



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## The Use of Ombudsmen in Federal Agencies

### Committee on Rulemaking

Proposed Recommendation | December 14, 2016

#### Proposed Amendment

**This document displays an amendment from the Council (as noted in the margin).**

1 This recommendation updates and expands on the Administrative Conference’s earlier  
2 Recommendation 90-2, *The Ombudsman in Federal Agencies*, adopted on June 7, 1990. That  
3 document concentrated on “external ombudsmen,” those who primarily receive and address  
4 inquiries and complaints from the public, and was formulated before “use of ombuds” was added  
5 to the definition of “means of alternative dispute resolution” in the Administrative Dispute  
6 Resolution Act (ADRA)<sup>1</sup> in 1996. In 90-2, the Conference urged “the President and Congress to  
7 support federal agency initiatives to create and fund an effective ombudsman in those agencies  
8 with significant interaction with the public,” believing that those agencies would benefit from  
9 establishing either agency-wide or program-specific ombudsman offices.

10 The present recommendation is based on a study of the far broader array of federal  
11 ombuds<sup>2</sup> that have been established since the Conference’s earlier recommendation on this  
12 subject. Federal ombuds now include multiple variations of both primarily externally-focused  
13 and primarily internally-focused ombuds (i.e., those who receive inquiries and complaints from  
14 persons within the agency). These individuals and offices can and do make a distinct and

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<sup>1</sup> 5 U.S.C. § 571–84 (2012); *see id.* § 571(3) (2012).

<sup>2</sup> 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); WALTER GELLHORN, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES* (1966).



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15 beneficial contribution to government effectiveness. While all forms of alternative dispute  
16 resolution expressly embraced by the ADRA have the capacity to reduce litigation costs and  
17 foster better relationships, the ombuds alone affords the constituent and the agency the  
18 opportunity to learn about and address issues before, in effect, they have been joined.  
19 Constituents and the agency are served by the ombuds' skilled, impartial assistance in resolution,  
20 and the agency is served by the opportunity for critical early warning of specific and systemic  
21 issues.

22 The research conducted to support this recommendation, including quantitative and  
23 qualitative surveys, interviews, case studies and profiles, revealed that federal ombuds can add  
24 value to their agencies in a variety of ways.<sup>3</sup> Ombuds (1) identify significant new issues and  
25 patterns of concerns that are not well known or being ignored; (2) support significant procedural  
26 changes; (3) contribute to significant cost savings by dealing with identified issues, often at the  
27 earliest or pre-complaint stages, thereby reducing litigation and settling serious disputes; (4)  
28 prevent problems through training and briefings; (5) serve as an important liaison between  
29 colleagues, units, or agencies; and (6) provide a fair process for constituents.

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

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<sup>3</sup> Carole 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](http://www.acus.gov/research-projects/ombudsman-federal-agencies-0).



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

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

57 Although functionally the federal ombuds landscape is quite diverse, most federal  
58 ombuds share three *core standards of practice*—independence, confidentiality, and  
59 impartiality—and share common characteristics. The core standards are set forth in the  
60 standards adopted by the American Bar Association (ABA),<sup>4</sup> the International Ombudsman  
61 Association (IOA),<sup>5</sup> and the United States Ombudsman Association (USOA),<sup>6</sup> though with some  
62 variations, particularly with respect to confidentiality. These organizations' standards are  
63 generally followed, as applicable, and considered essential by the ombuds profession, both

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

<sup>5</sup> IOA STANDARDS OF PRACTICE (2009), available at [https://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/IOA\\_Standards\\_of\\_Practice\\_Oct09.pdf](https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf).

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



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64 within and outside government. The further an ombuds office and the agency in which it resides  
65 deviate from the three core standards in practice, the more difficult it will be to defend whatever  
66 confidentiality the office does offer should it be subjected to legal challenge.

67 Most federal ombuds also share the following common characteristics: (1) Ombuds do  
68 not make decisions binding on the agency or provide formal rights-based processes for redress;  
69 (2) they have a commitment to fairness; and (3) they provide credible processes for receiving,  
70 reviewing, and assisting in the resolution of issues. The three core standards and these common  
71 characteristics, taken together, are central to the ombuds profession.

