



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

The Use of Ombudsmen in Federal Agencies

Committee on Rulemaking

Proposed Recommendation for Committee | October 19, 2016

NOTE: This document is a proposed recommendation currently under consideration. It has not been approved by the committee or the Administrative Conference and is subject to change.

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 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 ombuds² 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. These individuals and offices can and do make a distinct and beneficial contribution to government effectiveness. While all forms of alternative

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.



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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 complaints, 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.

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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.

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Internally-facing ombuds were more likely to report helping constituents by providing a safe way to discuss perceptions of unsafe or illegal behavior, and to use fair and helpful options; helping to prevent problems by coaching one-on-one; and providing group training and briefings to

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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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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 safe place, 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, impartiality, and confidentiality.

They are set forth in the standards adopted by the International Ombudsman Association, the American Bar Association, and the United States Ombudsman Association, though with some

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variations, particularly with respect to confidentiality.⁴ 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.

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Most federal ombuds also share three common characteristics—they do not make decisions binding on the agency or offer formal rights-based processes for redress (“informality”) but do have a commitment to fairness and credible processes for receiving, reviewing and assisting in the resolution of issues. These core standards and characteristics, taken together, define a unique profession.

In the absence of any applicable limiting legislation, it appears that agencies have the authority to establish ombuds offices or programs. Whether or not legislation establishing a generally applicable template and standards for federal ombudsmen is 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.⁵ 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.⁶

⁴ [Insert appropriate citations.]

⁵ Further, ombuds are ‘neutrals’ within the meaning of the Act including those ombuds who, after impartial review, advocate for specific processes or outcomes.

⁶ 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



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That said, 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 definitions (e.g., “issue in controversy,” “neutral,” “party”) and other provisions to expressly align them with current practice, particularly as it applies to the work of ombuds. Additionally, modification of ADRA § 574 to expressly encompass the kind of confidentiality offered under United States Ombudsman Association (USOA) standards⁷ as well as that offered by those practicing according to International Ombudsman Association (IOA) or American Bar Association (ABA) standards would assist those external ombuds who practice under USOA standards.

The research for this recommendation identified three unresolved issues that relate to the requirements of ADRA § 574 and the scope of confidentiality that ombuds offer to constituents.

Federal ombuds should be aware of these concerns and how they may affect particular ombuds programs:

- The relationship 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

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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.

⁷ Under the USOA standards, ombuds have the “discretion to keep confidential or release any information related to a complaint or investigation,” whereas ADRA § 574 bars a neutral from voluntarily disclosing any dispute resolution communication or any communication provided in confidence to the neutral with certain enumerated exceptions. The confidentiality provisions in IOA and ABA standards, on the other hand, are largely consistent with the requirements of § 574. Absent a modification of ADRA, however, the USOA divergence from § 574’s definition of confidentiality is arguably covered by § 574(d)(1) (permitting “alternative confidential procedures for disclosure”) provided the scope of confidentiality available is clearly understood within the agency and communicated to constituents.



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

- The requirements and interrelationship of the Federal Records Act,⁸ the Freedom of Information Act (FOIA),⁹ and the Privacy Act¹⁰ with regard to agency records and other documentation.
- The question whether, under the Federal Service Labor-Management Relations Statute¹¹ § 7114, the union is 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).

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.

We note also that although training not linked to issue resolution may not be covered by the confidentiality provisions in ADRA, it is a valuable tool for ombuds to use to increase the conflict competency of their agency or department and enhance recognition of the ombuds' role in the agency. To that end, knowledge and skill in conducting group work, ranging from focus

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⁸ See 44 U.S.C. Chaps. 31 and 33.

⁹ 5 U.S.C. § 552.

¹⁰ 5 U.S.C. § 552a.

¹¹ 5 U.S.C. Chap. 71.



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groups to sophisticated, complex interventions, should be considered in recruiting and training ombuds staff if this is consistent with the ombuds' mandate and agency needs.

Finally, the recommendation urges the creation of an independent 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.

Commented [DP1]: This text based on suggestions of S. Deyo

RECOMMENDATION

Establishment and Standards

1. Agencies should consider creating additional ombuds offices to provide safe places for designated constituents to raise issues and receive assistance in resolving them. They should ensure that the office is able to, and does adhere to, the three core standards of confidentiality, independence, and impartiality, as these standards are described in generally recognized sets of professional standards, which include those adopted by the International Ombudsman Association, the American Bar 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 to avoid any confusion.

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2. (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.



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(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 focus on the core standards of independence, impartiality, and confidentiality. 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.

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3. Agency leadership should provide visible support, renewed as leadership changes, for the role of the ombuds office and its standards, including confidentiality, independence, and impartiality.

4. Ombuds offices created by executive action should be established by 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.

5. Independence.

Commented [DP2]: Comment by B. Kurtz (HHS/ACL): It would be helpful to add the concept of avoiding conflicts of interest (both organizational and individual) in this section. In the Older Americans Act (and implementing regulations), e.g., there are strong provisions regarding the need to remove conflicts of interest in the LTC ombuds program, relating to both independence and impartiality.

(a) Both the perception of and actual independence from agency management structure are essential for the ombuds to be regarded as a source of impartial, fair assistance. Ombuds offices should be structurally separate from all other units of the agency and should have a separate budget. They should report only to the highest level of agency leadership and have no management decision-making authority apart from what is necessary to operate the ombuds office. Those few ombuds offices that have, by virtue of statutory mandate, some authority to make management decisions with respect to issues that are brought to them by constituents must have other indicia of independence that are unequivocal and sustainable.



