



Administrative Conference of the United States

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

**PART 3: LEGAL ANALYSIS**

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# The Ombudsmen in Federal Agencies: Legal Analysis<sup>1</sup>

## I. Introduction<sup>2</sup>

With the exception of specific federal ombuds positions created by statute, there is no statute applicable government-wide mandating that federal ombuds offices exist in the United States or addressing specifically how federal ombuds offices must or even might be created, organized, funded or operated.<sup>3</sup> The ombuds concept, as described elsewhere in this study, originated in the Swedish *classical ombudsman*, appointed by the legislature and established to review executive action. The classical ombudsman's attributes and standards of practice were thus determined by legislation, and according to a particular paradigm. However, in the United States organizational ombuds began to evolve alongside ombuds that were modeled on the classical ombudsman. Organizational ombuds evolved, not by legislative dictate, but rather as organizations such as corporations and universities and agencies recognized the need for creating safe places for internal issues to be raised and resolved. These organizational ombuds offices, most of them originally in the private sector, were conceived and developed without *statutory* mandate, template or protection, although they have sought legal refuge using several legal tools discussed later in this analysis.

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<sup>1</sup> We would like to acknowledge here the sustained, diligent work and many valued contributions of legal assistant Jonathan Osler as well as the assistance of legal intern Elise McCray. Additionally, we gratefully acknowledge the invaluable foundational research, analysis and writing done by Charles L. Howard, most particularly in his book *THE ORGANIZATIONAL OMBUDSMAN, ORIGINS, ROLES, AND OPERATIONS—A LEGAL GUIDE*, ABA Publishing (2010), which includes Howard's identification of numerous unpublished cases pertaining to ombuds in the private sector discussed herein. We are also grateful for Charles Howard's reading of and comments on an earlier draft of this analysis.

<sup>2</sup> This legal analysis adheres to the Twentieth Edition of *The Bluebook: A Uniform System of Citation*, which was published in the summer of 2015. Other than by possible inadvertent error, citation in this analysis differs from the Bluebook only in that the publication date is supplied for statutes and regulations solely where they are cited in the first instance.

<sup>3</sup> To the extent that federal ombuds function as "neutrals" under the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–584 (2012), however, § 574 of the Act imposes restrictions on the disclosure of confidential communications. These are discussed at length, *infra*.

Departures from a traditional legislative model of established parameters in the United States generated both much innovation and a lack of uniformity, even and perhaps particularly among federal ombuds. Those federal ombuds offices created pursuant to executive initiative and by executive action are essentially conceived and operated according to individual policy decisions rather than legal prescriptions and proscriptions. When the architects of federal ombuds offices, whether Congressional or executive, have sought ombuds-specific references at the inception, they have typically looked to generally recognized professional standards of practice applicable to the type of ombuds office being established, the example of other federal ombuds offices, and a variety of resources available to federal alternative dispute resolution practitioners.

Were a new ombuds office a typical box being added to an agency organizational chart, it might just assume the mantle of laws generally applicable to federal agencies and employees such as the Freedom of Information Act,<sup>4</sup> the Federal Records Act,<sup>5</sup> or the Federal Service Labor-Management Relations Statute,<sup>6</sup> without caveat and proceed from there. However, many federal ombuds offices have adopted, at least to some extent, generally accepted professional standards of practice that stipulate certain attributes and requirements that have been found to encourage ombuds use by constituents and the effective accomplishment of the ombud's mission. The legal questions before us are to what extent these (professional) standards are reflected in, and find protection in, the surrounding legal environment, and to what extent these standards conflict or are harmonious with the dictates of statutes of general application applicable to federal agencies or employees, case precedent or regulatory demands. An important backdrop for the consideration of these questions inevitably is the delicate balance of

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<sup>4</sup> 5 U.S.C. § 552 (2016) (current through Pub. L. No. 114-185).

<sup>5</sup> 44 U.S.C. §§ 3101–3107 (2016) (current through Pub. L. No. 114-185).

<sup>6</sup> 5 U.S.C. §§ 7101–7135 (2012).

government openness and accountability on the one hand with the degree of confidentiality critical for the effectiveness of government ombudsmen on the other.<sup>7</sup>

Of the commonly accepted professional ombuds standards of practice, the standard primarily affected by these legal questions is *confidentiality*, offered in some form by the majority of federal ombuds offices. *Neutrality* or *impartiality* come into *legal* play only insofar as the degree to which they are manifest affects the application of the ADRA's requirements for and protection of confidentiality, and vice versa. *Independence* is not reflected in the general legal framework at all except insofar as it may be enhanced or diminished depending on the extent to which an ombuds is perceived to be a neutral, confidential resource, and to the extent that evidence of independence from the agency management structure may have an impact on whether notice to an ombudsman is deemed notice to the agency. Other professional standards of practice variously embraced by different kinds of ombuds are essentially matters of policy not specifically addressed in generally applicable statute or case law.

Some federal ombuds and commentators have suggested that new legislation or modification of the Administrative Dispute Resolution Act (ADRA) could and should clarify, standardize, protect and bolster the standards and practices of federal ombuds.<sup>8</sup> This legal analysis considers that possibility as well as how, in light of the current legal environment, federal ombuds might best position themselves to articulate and protect the professional commitments they make to constituents.

As noted above, some federal ombuds are mandated by statute. These statutory provisions are exceptionally varied in purpose and structure as well as in the level of detail each

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<sup>7</sup> See generally Administrative Conference of the U.S. Recommendation 88-11, *Encouraging Settlements by Protecting Mediator Confidentiality*, 52 Fed. Reg. 5212 (Feb. 2, 1989).