72 Agencies have the authority to establish ombuds offices or programs. Although  
73 legislation establishing a generally applicable template and standards for federal ombudsmen has  
74 not been enacted, the 1996 addition of the words “use of ombuds” to the definition of “means of  
75 alternative dispute resolution” in ADRA clarifies that, when the ombuds office is assisting in the  
76 resolution of issues that are raised to it under its mandate, it is covered by the Act’s provisions.<sup>7</sup>  
77 The Act’s coverage attaches to communications that take place when the constituent first  
78 approaches the ombuds office with an issue and continues to cover communications that occur  
79 until the case is, in effect, closed.<sup>8</sup> While ADRA’s definition of “alternative means of dispute  
80 resolution” includes use of ombuds, federal agency ombuds programs would benefit from certain  
81 targeted amendments to ADRA to clarify certain definitions (e.g., “issue in controversy,”  
82 “neutral,” “party”) and other provisions as they apply to the work of ombuds, to expressly align  
83 them with current practice.

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<sup>7</sup> 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.

<sup>8</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 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.



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84 The research for this recommendation also identified three areas of potential conflict  
85 between (a) the requirements of ADRA § 574 and the scope of confidentiality that ombuds offer  
86 to constituents and (b) other legal requirements that may be applicable in certain situations.  
87 Federal ombuds should be aware of these matters and how they may affect particular ombuds  
88 programs:

89 (a) The relationships among their statutory duties to report information, the  
90 requirements of ADRA § 574(a)(3) on confidentiality, their agency's mission, and the  
91 professional standards to which they adhere. Any latitude they may have under ADRA §  
92 574(d)(1) should be considered in reaching an understanding within the agency and with  
93 constituents of the breadth and limits of confidentiality consistent with statutory requirements.

94 (b) The requirements and interrelationship of the Federal Records Act,<sup>9</sup> the Freedom  
95 of Information Act,<sup>10</sup> and the Privacy Act,<sup>11</sup> with regard to agency records and other  
96 documentation.

97 (c) The effect on confidentiality of the Federal Service Labor-Management Relations  
98 Statute,<sup>12</sup> pursuant to which the union may be entitled to notice and an opportunity to be present  
99 at meetings with bargaining unit employees (for those ombuds that have employees with a  
100 collective bargaining representative among their constituents, or who may have cause, in the  
101 course of resolving issues that have been brought to them, to engage with represented employees  
102 as well as management on issues affecting the terms and conditions of bargaining unit  
103 employees).

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

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<sup>9</sup> 44 U.S.C. Chaps. 21, 22, 29, 31, and 33.

<sup>10</sup> 5 U.S.C. § 552 (2012).

<sup>11</sup> *Id.* § 552a.

<sup>12</sup> *Id.* §§ 7101–35; *see id.* § 7114.



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

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

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

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### RECOMMENDATION

#### 122 1. *Establishment and Standards.*

123 a. Agencies should consider creating additional ombuds offices to provide places  
124 perceived as safe for designated constituents to raise issues confidentially and  
125 receive assistance in resolving them without fear of retribution. They should  
126 ensure that the office is able to, and does, adhere to the three core standards of  
127 independence, confidentiality, and impartiality, as these standards are described in  
128 generally recognized sets of professional standards, which include those adopted  
129 by the American Bar Association, the International Ombudsman Association, and  
130 the United States Ombudsman Association, and they should follow, to the extent  
131 applicable, the procedural recommendations below. Existing offices with the  
132 ombuds title that do not adhere to these standards should consider modifying their  
133 title, where permitted, to avoid any confusion.