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(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.

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(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.

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(d) Federal ombuds should not be subject to removal or the threat of removal from the ombuds office except for good cause shown. The act of looking into and assisting with the resolution of any issue within the ombuds' area of jurisdiction should not constitute such good cause.

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6. Confidentiality.

(a) Consistent with the generally accepted interpretation of the ADRA, 5 U.S.C. § 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. The restriction on disclosure of such communications, however, should not cease with issue resolution or other indicia of closure within the ombuds office.

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(b) The scope and limits of the confidentiality offered by ombuds offices should be articulated 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.



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

(d) Agencies should vigorously defend the confidentiality offered by ombuds offices practicing to generally accepted standards if challenged. 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.

7. *Impartiality:* Ombuds must be impartial with respect to matters brought to their attention and must be free of conflicts of interest with respect to the issues raised. After impartial review, an ombuds may appropriately advocate for specific processes or outcomes.

8. [Text previously appearing here is now in section 2(b).]

9. The credibility of federal ombuds should be reinforced by appointment of ombuds with the personal qualities appropriate to this work, who also possess sufficient stature and expertise. The latter 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.

Moved up [1]: Any action by Congress creating or affecting the operations of agency ombuds offices, whether through amendment of the ADRA or other legislative action, should focus on the core standards of independence, impartiality, and confidentiality. 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.

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10. While the spectrum of federal ombudsmen is too diverse to recommend a single federal position classification, job grade and set of qualifications at this time, agencies should consider working collaboratively with the Office of Personnel Management and the relevant ombuds professional associations to craft and propose appropriate job descriptions, classifications and qualifications covering the major categories of federal ombuds.

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11. To protect the independence and confidentiality of federal ombuds, it is essential that agencies ensure, consistent with available resources, that ombuds have access to non-agency



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independent counsel, whether provided under contract with the agency or under an arrangement enabling the sharing of such a resource across agencies.

12. 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 itself is self-contained and located and constructed to enable discreet meetings and conversations. Similarly, confidential telephonic and online communications and documentation should be protected from unauthorized intrusion.

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Additional Considerations and Practices

13. To the extent possible, ombuds offices should take advantage of peer evaluative processes by engaging the expertise of ombuds in other offices or agencies. Rigorous, credible peer evaluation can supplement office self-assessment and provide an additional degree of trust with respect to the handling of confidential information. As a regular professional practice for each office, supported by relevant professional working groups or ombuds associations, such evaluative processes, in addition to the normal lines of authority, will foster continual improvement and accountability of individual ombuds offices and the profession as a whole. Evaluation of ombuds by ombuds colleagues within an office can be useful if the office is of sufficient size to allow for this practice. For the same reasons of continuous improvement and accountability, federal ombuds should be encouraged as a regular practice to participate in relevant professional working groups or ombuds associations and training programs. External evaluation should be conducted by individuals knowledgeable about the roles and functions of federal ombuds.

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Commented [DP5]: Suggestion by B. Kurtz (HHS/ACL): The primary recommendation here should be that ombuds offices undergo periodic evaluation for the purposes of continual improvement and accountability.

14. [Text previously appearing here has been moved to the final section of the draft recommendation.]



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15. Ombuds offices should offer all relevant options to visitors to the ombuds office, including formal processes for resolving issues, and their requirements, so that no rights are unintentionally waived 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 other entities that provide formal complaint processes. Addressing “territorial” issues within the agency proactively through dialogue and establishing, as appropriate, protocols for referral will build mutual support and avoid any unintentional waiver of rights.

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16. Because of the critical importance of confidentiality to ombuds work, agency records management officials must be careful to avoid either inadvertent or compulsory disclosure of communications made in confidence. Informal documentation by ombuds of confidential case information should be considered “rough notes” as long as they are not shared. However, for those case records that must be contained in a system of records because they are more formal or shared, records schedules classifying confidential ombuds case records as temporary and providing for destruction upon closure of the subject case, should be the norm for offices practicing according to generally accepted professional standards, except for those offices subject to other legal constraints or requirements dictating that records be retained for a longer duration.

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17. Ombuds offices should engage in extensive outreach and build effective relationships with internal stakeholders and constituents. Outreach efforts should foster awareness of what the ombuds has to offer, to promote understanding of ombuds (and agency) processes, and to ensure that constituents understand the role of the ombuds and the standards adhered to. To ensure that there is a mutual understanding of roles and responsibilities, it is

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important for internal stakeholders, to establish protocols for referrals and overlap, to build cooperative relationships and partnerships that will enable resolutions, and to develop internal champions. Outreach also helps 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. Outreach to agency inspector general offices (OIG) is particularly important. In situations where their concerns overlap, it may be beneficial for OIG and ombuds offices to develop a mutual understanding of how these offices are distinct and complementary and an awareness of their respective roles, requirements, and standards.

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18. In staffing an agency's ombuds office, the agency or office should seek to achieve representation of a diversity of skills and backgrounds. Likewise, if size permits, mechanisms of mutual support should be established in order to build general competency and confidence within the office and to provide specific support when cases become highly emotional or complex. At a minimum, basic training for federal ombuds with regard to standards and practice, whether offered by one of the ombuds professional organizations or from within the government, is essential. Different modules for specific types of ombuds should be included. Training will further professionalize the role and status of ombuds in the federal government and foster accountability.

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

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20. An independent entity within the Executive Branch should be created by Congress or the President to serve as a central resource to address integrity and effectiveness issues and increase the professionalism of federal ombuds by developing policies, technical standards, and standards for evaluation.

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