<sup>8</sup> See, e.g., TAXPAYER ADVOCATE SERVICE, *2009 Annual Report to Congress, Vol. 2, Survey of Federal Government External Ombudsmen*, at 114–15 in which a proposal is made for a Federal Agency External Ombudsman Act.

statute affords both the description of the office and the standards to be applied. At one end of the spectrum is the whistleblower protection ombuds (WPO) created at § 117 of the Whistleblower Protection Enhancement Act of 2012.<sup>9</sup> That statute requires every Inspector General to “designate a Whistleblower Protection Ombudsman who shall educate employees” about prohibitions on retaliation for protected disclosures and, for those employees who have made or are contemplating making a protected disclosure, about the rights and remedies for retaliation.<sup>10</sup> The law prohibits the WPO from acting as a legal representative, agent or advocate for employees.<sup>11</sup> No further guidance is given in the statute, leaving the questions of how these educational functions are to be carried out, what additional functions, if any, a particular WPO must perform and what standards, if any, a WPO must adhere to up to the individual Inspector General’s Office in which that ombuds resides.

In contrast, at the other end of the spectrum is the Taxpayer Advocate Service (TAS) at the Internal Revenue Service. The office was originally created in 1979 by the IRS itself as a voice for taxpayers called the Taxpayer Ombudsman. Through the two Taxpayer Bill[s] of Rights in 1988 and 1996, respectively, the TAS was given the authority to issue Taxpayer Assistance Orders and renamed the Office of the Taxpayer Advocate.<sup>12</sup> TAS carries the dual responsibilities of resolving cases brought to them by individual taxpayers and proposing both administrative and legislative fixes for systemic problems that TAS identifies. Further, the 1998 IRS Restructuring and Reform Act mandated Local Taxpayer Advocates in every state.<sup>13</sup> The

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<sup>9</sup> Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1474, 1475 (codified at 5 U.S.C. app. § 3(d)).

<sup>10</sup> *Id.* § 3(d)(1)(C).

<sup>11</sup> *Id.* § 3(d)(2).

<sup>12</sup> *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, Title VI, § 6230, 102 Stat. 3342, 3733 (Nov. 10, 1988); Taxpayer Bill of Rights II, Pub. L. No. 104-168, § 101, 110 Stat. 1452, 1453 (July 30, 1996).

<sup>13</sup> *See* Pub. L. No. 105-206, § 1102, 112 Stat. 685, 697 (July 22, 1998). For a more detailed description of the evolution of the Taxpayer Advocate, refer to IRS, HISTORY OF THE TAXPAYER ADVOCATE, <https://www.irs.gov/advocate/history-of-the-office-of-the-taxpayer-advocate>.

statutory framework addresses both the independence and confidentiality of TAS. Although the National Taxpayer Advocate reports to the Commissioner of the IRS, TAS submits two yearly reports to Congress. Only the National Taxpayer Advocate, the Commissioner of the IRS or the Deputy Commissioner of the IRS are empowered to modify or rescind a taxpayer assistance order. Local advocates report to the National Taxpayer Advocate office rather than the regional IRS structure and are required by statute to notify taxpayers that they operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate.<sup>14</sup> In this regard the statute requires that each local advocate office maintain a separate phone, facsimile, and other electronic communication access, and a separate post office address.<sup>15</sup> With regard to confidentiality, Congress also granted the local taxpayer advocates the discretion to not disclose to the Internal Revenue Service contact with, or information provided by, taxpayers who come to them with issues and concerns.<sup>16</sup>

As these examples of ombuds mandated by statute suggest, each kind of federal statutory ombuds is unique in form and function.<sup>17</sup> Likewise, those ombuds offices initiated and shaped

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<sup>14</sup> See I.R.C. § 7803(c)(4)(A)(iii) (2012).

<sup>15</sup> *Id.* § 7803(c)(4)(B).

<sup>16</sup> *Id.* § 7803(c)(4)(A)(iv).

<sup>17</sup> For some additional examples of variations in federal ombuds created by statute, see also: Private Education Loan Ombudsman, created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2009, 2010 (2010) (ombuds is authorized by statute to informally resolve complaints from borrowers of education loans); Citizenship and Immigration Services Ombudsman, created by the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2197–99 (2002) (ombuds was created to assist individuals and employers in resolving problems with the Bureau of Citizenship and Immigration Services; the statute gives the ombuds discretion not to disclose to the Bureau “contact with, or information provided by, such individual or employer.”); Federal Housing Finance Agency Office of the Ombudsman, created by the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2668 (statute authorizes the ombuds to consider complaints and appeals from regulated entities and persons or entities having a business relationship with a regulated entity, but leaves it to FHFA to “specify the authority and duties” of the ombuds. FHFA implementing regulations require that the ombuds conduct independent inquiries and act as a neutral facilitator or mediator to help resolve complaints and submit fact findings and recommendations to the FHFA Director. See 12 C.F.R. § 1213 (2011)); Office of Government Information Services, created by the OPEN Government Act of 200, Pub. L. No. 110-175, 121 Stat. 2529, 2530 (amending the Freedom of Information Act, 5 U.S.C. 552) (created within the National Archives and known by the agency as the “FOIA Ombudsman”; empowered by statute to offer mediation services to resolve disputes between persons making FOIA requests and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the ombuds office, issue advisory opinions if mediation has not resolved the dispute. The FOIA ombuds has authority

by executive action also cover a remarkable range. Given the variability among federal ombuds offices, necessity requires that the legal conclusions and recommendations here are made with the preponderance of federal internal and external ombuds in mind, while inviting all federal ombuds offices to apply the law and commentary described here to the circumstances of their respective offices including, if applicable, to the statute which has mandated their office.

