



The Use of Ombudsmen in Federal Agencies

Committee on Rulemaking

Proposed Recommendation for Committee | November 3, 2016

NOTE: This document is a proposed recommendation currently under consideration. It has not been approved by the committee or the Administrative Conference and is subject to change.

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 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

¹ 5 U.S.C. §§ 571-84. See § 571(3).

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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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 complaints, 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.

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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Internally-facing ombuds were more likely to report helping constituents by providing a safe way to discuss perceptions of unsafe or illegal behavior and to use 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 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 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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Although functionally the federal ombuds landscape is quite diverse, most federal ombuds share three *core standards of practice*—independence, confidentiality, and impartiality. They are set forth in the standards adopted by the International Ombudsman Association (IOA),⁴ the American Bar Association (ABA),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 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 core standards and characteristics, taken together, define a unique profession.

In the absence of any applicable limiting legislation, it appears that agencies have the authority to establish ombuds offices or programs. 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

⁴ IOA STANDARDS OF PRACTICE (2009), available at: https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf.

⁵ 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>.

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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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 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 ADRA § 574 to expressly encompass the kind of confidentiality offered under USOA standards⁹ as well as that offered by those practicing according to IOA or ABA standards would assist those external ombuds who practice under USOA standards.

⁷ Further, ombuds are 'neutrals' within the meaning of the Act including those ombuds who, after impartial review, advocate for specific processes or outcomes.

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.

⁹ 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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

The research for this recommendation identified three unresolved issues that relate to the requirements of ADRA § 574 and the scope of confidentiality that ombuds offer to constituents. Federal ombuds should be aware of these matters and how they may affect particular ombuds programs:

- The relationship 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.
- The requirements and interrelationship of the Federal Records Act,¹⁰ the Freedom of Information Act (FOIA),¹¹ and the Privacy Act¹² with regard to agency records and other documentation.
- The question whether, under the Federal Service Labor-Management Relations Statute¹³ § 7114, the union is 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).

¹⁰ See 44 U.S.C. Chaps. 31 and 33.

¹¹ 5 U.S.C. § 552.

¹² 5 U.S.C. § 552a.

¹³ 5 U.S.C. Chap. 71.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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 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 ombuds offices arrange for periodic evaluation of office 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 ombuds in other offices or agencies, or by outside ombuds professionals, may be more suitable.

Deleted: Although training 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.

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 safe places for designated constituents to raise issues and receive assistance in resolving them. 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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

recognized sets of professional standards, which include those adopted by the International Ombudsman Association, the American Bar 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 to avoid any confusion, where permitted.

(b) Ombuds offices created by executive action should be established by 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 focus on 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. Agency leadership should provide visible support, renewed as leadership changes, for the role of the ombuds office and its standards, including independence, confidentiality, and impartiality.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

4. Independence.

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

Deleted: Both the perception of and actual independence from agency management structure are essential for the ombuds to be regarded as a source of impartial, fair assistance. O

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(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.

Commented [DP1]: Changes to this subsection were suggested by D. Shonka. (Comment letter dated 10-24-2016, posted on ACUS website.)

Deleted: They should report only to 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 statutory 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.

(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 removal or the threat of removal from the ombuds office except for good cause shown. The act of looking into and assisting with the resolution of any issue within the ombuds' area of jurisdiction should not constitute such good cause.

Commented [DP2]: D. Shonka recommends deleting this section entirely. (Comment letter dated 10-24-2016.)

(e) Ombuds must observe the confidentiality and ethics rules that are applicable to federal agency employees generally, including avoidance of conflicts of interest at both organizational and individual levels.

Commented [DP3]: Based on suggestions of M. Fuchs and B. Kurtz.

5. Confidentiality.

(a) Consistent with the generally accepted interpretation of the ADRA, 5 U.S.C. § 574, as applied to alternative dispute resolution offices, agencies should understand and support



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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. The restriction 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) Agencies should vigorously defend the confidentiality offered by ombuds offices practicing to generally accepted standards if challenged. 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.

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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

7. 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 at this time, 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.

8. 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 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 group or ombuds association training programs.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

(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.

9. *Independent Counsel.* To protect the independence and confidentiality of federal ombuds, agencies should ensure, consistent with available resources, that ombuds have access to independent legal counsel for matters within the purview of the ombuds, whether provided within the agency with appropriate safeguards for confidentiality or under an arrangement enabling the sharing of such a resource across agencies. The independent counsel should be free of conflicts of interest.

10. *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.

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

12. *Providing Information.* 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. Ombuds offices should work proactively with other offices within their agencies and relevant external entities, as appropriate.

Commented [DP4]: This section remains unsettled. The text appearing to the left was drafted by ACUS staff based on the committee's discussion on Oct. 19. The consultant research team has recommended the following text.

"To protect the independence, impartiality and confidentiality of federal ombuds, to the extent consistent with available resources, agencies should ensure that ombuds have access to independent legal counsel who, without conflict of interest, may assist the ombuds office in the performance of its duties as these duties are defined by legislative or agency mandate and represent the ombuds in instances in which ombuds office confidentiality is challenged."

Commented [DP5]: The remainder of this section in the prior draft was moved to the preamble.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

to establish protocols for referral, to build mutual support, and to avoid any unintentional waiver of rights.

13. 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.

14. Outreach.

(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 the standards adhered to. To ensure that there is a mutual understanding of respective roles and responsibilities within the agency, it is important for internal stakeholders to establish protocols for referrals and overlap, to build cooperative relationships and partnerships that will enable resolutions, and to develop internal champions. Such 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 communications media as appropriate and feasible.

(b) Agency ombuds offices should develop data that would document for agency senior leadership the opportunities offered by the use of ombuds offices for an enhanced program of agency risk management, including cost savings and avoidance of litigation.

Commented [DP6]: This subsection was drafted by ACUS staff for committee consideration, based on comments of Bruce MacAllister (posted on the ACUS website).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

15. Presidential Action. The President by executive order should create an entity within the Executive Branch to serve as a central resource to address integrity and effectiveness issues and increase the professionalism of federal ombuds by developing policies, technical standards, and standards for evaluation.