



Administrative Conference of the United States

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**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

## 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.

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.<sup>1</sup>

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 confidentiality offered under United States Ombudsman Association (USOA) standards<sup>2</sup> 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.

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<sup>1</sup> 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).

<sup>2</sup> 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.

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 Recommendation**

### **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 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.

