



Administrative Conference of the United States

**A REAPPRAISAL – THE NATURE AND VALUE OF
OMBUDSMEN IN FEDERAL AGENCIES**

PART 4: THE RECOMMENDATION

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

Proposed ACUS Recommendation

The following draft constitutes the proposed recommendation of the Administrative Conference’s Committee on Rulemaking, for consideration by the full Conference membership. It is based on the authors’ suggested recommendations submitted to the Conference on September 19, 2016. The original draft was modified by the committee, with the assistance of the authors and the Conference staff, through a series of public committee meetings held on September 24, October 19 and November 3, 2016, as well as by consideration and review of comments received via the ACUS website. The authors have worked collaboratively with all concerned to understand the concerns raised and are in general agreement with this proposed recommendation as put forth by the Committee on Rulemaking.

The Use of Ombudsmen in Federal Agencies

Committee on Rulemaking

Proposed Recommendation for Council | November 17, 2016

This recommendation updates and expands on the Administrative Conference’s earlier Recommendation 90-2, *The Ombudsman in Federal Agencies*, adopted on June 7, 1990. That document concentrated on “external ombudsmen,” those who primarily receive and address inquiries and complaints from the public, and was formulated before “use of ombuds” was added to the definition of “means of alternative dispute resolution” in the Administrative Dispute Resolution Act (ADRA)¹ in 1996. In 90-2, the Conference urged “the President and Congress to support federal agency initiatives to create and fund an effective ombudsman in those agencies

¹ 5 U.S.C. §§ 571-84; see § 571(3).

with significant interaction with the public,” believing that those agencies would benefit from establishing either agency-wide or program-specific ombudsman offices.

The present recommendation is based on a study of the far broader array of federal ombuds² that have been established since the Conference’s earlier recommendation on this subject. Federal ombuds now include multiple variations of both primarily externally-focused and primarily internally-focused ombuds (i.e., those who receive inquiries and complaints from persons within the agency). These individuals and offices can and do make a distinct and beneficial contribution to government effectiveness. While all forms of alternative dispute resolution expressly embraced by the ADRA have the capacity to reduce litigation costs and foster better relationships, the ombuds alone affords the constituent and the agency the opportunity to learn about and address issues before, in effect, they have been joined. Constituents and the agency are served by the ombuds’ skilled, impartial assistance in resolution, and the agency is served by the opportunity for critical early warning of specific and systemic issues.

The research conducted to support this recommendation, including quantitative and qualitative surveys, interviews, case studies and profiles, revealed that federal ombuds can add value to their agencies in a variety of ways.³ Ombuds (1) identify significant new issues and patterns of concerns that are not well known or being ignored; (2) support significant procedural changes; (3) contribute to significant cost savings by dealing with identified issues, often at the

² The term *ombudsman* is Scandinavian and means representative or proxy. Variations on the term exist in the field (ombudsmen, ombudsperson, ombuds, etc.) In this recommendation, the term “ombuds” will be used as the predominant term to be as inclusive as possible. For historical background on the use of ombudsmen in other countries and their potential value in the United States, *see* Walter Gellhorn, *OMBUDSMEN AND OTHERS: CITIZEN PROTECTORS IN NINE COUNTRIES* (1966), and Walter Gellhorn, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES* (1966).

³ Houk et al., *A Reappraisal — The Nature and Value of Ombudsmen in Federal Agencies*, *available at* www.acus.gov/research-projects/ombudsman-federal-agencies-0

earliest or pre-complaint stages, thereby reducing litigation and settling serious disputes; (4) prevent problems through training and briefings; (5) serve as an important liaison between colleagues, units, or agencies; and (6) provide a fair process for constituents.

Externally-facing ombuds were more likely to report supporting the agency with specific mission-related initiatives; helping the agency to improve specific policies, procedures, or structures; making administrative decisions to resolve specific issues; helping within the agency to keep its organizational processes coordinated; and advocating on behalf of individuals. Internally-facing ombuds were more likely to report helping constituents by providing a safe way to discuss perceptions of unsafe or illegal behavior; promoting the use of fair and helpful options; helping to prevent problems by coaching one-on-one; and providing group training and briefings to constituents. Whistleblower ombuds and procurement ombuds—consonant with their particular focus on more narrowly defined responsibilities—described their accomplishments as providing specific information and education, and guidance about very specific matters of concern to their constituents.

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

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

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

Most federal ombuds also share the following common characteristics: (1) Ombuds do not make decisions binding on the agency or provide formal rights-based processes for redress; (2) they have a commitment to fairness; and (3) they provide credible processes for receiving,

⁴ ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004), available at: <https://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf>.

⁵ IOA STANDARDS OF PRACTICE (2009), available at: https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf.

⁶ USOA GOVERNMENTAL OMBUDSMAN STANDARDS (2003), available at: <https://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf>.

reviewing, and assisting in the resolution of issues. The three core standards and these common characteristics, taken together, are central to the ombuds profession.

Agencies have the authority to establish ombuds offices or programs. Although legislation establishing a generally applicable template and standards for federal ombudsmen has not been 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.⁷ The Act’s coverage attaches to communications that take place when the constituent first approaches the ombuds office with an issue and continues to cover communications that occur until the case is, in effect, closed.⁸ 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 certain definitions (e.g., “issue in controversy,” “neutral,” “party”) and other provisions as they apply to the work of ombuds, to expressly align them with current practice.

The research for this recommendation also identified three areas of potential conflict between (a) the requirements of ADRA § 574 and the scope of confidentiality that ombuds offer to constituents and (b) other legal requirements that may be applicable in certain situations.

