phrasing used earlier in the recommendation, which begins with “To protect the independence and confidentiality of federal ombuds”, it is COFO’s understanding that this recommendation is intended to ensure that counsel treat the ombuds specifically (as opposed to the agency) as the client, with the core ombuds standards of practice a primary consideration. With that in mind, COFO suggests that the Conference edit some wording in the recommendation to ensure that this interpretation is clear.

One option for doing so would be to add language at the end of the recommendation for clarity, as shown in Suggestion Option 1 below.

Suggestion Option 1:

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 **and should provide advice consistent with and supportive of the core ombuds standards of practice.**

Alternatively, the language at the beginning of the recommendation could be moved to the beginning of the final sentence as shown in Suggestion Option 2:

Suggestion Option 2:

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. **To protect the independence and confidentiality of federal ombuds,** such counsel should be free of conflicts of interest.

Recommendation 13(a) – Providing Information

This recommendation subpart states that ombuds offices “should provide information about relevant options to visitors ... and their requirements, so that visitors do not unintentionally waive these options by virtue of seeking assistance in the ombuds office.” COFO is concerned about this phrasing in two ways – first, that it implies an affirmative requirement on the ombuds, and second, it implies that use of ombuds process could in and of itself lead to waiver of the ability to use formal process, which it does not. This in turn could lead to offices being targeted through unjustified formal process from visitors unhappy with the ultimate outcome of a dispute. Therefore, COFO suggests a tweak to this language to both avert possible confusion and ensure that this recommendation is treated as a best practice, not an affirmative requirement.

Additionally, this subpart states that “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”. COFO suggests minor language changes to ensure that this too is treated as a best practice, not an affirmative requirement, and that ombuds not be conflated with “entities that provide formal complaint processes”.

In total, COFO suggests these edits to this subpart:

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 **and relevant time limits**, so that visitors **are aware of the variety of resolution options available to them.** ~~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~~ **ensure that they do not confuse** employees or other visitors about the role ~~respective roles~~ of the ombuds ~~and those~~ **vis a vis** entities that provide formal complaint processes.

We sincerely hope the Administrative Conference will adopt these suggestions, and on behalf of the Coalition we once again express our gratitude to all involved in this project.

Sincerely,



Paul Sotoudeh
Chair, Coalition of Federal Ombudsman