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

### 138 2. *Legislative Considerations.*

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

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

### 150 3. *Leadership Support.*

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

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

### 156 4. *Independence.*

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



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- 164           b. The agency should ensure that the ombuds has direct access to the agency head  
165           and to other senior agency officials, as appropriate. Whether by statute,  
166           regulation, or charter, ombuds should expressly be given access to agency  
167           information and records pertinent to the ombuds' responsibilities as permitted by  
168           law.
- 169           c. Ombuds and the agencies in which they are located should clearly articulate in all  
170           communications about the ombuds that the ombuds office is independent and  
171           specifically not a conduit for notice to the agency.
- 172           d. Federal ombuds should not be subject to retaliation, up to and including removal  
173           from the ombuds office, based on their looking into and assisting with the  
174           resolution of any issues within the ombuds' area of jurisdiction.
- 175        5. *Confidentiality.*
- 176           a. Consistent with the generally accepted interpretation of ADRA § 574, as applied  
177           to alternative dispute resolution offices, agencies should understand and support  
178           that the Act's requirements for confidentiality attach to communications that  
179           occur at intake and continue until the issue has been resolved or is otherwise no  
180           longer being handled by the ombuds, whether or not the constituent ever engages  
181           in mediation facilitated by the ombuds office. Restrictions on disclosure of such  
182           communications, however, should not cease with issue resolution or other indicia  
183           of closure within the ombuds office.
- 184           b. Agencies (or other authorizers) should articulate the scope and limits of the  
185           confidentiality offered by ombuds offices in their enabling documents (whether  
186           statute, regulation, charter or other memoranda), as well as on the agency website,  
187           in brochures, and in any other descriptions or public communications about the  
188           office utilized by the office or the agency.
- 189           c. Agency leadership and management should not ask for information falling within  
190           the scope of confidentiality offered by the ombuds office.
- 191           d. If information is requested from an ombuds during discovery in litigation, or in  
192           the context of an internal administrative proceeding in connection with a  
193           grievance or complaint, then the ombuds should seek to protect confidentiality to



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194 the fullest extent possible under the provisions of ADRA § 574, unless otherwise  
195 provided by law. Agencies should vigorously defend the confidentiality offered  
196 by ombuds offices.

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

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

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

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

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

212 8. *Staffing.*

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

221 b. While the spectrum of federal ombudsmen is too diverse to recommend a single  
222 federal position classification, job grade, and set of qualifications, agencies and  
223 the Office of Personnel Management should consider working collaboratively, in



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224 consultation with the relevant ombuds professional associations, to craft and  
225 propose appropriate job descriptions, classifications, and qualifications, as set  
226 forth in the preceding subsection, covering the major categories of federal  
227 ombuds.

228 9. *Training and Skills.*

- 229 a. To promote accountability and professionalism, agencies should provide training  
230 to ombuds with regard to standards and practice, whether offered by one of the  
231 ombuds professional organizations or working groups, or from within the  
232 government.
- 233 b. Ombuds should identify steps to build general competency and confidence within  
234 the office and to provide specific support to ombuds when cases become highly  
235 emotional or complex. More generally, as a regular practice to support and  
236 improve their skills, federal ombuds should participate in relevant professional  
237 working groups or ombuds association training programs.
- 238 c. Ombuds offices should consider the use of developmental assignments via details  
239 to other agencies or offices, as appropriate, supplemented by mentoring, which  
240 can be helpful as part of their training program.

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

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

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



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- 254 13. *Providing Information.*
- 255 a. Ombuds offices should provide information about relevant options to visitors to
- 256 the ombuds office, including formal processes for resolving issues, and their
- 257 requirements, so that visitors do not unintentionally waive these options by virtue
- 258 of seeking assistance in the ombuds office. Correspondingly, ombuds offices
- 259 should not engage in behavior that could mislead employees or other visitors
- 260 about the respective roles of the ombuds and those entities that provide formal
- 261 complaint processes.
- 262 b. Agencies should disclose publicly on their websites the identity, contact
- 263 information, statutory or other basis, and scope of responsibility for their ombuds
- 264 offices, to the extent permitted by law.
- 265 c. Agency ombuds offices should explore ways to document for agency senior
- 266 leadership, without breaching confidentiality, the value of the use of ombuds,
- 267 including identification of systemic problems within the agency and, where
- 268 available, relevant data on cost savings and avoidance of litigation.
- 269 14. *Records Management.* Federal ombuds offices should work with agency records officials
- 270 to ensure appropriate confidentiality protections for the records created in the course of
- 271 the office's work and to ensure that ombuds records are included in appropriate records
- 272 schedules.
- 273 15. *Agency-wide Considerations.*
- 274 a. Ombuds offices should undertake outreach and education to build effective
- 275 relationships with those affected by their work. Outreach efforts should foster
- 276 awareness of the services that ombuds offer, to promote understanding of ombuds
- 277 (and agency) processes and to ensure that constituents understand the role of the
- 278 ombuds and applicable standards.
- 279 b. To ensure that there is a mutual understanding of respective roles and
- 280 responsibilities within the agency, ombuds offices should work proactively with
- 281 other offices and stakeholders within their agencies to establish protocols for
- 282 referrals and overlap, to build cooperative relationships and partnerships that will
- 283 enable resolutions, and to develop internal champions. Such initiatives also help



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

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

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