⁷ Further, ombuds are ‘neutrals’ within the meaning of the Act including those ombuds who, after impartial review, advocate for specific processes or outcomes. *See* ABA STANDARDS, *supra* note 4, at 14.

⁸ The Act’s coverage is generally understood to begin at intake in alternative dispute resolution offices and continue until closure even when the constituent’s interaction with the office ends without a session process involving both parties. For example, guidance concerning ADRA confidentiality issued by the Federal Alternative Dispute Resolution Council in 2000 concluded that ADRA confidentiality applies to the intake and convening stages of ADR. *See* Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085, 83,090 (Dep’t of Justice Dec. 29, 2000). Further, the Interagency ADR Working Group Steering Committee in its Guide states that ADR program administrators are “neutrals when they are helping the parties resolve their controversy by, for example, discussing ADR options with the parties, coaching, and preparing them to negotiate” *See* Interagency ADR Working Group Steering Comm., Protecting the Confidentiality of Dispute Resolution Proceedings 8 (2006). While ADRA covers dispute resolution communications occurring through the duration of the case, the neutral’s obligation to maintain this confidentiality does not end with the closure of the case.

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

- (1) The relationships among their statutory duties to report information, the requirements of ADRA § 574(a)(3) on confidentiality, their agency's mission, and the professional standards to which they adhere. Any latitude they may have under ADRA § 574(d)(1) should be considered in reaching an understanding within the agency and with constituents of the breadth and limits of confidentiality consistent with statutory requirements.
- (2) The requirements and interrelationship of the Federal Records Act,⁹ the Freedom of Information Act,¹⁰ and the Privacy Act,¹¹ with regard to agency records and other documentation.
- (3) The effect on confidentiality of the Federal Service Labor-Management Relations Statute,¹² pursuant to which the union may be entitled to notice and an opportunity to be present at meetings with bargaining unit employees (for those ombuds that have employees with a collective bargaining representative among their constituents, or who may have cause, in the course of resolving issues that have been brought to them, to engage with represented employees as well as management on issues affecting the terms and conditions of bargaining unit employees).

In addition, this recommendation addresses standards applicable to federal agency ombuds offices and related issues involved in creating such offices. The practices included in this recommendation are intended to highlight some overarching beneficial practices observed

⁹ 44 U.S.C. Chaps. 21, 22, 29, 31, and 33.

¹⁰ 5 U.S.C. § 552.

¹¹ 5 U.S.C. § 552a.

¹² 5 U.S.C. §§ 7101-35; *see* § 7114.

among federal ombuds and to supplement the recommended practices and guidance available from various ombuds professional organizations.

To foster continual improvement and accountability of individual ombuds offices, the recommendation advises that each ombuds office arrange for periodic evaluation of its management and program effectiveness. Evaluation of ombuds by colleagues within the office can be useful if the office is of sufficient size to make this feasible. Otherwise, any external evaluation should be conducted by individuals knowledgeable about the roles, functions, and standards of practice of federal ombuds. For example, peer evaluation using the expertise of similar types of ombuds in other offices or agencies, or by outside ombuds professionals, may be suitable.

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

RECOMMENDATION

1. *Establishment and Standards.*

- (a) Agencies should consider creating additional ombuds offices to provide places perceived as safe for designated constituents to raise issues confidentially and receive assistance in resolving them without fear of retribution. They should ensure that the office is able to, and does, adhere to the three core standards of independence, confidentiality, and impartiality, as these standards are described in generally recognized sets of professional standards, which include those adopted by the American Bar Association, the International Ombudsman

Association, and the United States Ombudsman Association, and they should follow, to the extent applicable, the procedural recommendations below. Existing offices with the ombuds title that do not adhere to these standards should consider modifying their title, where permitted, to avoid any confusion.

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

2. *Legislative Considerations.*

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

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

3. *Leadership Support.*

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

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

4. *Independence.*

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

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

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

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

5. *Confidentiality.*

(a) Consistent with the generally accepted interpretation of ADRA § 574, as applied to alternative dispute resolution offices, agencies should understand and support that the Act's requirements for confidentiality attach to communications that occur at intake and continue until the issue has been resolved or is otherwise no longer being handled by the ombuds, whether or

not the constituent ever engages in mediation facilitated by the ombuds office. Restrictions on disclosure of such communications, however, should not cease with issue resolution or other indicia of closure within the ombuds office.

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

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

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

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

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

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

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

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

8. *Staffing.*

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

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

9. *Training and Skills.*

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

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

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

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

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

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

13. *Providing Information.*

(a) Ombuds offices should provide information about relevant options to visitors to the ombuds office, including formal processes for resolving issues, and their requirements, so

that visitors do not unintentionally waive these options by virtue of seeking assistance in the ombuds office. Correspondingly, ombuds offices should not engage in behavior that could mislead employees or other visitors about the respective roles of the ombuds and those entities that provide formal complaint processes.

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

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

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

15. *Agency-wide Considerations.*

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

(b) To ensure that there is a mutual understanding of respective roles and responsibilities within the agency, ombuds offices should work proactively with other offices and stakeholders within their agencies to establish protocols for referrals and overlap, to build cooperative relationships and partnerships that will enable resolutions, and to develop internal

champions. Such initiatives also help the ombuds to identify issues new to the agency, as well as patterns and systemic issues, and to understand how the ombuds can use the resources available to add the most value. Outreach should be ongoing to keep up with the turnover of agency officials and constituents and should utilize as many communications media as appropriate and feasible.

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