## **II. Background — Ombuds Privilege, Inherent Judicial Authority to Manage Discovery, and the Administrative Dispute Resolution Act (ADRA) of 1996**

At the time that ombuds first began to appear in the federal government, there were virtually no legal underpinnings on which to rely. An attempt was made to rectify this omission, at least in part, when ADRA was reauthorized and amended in 1996 adding “use of ombuds” to the list of procedures defined as “alternative means of dispute resolution” in § 571(3).<sup>18</sup>

However the significance of this addition is not entirely certain<sup>19</sup> and hence has been subject to different interpretations by commentators. Accordingly, to the extent that there may be

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to recommend policy changes to Congress and the President and to review agency FOIA compliance.); Office of Ombudsman for Civil Service Employees, Pub. L. No. 100-204, 101 Stat. 1360 (1987) (codified at 22 U.S.C. § 2664a) (operating within the Department of State, this is one of the few internal ombudsman created by federal statute. With regard to independence, the statute specifies that the ombuds reports to the Office of the Secretary, that it is a career senior executive service position and that the ombuds has the right to participate in certain management meetings. The office publicly states that it adheres to the principles of independence, neutrality and impartiality, confidentiality, and informality. *See, About Us*, DEPARTMENT OF STATE OFFICE OF THE OMBUDSMAN, <http://www.state.gov/s/ombudsman/>). Additional examples of statutory ombuds and ombuds-like offices can be found in WENDY R. GINSBERG & FREDERICK M. KAISER, CONG. RESEARCH SERV., FEDERAL COMPLAINT-HANDLING, OMBUDSMAN, AND ADVOCACY OFFICES 22–47 (2009).

<sup>18</sup> *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

<sup>19</sup> *See, e.g.*, Howard Gadlin & Samantha Levine, *Stranger in a Strange World, the Ombudsman in the Federal Government*, ACRESOLUTION, Spring 2008, at 19 (“Not until the act was amended in 1996 was ‘use of ombuds’ listed as one of the ‘alternative means of dispute resolution’ and, to this day, the language in ADRA is tailored to the essential features of mediation-based programs. As a result, it is not always clear whether the activities of ombudsmen offices are covered by ADRA, a situation that contributes to some of the confusion that exists around the ombudsman concept.”). *See also* Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dep’t of Justice December 29, 2000) (interpreting provisions of the Administrative Dispute Resolution Act broadly but seemingly based on a mediation model). Additionally, in the introduction to its 2006 guide on ADR confidentiality, the Interagency ADR Working Group Steering Committee states: “This Guide focuses solely on confidentiality related to the use of mediation in federal workplace disputes. Confidentiality under the ADR Act may also apply to other ADR processes used to address workplace disputes, such as facilitation, conciliation and use of ombuds.” INTERAGENCY ADR WORKING GROUP STEERING COMM., PROTECTING THE CONFIDENTIALITY OF DISPUTE RESOLUTION PROCEEDINGS 3 (2006) [hereinafter *IADRWG Guide*].



ambiguity or gaps in coverage, this analysis will discuss other elements of the law that might inform interpretation of the Act or supplement it. The legal analysis will then discuss the implications of the inclusion in ADRA of “use of ombuds,” and the degree to which the Act’s requirements and protections apply to the functions of federal ombuds.

In the context at issue in this study, there is a difference between confidentiality and privilege. Confidential information is that which may be communicated to an ombuds and which the ombuds is precluded, either by virtue of pledge, charter, standard of practice or law, from disclosing voluntarily without the consent of the constituent that made the communication. Privileges, on the other hand, are generally fashioned by law<sup>20</sup> or case precedent to shield certain information from discovery or, in the case of some privileges, to shield individuals from involuntary testimony. While assertion of privileges, particularly by the government, is not favored by the courts and is of narrow application, given the scant case law interpreting relevant provisions of ADRA or addressing the parameters of federal ombudsmen confidentiality, the law pertaining to ombuds privilege and related privileges is one factor, among others, indicating how expansive courts and administrative tribunals might be if and when required to define the scope of federal ombuds confidentiality. However, the scope of ombuds confidentiality is not delimited by the degree to which a federal ombuds privilege has, or has not, been recognized.

### **A. Ombuds Privilege**

In discussing the protection afforded by the law to communications made to a federal ombuds, we turn first to the question of whether a federal common law privilege for ombuds

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<sup>20</sup> *See, e.g.*, FED. R. EVID. 502 (establishing attorney-client privilege).

exists.<sup>21</sup> The inquiry begins with Federal Rule of Evidence 501, which states that “[t]he common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless” the Constitution, a federal statute, or rules prescribed by the Supreme Court provide otherwise.<sup>22</sup> Thus, “we start with the primary assumption that there is a general duty to give what testimony one is capable of giving.”<sup>23</sup> The Supreme Court articulated the federal common law boundaries of privilege in *Jaffee v. Redmond*,<sup>24</sup> which considered whether conversations between an individual and a psychiatric social worker were privileged. In that case a man was shot and killed by a police officer, and the family of the deceased sued the officer and the town, alleging violations of the deceased’s constitutional rights by use of excessive force. After the shooting the officer received extensive counseling from a therapist. The relatives attempted to compel disclosure of statements made by the officer to her therapist during the counseling sessions. The officer argued against disclosure, urging the court to recognize a common law “psychotherapist privilege” under Rule 501 of the Federal Rules of Evidence.<sup>25</sup>

The Court began by acknowledging that there is generally a presumption against creating new evidentiary privileges.<sup>26</sup> However, the Court recognized that Rule 501 authorizes federal courts to define new privileges “in the light of reason and experience,” and also that case law precedent stood for the proposition that new exceptions may be justified “by a compelling ‘public good transcending the normally predominant principle of utilizing all rational means for

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<sup>21</sup> Inasmuch as we would expect that cases involving federal ombuds will be heard in federal courts under the Federal Rules of Evidence and Civil Procedure the analysis of privilege begins there. Some state cases are discussed *infra* to the extent that they shed light on national trends with regard to ombuds privilege and the rationale therefore.

<sup>22</sup> FED. R. EVID. 501.

<sup>23</sup> *Trammel v. United States*, 445 U.S. 40, 50 (1980).

<sup>24</sup> 518 U.S. 1, 9 (1996)

<sup>25</sup> *Id.* at 3–4.

