



The Use of Ombudsmen in Federal Agencies

Committee on Rulemaking

Proposed Recommendation for Council

1 This recommendation updates and expands on the Administrative Conference’s earlier
2 Recommendation 90-2, *The Ombudsman in Federal Agencies*, adopted on June 7, 1990. That
3 document concentrated on “external ombudsmen,” those who primarily receive and address
4 inquiries and complaints from the public, and was formulated before “use of ombuds” was added
5 to the definition of “means of alternative dispute resolution” in the Administrative Dispute
6 Resolution Act (ADRA)¹ in 1996. In 90-2, the Conference urged “the President and Congress to
7 support federal agency initiatives to create and fund an effective ombudsman in those agencies
8 with significant interaction with the public,” believing that those agencies would benefit from
9 establishing either agency-wide or program-specific ombudsman offices.

10 The present recommendation is based on a study of the far broader array of federal
11 ombuds² that have been established since the Conference’s earlier recommendation on this
12 subject. Federal ombuds now include multiple variations of both primarily externally-focused
13 and primarily internally-focused ombuds (i.e., those who receive inquiries and complaints from

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).



14 persons within the agency). These individuals and offices can and do make a distinct and
15 beneficial contribution to government effectiveness. While all forms of alternative dispute
16 resolution expressly embraced by the ADRA have the capacity to reduce litigation costs and
17 foster better relationships, the ombuds alone affords the constituent and the agency the
18 opportunity to learn about and address issues before, in effect, they have been joined.
19 Constituents and the agency are served by the ombuds' skilled, impartial assistance in resolution,
20 and the agency is served by the opportunity for critical early warning of specific and systemic
21 issues.

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

30 Externally-facing ombuds were more likely to report supporting the agency with specific
31 mission-related initiatives; helping the agency to improve specific policies, procedures, or
32 structures; making administrative decisions to resolve specific issues; helping within the agency
33 to keep its organizational processes coordinated; and advocating on behalf of individuals.

34 Internally-facing ombuds were more likely to report helping constituents by providing a safe way

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



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35 to discuss perceptions of unsafe or illegal behavior; promoting the use of fair and helpful
36 options; helping to prevent problems by coaching one-on-one; and providing group training and
37 briefings to constituents. Whistleblower ombuds and procurement ombuds—consonant with
38 their particular focus on more narrowly defined responsibilities—described their
39 accomplishments as providing specific information and education, and guidance about very
40 specific matters of concern to their constituents.

41 Since the Conference last considered ombuds in the federal government, the milieu in
42 which government operates has, by all accounts, become more polarized, with government itself
43 often the target of suspicion and hostility. In a challenging environment in which many federal
44 agencies struggle to maintain the trust of the public they serve and even of their own employees,
45 the ombuds is uniquely situated to provide both pertinent information and assistance in resolving
46 issues to constituents and the agency alike. The ability of the ombuds to provide a place
47 perceived as safe — which can offer a ready, responsive, and respectful hearing and credible
48 options — in itself builds trust. And trust is a commodity without which government in a
49 democratic society cannot function effectively.

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



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57 Although functionally the federal ombuds landscape is quite diverse, most federal
58 ombuds share three *core standards of practice* — independence, confidentiality, and impartiality
59 — and share common characteristics. The core standards are set forth in the standards adopted
60 by the American Bar Association (ABA),⁴ the International Ombudsman Association (IOA),⁵
61 and the United States Ombudsman Association (USOA),⁶ though with some variations,
62 particularly with respect to confidentiality. These organizations’ standards are generally
63 followed, as applicable, and considered essential by the ombuds profession, both within and
64 outside government. The further an ombuds office and the agency in which it resides deviate
65 from the three core standards in practice, the more difficult it will be to defend whatever
66 confidentiality the office does offer should it be subjected to legal challenge.

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

72 Agencies have the authority to establish ombuds offices or programs. Although
73 legislation establishing a generally applicable template and standards for federal ombudsmen has
74 not been enacted, the 1996 addition of the words “use of ombuds” to the definition of “means of
75 alternative dispute resolution” in ADRA clarifies that, when the ombuds office is assisting in the

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>.



