

**Comments on the October 7, 2016 draft ombudsman recommendation,
submitted by Administrative Conference Public Member Meredith Fuchs
(formerly a Conference Government Member from the Consumer Financial
Protection Bureau)**

RECOMMENDATION

Establishment and Standards

1. In order to achieve the benefits that ombuds uniquely provide, Congress and agency officials should consider creating ombuds offices that could provide safe places for designated constituents to raise issues and receive assistance in resolving them. They should consider attaching the “ombuds” title to the office only if 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. Existing offices with the ombuds title that do not adhere to these standards should consider modifying their title.

Recommend removing this initial language before the comma. It alludes to matters outside the recommendation, but without specificity, and thus adds ambiguity.

2. Agencies establishing an ombuds office should incorporate the three core standards of confidentiality, independence, and impartiality in the structure and procedures of that office, and should follow, to the extent applicable, the procedural recommendations below.

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.



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5. *Independence.*

(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.

(b) Ombuds should have 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 of notice to the agency.

(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 ombud's area of jurisdiction should not constitute such good cause.

6. *Confidentiality.*

(a) Consistent with the generally accepted interpretation of the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. § 574, as applied to alternative dispute resolution

The phrase "highest level of leadership" is unclear. Does it mean the head of the agency? I recommend that this be defined to be senior leadership at the head, deputy head, or associate level. It may often be useful to report to someone other than the head of the agency for operational support and a more detailed level of understanding about agency processes.

I recommend including a statement that ombuds are subject to the same confidentiality and ethics rules of all agency employees. Without that, this will not be easy for agencies to provide.

Can they be appointable for a term?



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offices, the Act's requirements for confidentiality should be understood by agencies to 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.

(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.

(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.

As noted above, consider as a possible place to say that ombuds are subject to the same confidentiality and ethics requirements as other employees.

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. 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



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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.

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, facilitation and group work with diverse populations, training, and data analysis.

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 various ombuds professional associations to craft and propose appropriate job descriptions, classifications and qualifications covering the major categories of federal ombuds.

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 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 physical ombuds office itself should be 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.

It is very unusual to have agency personnel represented by counsel other than internal counsel or DOJ. This would be a significant change and have budgetary consequences for agencies. The ombuds responsibility is to advocate for fair processes, not to challenge agency views of the law. So, it is hard to understand why this is needed. At my agency we provided an ethics lawyer as internal counsel to the ombuds because she already had independence from the regular chain of command.



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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

14. An independent entity within the Executive Branch should be created by legislation or executive order to address integrity and effectiveness issues and increase the professionalism of federal ombuds by developing policies, technical standards, and standards for evaluation.

15. Ombuds offices should offer all relevant options to visitors to the ombuds office, including 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, ombuds offices should not engage in behavior that could mislead employees about the respective roles of the ombuds and these other entities. Addressing “territorial” issues

I would go further and say that ombuds should, in the first instance, refer people to agency processes for resolving issues and only proceed once the person has indicated that they used agency processes or have a reason that they need to remain confidential to the agency. Otherwise there is a risk that people will bypass the existing process unnecessarily. There is a big risk of scope creep that could cause other agency offices to resent the ombuds.



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within the agency proactively through dialogue and establishing, as appropriate, protocols for referral will build mutual support and avoid any unintentional waiver of rights.

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, the several records schedules recently approved, 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.

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. It is important for internal stakeholders, in order to ensure that there is a mutual understanding of roles and responsibilities, 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

This adjective could create differences of opinion. I recommend removing it and instead saying something more descriptive like "outreach to individuals and stakeholders whose interactions with the agency may fall within the scope of the ombuds's mandate."



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appropriate and feasible. Outreach to agency inspector general offices (OIG) is particularly important. Developing a mutual understanding of how the OIG and ombuds offices are distinct and complementary and an awareness of their respective roles, requirements and standards may prove to be beneficial in situations where their concerns overlap.

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.

19. Apprenticeships via details to other agencies or offices, as appropriate, supplemented by mentoring, can be helpful as part of a training program for federal ombuds.