<sup>26</sup> *Id.* at 9.

ascertaining truth.”<sup>27</sup> Turning to the nature of the therapist relationship, the Court explained that “[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust. . . . The mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.”<sup>28</sup>

Having established that open and candid communications are essential to successful psychiatric therapy, the Court held that recognizing a psychotherapist privilege “serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry . . . is a public good of transcendent importance.”<sup>29</sup> Moreover, the Court concluded that in contrast to the “significant” interests served by recognizing the privilege, “the likely evidentiary benefit that would result from the denial of the privilege is modest.”<sup>30</sup>

Notably the Court “reject[ed] the balancing component of the privilege” adopted by the 7<sup>th</sup> Circuit:

Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . An uncertain privilege, or one which purports to be certain but results in widely varying applications by the court, is little better than no privilege at all.<sup>31</sup>

Thus, the court eschewed a balancing test in favor of absolute certainty; however, the Court determined that it was “neither necessary nor feasible” to define the “full contours” of the privilege.<sup>32</sup>

In the often-cited case of *Folb v. Motion Picture Indust. Pension & Health Plans*,<sup>33</sup> the court distilled the principles set forth by the Supreme Court in *Jaffee* and applied them in a case

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<sup>27</sup> *Id.* at 9 (quoting *Trammel*, 445 U.S. at 50).

<sup>28</sup> *Id.* at 10.

<sup>29</sup> *Id.* at 11.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (citing lower court’s decision in *Jaffee v. Redmond*, 51 F.3d 1346).

<sup>32</sup> *Id.* at 18.

involving a mediation proceeding. In *Folb*, a former employee of the Motion Picture Industry Pension & Health Plans brought suit alleging employment discrimination on the basis of gender. He also claimed that the Plans had improperly discharged him for whistleblowing, and had relied on a complaint of sexual harassment made against him as a pretext for his discharge. The magistrate judge below denied the plaintiff’s motion to compel production of documents and statements generated during mediation between the Plans and Vasquez, the employee who had brought the harassment claim against Folb. According to Folb, the Plans intended to argue that he was properly terminated as a consequence for sexually harassing Vasquez “despite the fact that they may have argued in mediation or settlement negotiations . . . that she was never sexually harassed at all.”<sup>34</sup>

On appeal, the *Folb* court reduced the privilege analysis in *Jaffee* down to four elements: “(1) whether the privilege is necessary for confidence and trust; (2) whether the privilege would serve public ends; (3) whether the evidentiary detriment caused by exercise of the privilege is modest; and (4) whether denial of the federal privilege would frustrate a parallel privilege adopted by the states.”<sup>35</sup> The court then applied these principles in determining whether, “in light of reason and experience,” it should recognize a federal mediation privilege.<sup>36</sup> First the court found that, on balance, the public interest in “encouraging parties to attend mediation and communicate openly and honestly in order to facilitate successful alternative dispute resolution”<sup>37</sup> favored the privilege. Second, after an exhaustive examination of the state and federal legal authorities on the issue, the court determined that “the majority of the courts to have

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<sup>33</sup> 16 F. Supp. 2d 1164 (C.D. Cal. 1998), aff’d, 216 F.3d 1082 (9<sup>th</sup> Cir. 2000). The case has been called “the bedrock of the federal common law mediation privilege.” See Lipps, *infra* note 60, at 4.

<sup>34</sup> *Id.* at 1166–67. The court noted that Vasquez and the Plans had signed a confidentiality agreement covering communications made during the mediation.

<sup>35</sup> *Id.* at 1171.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1172.

considered the issue appear[] to have concluded that the need for confidentiality and trust between participants in a mediation proceeding is sufficient imperative to necessitate the creation of some form of privilege.”<sup>38</sup> Finally, citing *Jaffee*, the court reasoned that the “evidentiary benefits that would result from the denial of the privilege [would] [be] modest[,]” inasmuch as, absent the mediation, the evidence “would simply never [have] come into being.”<sup>39</sup> On a final point, the court limited its holding “only to information disclosed in conjunction with mediation proceedings with a neutral.”<sup>40</sup>

While the instruction this case provides with regard to general principles of confidentiality and impartiality is of interest when considering how such a privilege might be applied to ombuds, the court in *Folb* decided what they considered to be a very narrow issue based on the facts of the case. The court specified that its duty was only to decide “whether communications between parties who agreed in writing to participate in a confidential mediation with a neutral third party should be privileged, and whether that privilege should extend to communications between the parties after they have concluded their formal mediation with the neutral.”<sup>41</sup> This disinclination to “address the outer limits of a federal mediation privilege”<sup>42</sup> is important because the shape of the privilege found contains certain elements that are common or necessary to the process of mediation, but not to all functions of ombuds. These elements include the signing of a written agreement to participate in a confidential mediation and the designation of the process as a “formal” process with a neutral mediator (as opposed to private settlement discussions). In this regard, the court distinguished communications that were “in

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<sup>38</sup> *Id.* at 1175.

<sup>39</sup> *Id.* at 1178 (citing *Jaffee*, 518 U.S. at 11).

<sup>40</sup> *Id.* at 1180.

<sup>41</sup> *Id.* at 1172.

<sup>42</sup> *Id.* at 1178.

conjunction with” or “in preparation for and during the course of a mediation with a neutral,”<sup>43</sup> which it found to be protected, from discussion between the parties that occurred after conclusion of the mediation, which it found to be unprotected by the mediation privilege.<sup>44</sup>

Addressing the holding in *National Labor Relations Board v. Joseph Macaluso*,<sup>45</sup> discussed *infra*, the *Folb* court stated that both confidentiality and neutrality in mediation “serve the same ultimate purpose: encouraging parties to attend mediation and communicate openly and honestly in order to facilitate successful alternative dispute resolution.”<sup>46</sup> These two principles are distinguished by the goals of implementing them, but they still go hand in hand. According to *Folb*, confidentiality exists to encourage parties to speak freely without fear of their statements being brought up later in court, or elsewhere, and impartiality is necessary to prevent undermining mediation as a fair alternative to litigation.<sup>47</sup>

A number of courts, including the one in *Folb*, have made it clear that not enforcing these rules has consequences for parties and neutrals regardless of whether the mediation is successful. For example, prior to *Folb*, the Ninth Circuit Court of Appeals in *Macaluso* had found that failure to protect neutrals such as mediators could have consequences well beyond the impact on the case at hand for the larger federal systems relying on mediation as a valuable tool, such as the labor management system.<sup>48</sup> In that case, involving unfair labor practice allegations before the National Labor Relations Board (NLRB) and a subpoena of a Federal Mediation and Conciliation Service (FMCS) mediator, the court considered whether the preservation of

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<sup>43</sup> *Id.* at 1180.