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76 resolution of issues that are raised to it under its mandate, it is covered by the Act’s provisions.⁷
77 The Act’s coverage attaches to communications that take place when the constituent first
78 approaches the ombuds office with an issue and continues to cover communications that occur
79 until the case is, in effect, closed.⁸ While ADRA’s definition of “alternative means of dispute
80 resolution” includes use of ombuds, federal agency ombuds programs would benefit from certain
81 targeted amendments to ADRA to clarify certain definitions (e.g., “issue in controversy,”
82 “neutral,” “party”) and other provisions as they apply to the work of ombuds, to expressly align
83 them with current practice.

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

89 (1) The relationships among their statutory duties to report information, the requirements of
90 ADRA § 574(a)(3) on confidentiality, their agency’s mission, and the professional standards
91 to which they adhere. Any latitude they may have under ADRA § 574(d)(1) should be

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.



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92 considered in reaching an understanding within the agency and with constituents of the
93 breadth and limits of confidentiality consistent with statutory requirements.

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

97 (3) The effect on confidentiality of the Federal Service Labor-Management Relations Statute,¹²
98 pursuant to which the union may be entitled to notice and an opportunity to be present at
99 meetings with bargaining unit employees (for those ombuds that have employees with a
100 collective bargaining representative among their constituents, or who may have cause, in the
101 course of resolving issues that have been brought to them, to engage with represented
102 employees as well as management on issues affecting the terms and conditions of bargaining
103 unit employees).

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

109 To foster continual improvement and accountability of individual ombuds offices, the
110 recommendation advises that each ombuds office arrange for periodic evaluation of its

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.



111 management and program effectiveness. Evaluation of ombuds by colleagues within the office
112 can be useful if the office is of sufficient size to make this feasible. Otherwise, any external
113 evaluation should be conducted by individuals knowledgeable about the roles, functions, and
114 standards of practice of federal ombuds. For example, peer evaluation using the expertise of
115 similar types of ombuds in other offices or agencies, or by outside ombuds professionals, may be
116 suitable.

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

RECOMMENDATION

122 1. *Establishment and Standards.*

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



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

137 2. *Legislative Considerations.*

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

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

148 3. *Leadership Support.*

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

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



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154 4. *Independence.*

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

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

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

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

171 5. *Confidentiality.*

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



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177 disclosure of such communications, however, should not cease with issue resolution or other
178 indicia of closure within the ombuds office.

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

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

185 (d) If information is requested from an ombuds during discovery in litigation, or in
186 the context of an internal administrative proceeding in connection with a grievance or complaint,
187 then the ombuds should seek to protect confidentiality to the fullest extent possible under the
188 provisions of ADRA § 574, unless otherwise provided by law. Agencies should vigorously
189 defend the confidentiality offered by ombuds offices.

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

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

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



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

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

205 8. *Staffing.*

206 (a) Agencies should reinforce the credibility of federal ombuds by appointment of
207 ombuds with sufficient professional stature, who also possess the requisite knowledge, skills, and
208 abilities. This should include, at a minimum, knowledge of informal dispute resolution practices
209 as well as, depending on the office mandate, familiarity with process design, training, data
210 analysis, and facilitation and group work with diverse populations. Agency ombuds offices
211 should also seek to achieve the necessary diversity of ombuds skills and backgrounds on their
212 staffs to credibly handle all matters presented to the office.

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



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219 9. *Training and Skills.*

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

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

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

231 10. *Access to Counsel.* To protect the independence and confidentiality of federal
232 ombuds, agencies should ensure, consistent with available resources, that ombuds have access to
233 legal counsel for matters within the purview of the ombuds, whether provided within the agency
234 with appropriate safeguards for confidentiality, by direct hiring of attorneys by the ombuds
235 office, or under an arrangement enabling the sharing across agencies of counsel for this purpose.
236 Such counsel should be free of conflicts of interest.

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



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

244 13. *Providing Information.*

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

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

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

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



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262 15. *Agency-wide Considerations.*

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

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

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