



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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A Reappraisal – The Nature and Value of Ombudsmen in Federal Agencies

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 neutrality or 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 offer 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 1¹ – 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

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.

gathered for this Report may help to explain why federal ombuds—and their accomplishments—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** for different, cross-cutting characteristics of various ombuds office types.

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 and/or neutrality, independence, and informality.

Were an effort made to promulgate a common set of standards for the full spectrum of federal ombuds, *independence*, and *neutrality or 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 offer 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 Ombudsman (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.

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),⁴ 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 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,⁵ 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.⁶

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.

⁴ See discussion of standards in Report Part 2 Section 1.3.3 and 1.3.4

⁵ 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.

⁶ Office of the Attorney General, 2007; See also Report Part 2 Sections 1.6, 1.7, and 2.2 for specific examples.

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.
 - 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.

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
- 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.

Summary and Highlights of the Legal Analysis⁷

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. ADRA⁸ § 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.

⁷ Citations in the legal portions of the Report follow Bluebook rather than APA formatting.

⁸ Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–584 (2012) [cited herein by section number only].

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 include “use of ombuds” under the Act’s requirements and protections.⁹ 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”¹⁰ 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”¹¹ 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

⁹ 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).

¹⁰ See 5 U.S.C. § 571(3).

¹¹ 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*).

text is not clear and there appears to be no legislative history¹² 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, 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”¹³ 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.”¹⁴

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.¹⁵ 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.¹⁶

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

¹² 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 but does not clarify which ombuds functions are covered or what might have been meant by the somewhat contradictory term “neutral parties.”

¹³ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

¹⁴ See *United States v. Wilson*, 503 U.S. 333, 336 (1992); *Stone v. INS*, 514 U.S. 386, 397 (1995).

¹⁵ See 5 U.S.C. § 571(8).

¹⁶ See also *ABA Guide to Confidentiality*, *supra* note 4, at 60.

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 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.¹⁷

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.¹⁸ 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

¹⁷ *Id.* at 61.

¹⁸ *Id.* at 60.

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 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.¹⁹ 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

¹⁹ 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).

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 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.²⁰ 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 ACUS²¹ 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.²²

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

²⁰ See Charles L. Howard, *THE ORGANIZATIONAL OMBUDSMAN, ORIGINS, ROLES, AND OPERATIONS—A LEGAL GUIDE* 305–07 (2010).

²¹ See Administrative Conference Recommendation 87-3, Agency Hiring of Private Attorneys, 52 Fed. Reg. 23,632 (June 24, 1987).

²² See *Sharing Neutrals*, HHS, <http://www.hhs.gov/dab/divisions/adr/sharingneutrals/sn.html>.

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 (IOA, ABA and USOA).²³ 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.²⁴ 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.²⁵ 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

²³ 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).

²⁴ 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.

²⁵ 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).

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, 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.²⁶ The same would be true for many of the reporting

²⁶ 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

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.”²⁷

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

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

²⁷ 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.”).

advise that if the visitor declines and the ombuds affirmatively is 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)²⁸ 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

²⁸ 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 . . .”).

given collateral responsibilities that would be inconsistent with such disavowals of agency. 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 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)²⁹ § 7114; the Inspector General Act of 1978³⁰ and the impact of the Federal Records Act (FRA),³¹ Freedom of Information Act (FOIA)³² and the Privacy Act³³ on ombuds records and confidentiality.

Draft ACUS Recommendation

The following draft recommendation is submitted by the authors of this report for consideration by members of the Administrative Conference, and does not represent the views of the Conference or its committees or staff.

Preamble

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) 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.

²⁹ 5 U.S.C. §§ 7101–7135 (2012).

³⁰ Pub. L. No. 95-452 (Oct. 12, 1978) (codified as amended at 5 U.S.C. app (2015)) (“IG Act”).

³¹ 44 U.S.C. §§ 3101–3107 (2016) (current through Pub. L. No. 114-185).

³² See also 5 U.S.C. § 552 (2016) (current through Pub. L. No. 114-185).

³³ 5 U.S.C. § 552a (2012).

Having examined a far broader array of federal ombudsman that includes multiple variations of both primarily externally-focused and primarily internally-focused ombudsmen, ombudsmen can and do make a distinct and beneficial contribution to government effectiveness. While all forms of alternative dispute resolution expressly embraced by the Administrative Dispute Resolution Act 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.

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 ombudsman is uniquely situated to provide both pertinent information and assistance in resolving issues to constituents and agency alike. The ability of the ombudsman 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 ombudsmen and those that are contemplating creating ombuds offices to align their office standards and practices with those included in this recommendation.

Although functionally the federal ombuds landscape is quite diverse, most federal ombuds share three *core standards of practice*—independence, neutrality or impartiality, and confidentiality. These are considered essential to the ombuds profession. Most 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 attributes, taken together, define a unique profession.