<sup>44</sup> *Id.* The court noted, however, that settlement negotiations not part of the mediation might come within the domain of FED. R. EVID. 408 (“Compromise Offers and Negotiations”).

<sup>45</sup> 618 F.2d 51 (9th Cir. 1980).

<sup>46</sup> *Folb*, 16 F. Supp. 2d at 1172.

<sup>47</sup> *Id.* at 1171–76.

<sup>48</sup> *Macaluso*, 618 F.2d at 55 (“[F]ederal mediation has become a substantial contributor to industrial peace in the United States. . . . Any activity that would significantly decrease the effectiveness of this mediation service could threaten the industrial stability of the nation.”).

mediator effectiveness by protection of mediator neutrality was a ground for revocation of the subpoena consistent with the power and duties of the NLRB under the National Labor Relations Act.

Relying on federal law and policy favoring mediation — particularly in the labor management arena — the court in *Macaluso* determined that “the public interest in maintaining the perceived and actual impartiality of federal mediators does outweigh the benefits derivable”<sup>49</sup> from the mediator’s testimony even though, in that instance, it would likely have resolved the pivotal credibility issue between the two parties. The court stated that “[i]f conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.”<sup>50</sup> It further opined:

To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference.<sup>51</sup>

The court found such disclosures would not only be harmful to the person or persons who made them in confidence, but also to these programs whose goals are to promote public trust in them and their ability to resolve disputes fairly. Ultimately the court held that “the complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor

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<sup>49</sup> *Id.* at 54. *Cf.* *Blackmon-Malloy v. United States Capitol Police Bd.*, 575 F.3d 699, 711 (D.C. Cir. 2009) (“Congress understood what courts and commentators acknowledge, namely, that confidentiality plays a key role in the informal resolution of disputes.”).

<sup>50</sup> *Id.* at 55.

<sup>51</sup> *Id.* (quoting *Tomlinson of High Point, Inc.*, 74 NLRB 681, 688 (1947)).

mediation, and that labor mediation is essential to continued industrial stability, a public interest sufficiently great to outweigh the interest in obtaining every person's evidence."<sup>52</sup>

Similarly, the court in *United States v. Gullo*<sup>53</sup> considered confidential communications that arose during a dispute resolution proceeding<sup>54</sup> involving neutrals at a Community Dispute Resolution Center operated under the direction of the chief court administrator. In upholding "a privilege" precluding the government from disclosing the dispute resolution communications to a grand jury, the court warned about the threat to such programs if dispute resolution confidentiality is not upheld, citing the state policy encouraging participation in informal dispute resolution processes without restraint and intimidation and the impact on both participation and candor that the "privilege generally serves to foster . . . ."<sup>55</sup>

Significantly, in *Molina v. Lexmark*<sup>56</sup> the same district court that had decided *Folb* qualified its holding, stating that the "exact contours of the privilege recognized in *Folb* are unclear."<sup>57</sup> *Molina* was a class action suit. When the defendant attempted to remove the case to federal court, *Molina* argued that *Lexmark* had not sought removal within the requisite time

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<sup>52</sup> *Id.* at 56.

<sup>53</sup> 672 F. Supp. 99 (W.D.N.Y. 1987).

<sup>54</sup> The court refers to the proceeding in the case as "mediation/arbitration"; the dispute resolution agreement executed by *Gullo* provided for both, stipulating that the parties "would attempt to reach settlement through mediation and, if that failed, in binding arbitration." *Id.* at 102-103.

<sup>55</sup> *Id.* at 104. Note however, that there is a hint in *Gullo* that courts view the question differently during criminal actions in which the defendant's rights often trump other imperatives. Although the *Gullo* court held that disclosure was not required because the grand jury already had enough evidence to indict the target, it is likely that absent such evidence the subpoena would have been enforced despite the court's strong support for protection of alternative dispute resolution communications. In a recent civil case, the Second Circuit set forth a three-factor test for disclosure of confidential mediation communications:

A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material; (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. [citations omitted] All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.

*In Re Teligent*, 640 F.3d 53 (2d Cir. 2011). Although it is not clear whether the Second Circuit intended for the test to apply to any kind of request to the court for disclosure of mediation communications, the court's language is sufficiently broad to support such an interpretation.

<sup>56</sup> No. CV 08-04796, 2008 WL 4447678 (C.D. Cal Sept. 30, 2008).

<sup>57</sup> *Id.* at \*15.



period because Lexmark had been provided notice of the facts that were the predicate for removal during the mediation of the case. Lexmark disputed this claim based, *inter alia*, on its assertion that the information obtained during the mediation was privileged under *Folb*.

The *Molina* court stressed that the *Folb* court had repeatedly limited the privilege that it found to the factual context before it, namely one in which a third party who did not participate in the mediation sought in discovery to obtain mediation communications. Noting that “confidential does not necessarily mean privileged,” the *Molina* court described confidentiality as affecting the freedom of the neutral or the parties to disclose information whereas privilege would affect the ability of third parties to compel disclosure. Therefore the court concluded that the information sought was subject to disclosure in *Molina* inasmuch as a party to the case was seeking mediation communications in the same case, the case was a class action and thus entailed a greatly diminished expectation of confidentiality, and because it found the reason for disclosure (establishing an “objective baseline” for calculating the timeliness of removal) compelling.<sup>58</sup>

*Molina* discusses the mixed case law on mediation privilege after *Folb* and notes that no Circuit court had thus far adopted a mediation privilege. In this regard, it highlights the Fifth Circuit’s analysis in *In re Grand Jury Subpoena*.<sup>59</sup> That case will be discussed in some detail below with regard to the interpretation of confidentiality under ADRA.

