



Recommendation 90-2

The Ombudsman in Federal Agencies

(Adopted June 7, 1990)

The ombudsman¹ is an institution frequently used in other countries, and increasingly used in this country, as a means of inquiring into citizen grievances about administrative acts or failures to act and, in suitable cases, to criticize or to make recommendations concerning future official conduct. Typically, an ombudsman investigates selected complaints and issues nonbinding reports, with recommendations addressing problems or future improvements deemed to be desirable. In cases involving the agencies of the government, an ombudsman may deal with complaints arising from maladministration, abusive or indifferent treatment, tardiness, unresponsiveness, and the like.² To succeed, an ombudsman must have influence with, and the confidence of, top levels of an agency, be independent, and be able to conduct meaningful investigations into a complaint without being thwarted by the agency staff whose work is being examined. The most successful occupants of that office have generally been persons of high rank and status with direct access to the highest level of authority.

The experiences of several federal agencies show an effective ombudsman can materially improve citizen satisfaction with the workings of the government, and, in the process, increase the disposition toward voluntary compliance and cooperation with the government, reduce the occasions for litigation, and provide agency decision makers with the information needed to

¹ "Ombudsman" is a Swedish word meaning "agent" or "representative," and its use here is not intended to discourage others from using more gender neutral terminology.

² An ombudsman may be appointed by the legislature or by the executive and with a variety of possible powers, missions, and available resources. While there is no universally accepted notion of what an ombudsman should do, under one approach, that of the Model Ombudsman Statute, the ombudsman could address "an administrative act that might be:

1. contrary to law or regulation;
2. unreasonable, unfair, oppressive, or inconsistent with the general course of an administrative agency's functioning;
3. mistaken in law or arbitrary in ascertainties of fact;
4. improper in motivation or based on irrelevant considerations;
5. unclear or inadequately explained when reasons should have been revealed;
6. inefficiently performed; or
7. otherwise objectionable * * *."

The Comment to the Model Statute adds, "Very clearly, the ombudsman must not attempt to be a super-administrator, doing over again what specialized administrators have already done and, if he disagrees, substituting his judgment for theirs."



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identify and treat problems. Agencies currently employing an ombudsman with success in various programs include, among others, the Internal Revenue Service and the Army Materiel Command.

The Conference urges 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. The Conference believes these agencies would benefit from establishing an office of ombudsman either on an agency-wide basis or to assist in the administration of particular programs.

Recommendation

A. Establishment of Ombudsmen

1. Federal agencies that administer programs with major responsibilities involving significant interactions with members of the general public are likely to benefit from establishing an ombudsman service. Examples of such programs include the following: licensing; revenue collection; procurement; award and distribution of welfare, pension, or disability benefits; oversight of public lands; administration of detention facilities; public assistance programs; immigration programs; and subsidy or grant programs.

2. In cases where agencies with significant interaction with the public seek legislation to provide funds or other statutory underpinnings for an ombudsman, the legislation should conform generally to the guidelines set forth in paragraph B, below, and should be prepared in consultation with knowledgeable agency personnel and outside entities and affected members of the public or their representatives.

3. Whether or not legislation is enacted, each federal agency with major responsibilities involving significant interaction with members of the general public should consider setting up an agency-wide or program-specific ombudsman as a means of gaining experience with the concept and improving service to the public. Agencies should follow the guidelines in paragraph B in establishing an agency ombudsman.

B. Guidelines for Ombudsman Legislation and Agency Programs

1. Powers, Duties

a. Ombudsman legislation or agency guidelines should set out the functions to be performed by the ombudsman and confer the powers needed to enable the ombudsman to (i) receive and



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inquire into complaints, (ii) recommend solutions in individual matters and make recommendations for administrative and regulatory adjustments to deal with chronic problems and other systemic difficulties, (iii) advise within the agency concerning procedures, forms, and similar issues affecting the nature and delivery of services; and (iv) call attention to agency problems not yet adequately considered within.

b. The legislation or agency guidelines should require the ombudsman to submit periodic reports summarizing the grievances considered; investigations completed; recommendations for action, improvement in agency operations, or statutory changes; agency response; and any other matters the ombudsman believes should be brought to the attention of the agency head, Congress or the public.

c. The legislation or guidelines should also provide that the ombudsman should refrain from involvement in the merits of individual matters that are the subject of ongoing adjudication or litigation or investigations incident thereto.

2. Qualifications, Term

The legislation or guidelines should set forth the qualifications required for the position of ombudsman, the tenure of office, salary, safeguards protecting the independence and neutrality of the ombudsman, and means for ensuring access to the ombudsman. The Conference recommends the ombudsman be a respected, senior person known for his or her judgment, probity, and persuasiveness.

3. Confidentiality

a. The legislation or guidelines should protect communications to or from the ombudsman in connection with any investigation (other than reports intended to be made public), as well as the ombudsman's notes, memoranda and recollections, and documents provided in confidence to the ombudsman. The legislation or guidelines should provide protection against disclosure in judicial, administrative, and congressional proceedings consistent with that recommended by Administrative Conference Recommendation 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality*, 1 CFR 305.88-11.³

³ As a practical matter, confidentiality guarantees in pending legislation—the Administrative Dispute Resolution Act, S. 971 and H.R. 2497 (101st Congress 1st Session)—if enacted, would likely protect communications in ombudsman proceedings.



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b. An agency, when establishing an ombudsman, should explicitly disclaim authority ordinarily,⁴ to discover or otherwise force disclosure of an ombudsman's notes, memoranda or recollections, or of documents provided to the ombudsman in confidence.

4. Judicial Review, Liability

Any such legislation should provide that (i) no inquiry, report, recommendation, or other action of the ombudsman shall be subject to examination or review in any court, unless the ombudsman is subject to criminal investigation; and (ii) no civil action shall lie against the ombudsman for any action, failure to act, or statement made in discharging the ombudsman's responsibilities.

5. Access to Agency Officials and Records

The ombudsman should be given direct access to the head of the agency and to high-ranking officials within it. The legislation or guidelines should authorize the ombudsman to request agency officials to provide information (in person or in writing) or records the ombudsman deems necessary for the discharge of its responsibilities; and should require, absent countervailing compelling concerns relating to confidentiality or privacy, that such information be supplied to the extent permitted by law.

6. Outreach

An agency with an ombudsman should take effective steps to ensure that persons who deal with the agency are aware of the existence, purpose, and availability of the ombudsman service. These steps could include active campaigns to inform the public of the service.

Citations:

55 FR 34211 (August 22, 1990)

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⁴ Exceptions might include cases where there is a duty to warn of a threat to personal health or safety, criminal matters, and other compelling exigent circumstances.