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. The Act’s coverage attaches when the constituent first approaches the ombuds office with an issue and continues until the case is, in effect, closed.³⁴

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 § 574 to expressly encompass the kind of

³⁴ 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 December 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).

confidentiality offered under United States Ombudsman Association (USOA) standards³⁵ 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 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 in this regard that although training that is 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 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.

The Recommendations

Definition and standards

1. In order to achieve the benefits that ombuds uniquely provide, those legislative and agency officials who would create offices intended to provide safe places for designated constituents to raise issues and receive assistance in resolving them should consider

³⁵ 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.

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/neutrality, as these standards are described in at least one of the three generally recognized sets of professional standards 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.

2. Although a new statute specifically pertaining to ombuds is not necessarily warranted at this time, clarity and uniformity of definition, purpose, and standards for federal ombudsmen would benefit federal ombuds, the constituencies they serve, and the profession at large. Any legislative efforts should focus on the three core standards (independence, neutrality or impartiality, and confidentiality) while accounting for the differences among the three generally recognized sets of professional standards, particularly as to confidentiality. Further it should account for differences in constituencies (whether primarily internal or external), type of office (advocates, analytic, organizational, etc.), and agency missions.
 - i. *Independence*: Both the perception of and actual independence from agency management structure is essential for the ombuds to be regarded as a source of impartial, fair assistance. Ombuds offices, therefore, should be structurally separate from all but 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 their 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. 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.

ii. *Confidentiality:*

- a. 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.
- b. 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.
- c. Agency leadership and management should avoid asking for information falling within the scope of confidentiality offered by the ombuds office. 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.

iii. *Impartiality and Neutrality:* Consistent with ADRA, a “neutral” is an individual who is acceptable to the parties and assists them in resolving issues in controversy.

Ombuds who meet these criteria should be considered to be neutrals under the Act.

This interpretation should apply to ombuds who, after impartial review, advocate for specific processes or outcomes.

Establishment and structure

1. 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, training and data analysis.
2. 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.
3. In order to ensure the independence of ombuds who are often looking into agency actions and practices, ombuds offices should be established with a separate structure that permits independent reporting to the highest level of the agency and with a separate budget.
4. 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.
5. 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 a degree of trust with respect to the handling of confidential information not associated with other

third-party evaluations. 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 the continual improvement and accountability of individual ombuds offices and the profession as a whole. Likewise, peer evaluation within the office for individual practitioners 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.

Legal issues

1. Consistent with the generally accepted interpretation of § 574 of ADRA as applied to alternative dispute resolution offices, the Act's requirements for confidentiality should be understood to attach at intake and continue until the issue has been resolved or otherwise no longer being handled by the ombuds, whether or not the constituent ever engages in mediation facilitated by the ombuds office.
2. 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.
3. Agencies where federal ombuds practice according to the core standards, i.e., independence, neutrality or impartiality, and confidentiality, 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. This principle should be reiterated in communications by the ombuds to constituents.

Select practices

1. Ombuds offices should advise 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, 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 within the agency proactively through dialogue and establishing, as appropriate, protocols for referral will build mutual support and avoid any unintentional waiver of rights.
2. Some informal documentation by ombuds of confidential case information can 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 and/or shared, the record 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. Ombuds offices should engage in extensive outreach and build effective relationships with internal stakeholders and constituents, to 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 build the 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 media as appropriate and feasible.

3. Such outreach is particularly important for agency inspector general offices (OIG) inasmuch as proactively 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.
4. 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.
5. 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.
6. Federal ombuds should be aware of legal issues that may affect their work as they relate to the requirements under the Administrative Dispute Resolution Act (ADRA) § 574 and the scope of confidentiality that ombuds offer to constituents.

The legal issues include:

- a. The relationship between 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. In this regard 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.
- b. The requirements and interrelationship of the Federal Records Act, the Freedom of Information Act (FOIA) and the Privacy Act with regard to agency records and other documentation.
- c. 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, should consider the question of whether, under FSLMRS § 7114, the union is entitled to notice and an opportunity to be present at meetings with bargaining unit employees.



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	<ul style="list-style-type: none"> • 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. <ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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 Ombudsman
	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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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.	<ul style="list-style-type: none"> • 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 (SI) 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	Individuals who respond in a responsible and constructive way to complaints made by or on behalf of individual nursing home patients." While it is mandated by the Older Americans Act, it is decentralized, and the implementation at the state level is often handled by a designated state agency.	<p>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."</p> <p>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</p> <p>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.</p>	Persons in long term care and residential care facilities for the elderly	<ul style="list-style-type: none"> • Independence • Confidentiality • Advocacy • Mandatory reporting of abuse and neglect 	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.	Long-Term Care Ombudsman
	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.	<p>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.</p> <p>For the Coast Guard COMMANDANT INSTRUCTION 1750.4E 14 January 2013.</p>	Service members' families	<p>Per the Ombudsman Code of Conduct, each ombudsman shall</p> <ul style="list-style-type: none"> • 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."