Concerns about protecting confidential mediation communications from involuntary disclosure have also been articulated in many scholarly articles on the subject. Illustratively, Alan Kirtley argues that “[w]ithout adequate legal protection, a party's candor in mediation

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<sup>58</sup> Although it found the *Folb* privilege inapplicable, the *Molina* court considered the four factors outlined in *Folb* and still found that the applying the privilege in *Molina* was unwarranted. The court noted that, unlike *Folb*, neither Lexmark nor *Molina* had signed a confidentiality agreement implying that this omission might have some significance.

<sup>59</sup> *In re Grand Jury Subpoena* Dated December 17, 1996, 148 F. 3d 487 (5<sup>th</sup> Cir. 1998) [hereinafter *In re Grand Jury*].

might well be ‘rewarded’ by a discovery request or the revelation of mediation information at trial. A principal purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed mediation.”<sup>60</sup>

While the significance for ombuds of the common law mediation privilege articulated in *Folb* is not clear, the trajectory of cases discussing ombuds privilege itself is even more equivocal. Courts have gone back and forth over time on ombuds privilege manifesting profound differences in how courts discuss ombuds and their functions. Some courts have viewed them as very similar to mediators, while others have found the resemblance less striking, and less supportive of creation of an ombuds privilege. Courts that have found an ombuds privilege have construed it very narrowly.

The first case in the chronology of key decisions on ombuds privilege is *Shabazz v. Scurr*.<sup>61</sup> In this case, multiple “Section 1983”<sup>62</sup> suits were filed against state prison officials following an inmate's death. Officials of the state's ombudsman office moved to intervene and assert a state law evidentiary privilege against a former prison ombudsman employed by the plaintiffs in his subsequent occupation as an investigator operating a private consulting firm. The district court held that “a limited privilege exists under federal law” for communications received by a prison ombudsman, and that this privilege belonged to the office.<sup>63</sup> However, the court relied in part on a state law “and other confidentiality provisions” that provided for

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<sup>60</sup> Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation*, 1995 J. DISP. RESOL., 1995, at 10-11 (1995). See also Joseph Lipps, *The Path Toward a Federal Mediation Privilege*, 2010 AM. J. OF MEDIATION 4, 2010; Marcia S. Cohen, *The Mediation Privilege*, 87 FL. BAR J. 4, 2013, at 14; Ryan D. O’Dell, *Federal Court Positively Adopts a Federal Common Law Testimonial Privilege for Mediation*, 1999 J. DISP. RESOL., 1999. The latter article concurs with the need for protection of mediation confidentiality but argues that the basis for the decision articulated in *Folb* fell short of a convincing argument for privilege.

<sup>61</sup> 662 F. Supp. 90 (S.D. Iowa 1987).

<sup>62</sup> 5 U.S.C. § 1983 (2012). A section 1983 claim is a civil action filed against a person who, acting under “color of law,” has deprived the plaintiff of rights, privileges, or immunities granted under federal law or the United States Constitution.

<sup>63</sup> *Id.* at 90–91.

confidentiality of communications made to the ombudsman office, and did not recognize an ombuds privilege generally.<sup>64</sup> It did, however, recognize that courts have an interest in protecting the means of compromise and settlement of disputes and, in this circumstance, the office's "problem-solving" function.<sup>65</sup>

Eight years later in *Gartsang v. Superior Court*,<sup>66</sup> a California court of appeals addressed the question of whether communications made to a university ombudsman during mediation sessions are privileged. Garstang, a California Institute of Technology employee, sought to compel answers to certain deposition questions concerning conversations between several of her co-workers and the Caltech ombuds. The court stated that, although there was no specific statutory privilege for ombuds under California law, the basis for a qualified privilege could instead be found in the state's constitutional right of privacy.<sup>67</sup> Again, while the holding itself is of little utility outside of California, the court's rationale is of interest. It specifically relied on evidence in the record of the ombud's observed and widely publicized pledge of confidentiality creating an expectation of confidentiality on the part of the employees. Further, the court found that communications with this ombuds were privileged because, on balance, the confidentiality essential to the relationship, the societal value of the relationship and the potential injury to the relationship outweighed the possible benefit to be gained by disclosure.<sup>68</sup>

Perhaps the most cited of the cases on ombuds privilege is *Carman v. McDonnell Douglas Corp.*<sup>69</sup> in which the 8<sup>th</sup> Circuit Court of Appeals found that communications between

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<sup>64</sup> *Id.* at 92.

<sup>65</sup> *Id.*

<sup>66</sup> 39 Cal. App. 4th 526, 46 Cal. Rptr. 2d 84 (1995).

<sup>67</sup> *Id.* at 532.

<sup>68</sup> *Id.* at 534 (discussing and citing with approval *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 571 (1991), *vacated*, 990 F.2d 1051 (8th Cir. 1993)). *See also* Helen Hasenfeld, *Lessons Learned: A Revisit to the Garstang vs. California Institute of Technology Ruling*, 4 J. OF THE INT'L OMBUDSMAN ASS'N 2, 2011, at 16 (for a discussion of *Garstang* written by the ombuds who was the subject of the decision).

<sup>69</sup> 114 F.3d 790 (8th Cir. 1997).

an employee and a company ombudsman who both investigated and mediated workplace disputes were not privileged from disclosure. In this case an employee, Carman, sued his former employer, McDonnell Douglas, claiming that his termination violated the Age Discrimination in Employment Act, the Missouri Human Rights Act, and the Employee Retirement Income Security Act of 1974 (ERISA). The District Court granted summary judgment to McDonnell Douglas and Carman appealed. The Court of Appeals agreed with the employer “that fair and efficient alternative dispute resolution techniques benefit society and are worthy of encouragement,”<sup>70</sup> but ultimately decided that they were not convinced as to the necessity of the privilege based on the evidence submitted by McDonnell Douglas. In the words of the court:

To justify the creation of a privilege, McDonnell Douglas must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information. The creation of a wholly new evidentiary privilege is a big step. This record does not convince us that we should take it.<sup>71</sup>

The court in *Carmen* went to some lengths to describe the limits of the record on which it was constrained to rely. The court distinguished corporate ombuds, who are “paid by the corporation and lack[] . . . structural independence,” from government *classical* ombuds, “where the office of ombudsman is a separate branch of government that handles disputes between citizens and government agencies.”<sup>72</sup> The court noted that McDonnell Douglas failed to argue or present any evidence that “the ombudsman method” is superior to other forms of alternative dispute resolution, and, additionally, that the company failed to demonstrate the efficacy of its own ombuds at resolving disputes prior to litigation.<sup>73</sup> Further, the court found “McDonnell Douglas has failed to make a compelling argument that most of the advantages afforded by the

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<sup>70</sup> *Id.* at 793.

<sup>71</sup> *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 794 (8th Cir. 1997).

<sup>72</sup> *Id.* at 793.

<sup>73</sup> *Id.*

ombudsman method would be lost without the privilege,” asserting that “corporate ombudsmen still have much to offer employees in the way of confidentiality, for they are still able to promise to keep employee communications confidential from management.”<sup>74</sup> Relying thus on McDonnell Douglas’ complete failure to carry its burden of proof, the *Carmen* court rejected the argument of ombuds privilege and concluded that granting the privilege would neither convince an employee that the ombuds is neutral nor affect the relationship between the ombuds and management, and that the ombuds would still be able to “promise confidentiality in most circumstances even with no privilege.”<sup>75</sup>

Charles L. Howard in his seminal and comprehensive book, *The Organizational Ombudsman*,<sup>76</sup> has argued that the decision in *Carmen* was a captive of the circumstances, the limitations of the evidence presented and the limited arguments made by the employer in defense of the ombuds privilege.<sup>77</sup> In this regard, Howard notes that in an earlier case involving the same ombuds program, *Kientzy v. McDonnell Douglas Corp.*,<sup>78</sup> the magistrate judge found that communications with the corporate ombuds sought in a suit alleging employment discrimination were privileged. The judge in *Kientzy* had relied on his findings that: (1) the communications were made to the ombuds in the belief that they would be kept confidential; (2) the confidentiality of communications is essential to the relationship between the ombuds and both employees and management; (3) the relationship between the company’s ombudsman office and its employees and management is worthy of societal support; and (4) the harm caused by a

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<sup>74</sup> *Id.* at 793–94.

<sup>75</sup> *Id.* at 794.

<sup>76</sup> See HOWARD, *supra* note 1.

<sup>77</sup> See *id.* at 233–39.

<sup>78</sup> 133 F.R.D. 570.

disruption of the confidential relationship between the ombudsman’s office and others would be greater than the benefit to plaintiff by disclosure.<sup>79</sup>

Howard suggests circumstances that may have led the court in *Carmen* to reject the *Kientzy* holding. He notes initially that by the time of the *Carmen* decision the McDonnell Douglas ombuds program had been disbanded and thus posits that the company’s ardor for defending the interests of the program had faded.<sup>80</sup> As a result, in the proceeding before the trial judge in *Carmen*, the company merely relied on two unreported decisions in the same federal district court in which the privilege had been recognized and presented no evidence in support of the claim of privilege in the case at hand.<sup>81</sup> Thus, Howard argues, the *Carmen* decision was based on a lack of evidence supporting the claim of privilege and a fundamental misunderstanding of how properly structured ombuds offices function.<sup>82</sup> Howard concludes that, despite *Carmen*, in a properly litigated case concerning an ombuds office that is structured and functions according to recognized standards, a claim of testimonial privilege might still prevail.<sup>83</sup>

A subsequent case validates Howard’s concern about how ombuds privilege cases are litigated. Following *Carmen*, in *Solorzano v. Shell Chemical Co.*,<sup>84</sup> the court approached the question of privilege very cautiously. The case involved a Shell employee who was allegedly

<sup>79</sup> *Id.* at 571–73 (employing the four-factor “Wigmore test” set forth in *In re Doe*, 711 F.2d 1187, 1193 (2nd Cir. 1983)).

<sup>80</sup> See HOWARD, *supra* note 1, at 234.

<sup>81</sup> *Id.* at 235.

<sup>82</sup> *Id.* at 236–37.

<sup>83</sup> *Id.* at 221 (“[W]hile *Carmen* placed a cloud on an ombud’s ability to claim a testimonial privilege, the court’s opinion serves as a useful guide in articulating several issues that should be addressed by ombuds in seeking recognition of an ombudsman privilege.”). Cf. Scott C. Van Soye, *Illusory Ethics: Legal Barriers to an Ombudsman’s Compliance with Accepted Ethical Standards*, 8 PEPP. DISP. RESOL. L. J. 117, 132 (2007) (taking the more negative view that “a future claim of [ombudsman] privilege stands a poor chance of success in the federal courts.”). See also Kendall D. Isaac, *The Organizational Ombudsman’s Quest for Privileged Communications*, 32 HOFSTRA LAB. & EMP. L.J. 31, 47 (2014) (discussing the history of the ombudsman privilege and recommending the creation of “both a federal and a state statutory privilege.”); James R. Coben & Peter N. Thompson, *Disputing Irony: Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 68–73 (2006) (meta-analysis of over 1000 cases involving legal disputes about mediation, including 152 opinions where courts considered mediation confidentiality — of which 46 addressed privilege issues — and addressing the importance of how such claims are raised and litigated).

<sup>84</sup> No. CIV.A.99-2831, 2000 WL 1145766 (E.D. La. Aug. 14, 2000).

fired for substance abuse, but claimed he was discriminated against by the company. In pursuing a discrimination suit, he requested any files maintained on him by Shell’s ombudsman program regarding his claims. The court stated that “in deciding whether to recognize a new federal privilege, the Court should ‘balance the public’s need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality in order to achieve the objectives underlying the privilege in issue.’”<sup>85</sup> The magistrate judge noted that the Supreme Court refused to carve out a privilege in a case involving federal claims that — like Solorzano’s — were brought under “broadly remedial statutes, which set forth an integrated, multi-step enforcement procedure designed to be initiated by laymen.”<sup>86</sup> The judge concluded that “[t]his court, like many others, is reluctant to find a new privilege that may undermine the federal interests at stake in . . . claims brought under federal law.” On the specific question of whether to create a federal ombudsman’s privilege, relying on a similarly limited record the *Solorzano* court was persuaded by the reasons elucidated in *Carman* for rejecting such a privilege. After quoting from *Carman* at length, the judge held: “I am particularly reluctant to recognize such a privilege as a matter of federal common law when a narrowly drawn protective order . . . short of recognition of a broad-ranging privilege, will suffice to accommodate any need for confidentiality . . . .”<sup>87</sup>

Two cases arising in California are additionally of interest, based on their rationale and dicta, although they rely on state law. In *Ombudsman Services of Northern California v.*

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<sup>85</sup> *Id.* at 5 (quoting *Syposs v. United States*, 179 F.R.D. 406, 409 (W.D.N.Y.1998) (internal citations omitted)).

<sup>86</sup> *Id.* (citing *University of Pa. v. EEOC*, 493 U.S. 182, 190 (1990); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123–24 (1988)).

<sup>87</sup> *Id.* at 5. *Cf.* *Miller v. Regents of the Univ. of Colo.*, 1999 WL 506520, 188 F.3d 518 (10<sup>th</sup> Cir. 1999) (Table), at \*3, \*15 (affirming district court’s ruling “limiting discovery pursuant to an ombudsman privilege”; but recognizing “that neither Colorado nor federal law . . . recognize an ombuds privilege.”). *Miller* is discussed, *infra*, with regard to judges’ inherent authority to manage discovery.

*Superior Court*<sup>88</sup> the California court, on appeal, decided that the trial court had erred in requiring the production of records of the Ombudsman Services of Northern California, an authorized representative of the Office of the State Long-Term Care Ombudsman. A representative of a decedent's estate sued the care facility where the decedent had been living and other defendants for elder abuse, wrongful death, and other causes of action. The Superior Court below had ordered the long-term care ombudsman to provide the parties with all records relating to the care facility over a specified time period.

On appeal, the court noted that “confidentiality is critical to the functioning of the ombudsman.”<sup>89</sup> The court began its analysis by recognizing that California Evidence Code § 911<sup>90</sup> codifies the Legislature’s intent “to abolish common law privileges and to keep the courts from creating new non-statutory privileges as a matter of judicial policy.”<sup>91</sup> In this case, however, the court found that it did not need to address the issue of common law privilege, because “there is a specific [state] statute providing a privilege for the investigatory records and files of the office of the long-term care ombudsman.”<sup>92</sup> The court noted that the California statute comports with federal laws requiring that states receiving federal funding for long-term care ombudsmen “preserve the confidentiality” of information gathered pursuant to those programs.<sup>93</sup> In concluding its analysis, the court “balance[ed] the need for discovery against the fundamental right of privacy” afforded under article 1, § 1 of the California Constitution,

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<sup>88</sup> 154 Cal. App. 4th 1233 (2007).

<sup>89</sup> *Id.* at 1242.

<sup>90</sup> The provision states:

Except as otherwise provided by statute:

(a) No person has a privilege to refuse to be a witness.

(b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.

(c) No person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object, or other thing.

CAL EVID. CODE § 911 (2007).

<sup>91</sup> *Ombudsman Servs.*, 154 Cal. App. 4th at 1243 (*Welfare Rights Org. v. Crisan*, 33 Cal. 3d 766, 768–769 (1983)).

<sup>92</sup> *Id.* (citing CAL WELF. & INST. CODE § 9725 (2007) (“Records and files of office; confidentiality”).)

<sup>93</sup> *Id.* at 1246 (citing 42 U.S.C. §§ 3058d(a)(6)(A), (C), 3058i(e)(2)(A)).



determining in this case that the “undisputed evidence established a very strong constitutional privacy interest in the records sought to be discovered by [the] plaintiff.” Thus the court held that to compel disclosure of the ombudsman’s records would violate the protected privacy rights under the state’s constitution.

In contrast, in *Gazzano v. Stanford University*,<sup>94</sup> the United States District Court relied on *Carman* and *Miller v. Regents of the University of Colorado*, discussed *infra*, to deny a claim that communications with the university ombuds should be privileged. In a case of alleged dismissal for whistleblowing, the plaintiff sought to obtain all prior written correspondence between himself and the ombuds. Inasmuch as the case had been removed to federal court because of certain labor issues, the judge found that federal, rather than state, law on privilege applied. Acknowledging that Stanford had “failed to provide specific facts emphasizing the need for confidentiality in this situation,” the judge concluded that ombuds “are generally known to be company representatives, making them fundamentally different from neutral, third-party mediators,” and that therefore employees are “unlikely to approach the ombudsmen with the expectation that such communications be kept confidential.”<sup>95</sup> Once again, *Gazzano* raises the question of whether, had the case been litigated differently and the court thus been more knowledgeable about this ombuds and ombuds generally, the outcome might have been different.<sup>96</sup>

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<sup>94</sup> Case No. C 12-05742 PSG, 2013 WL 3158075, at \*3 nn.18–19 (ruling on an order regarding motion to compel and motion for protective order).

<sup>95</sup> *Id.* The court appeared to assume, arguably erroneously, that any privilege would belong to the constituent seeking ombuds assistance rather than to the ombuds him or herself.

<sup>96</sup> *Id.* See also *supra* notes 80–83 and accompanying text discussing the impact of litigation strategy on the outcome in *Carman*.

## B. Judicial Authority to Manage Discovery

Although courts have been reluctant to find a federal ombuds privilege, courts generally have inherent authority to control the introduction of evidence in a given case by determining the proper scope of discovery. For example, the court in *Dondi Properties Corp. v. Commerce Savings & Loan Ass'n* stated:

By means of the Rules Enabling Act of 1934, now codified as 28 U.S.C. § 2072, Congress has authorized the Supreme Court to adopt rules of civil procedure. The Court has promulgated rules that empower district courts to manage all aspects of a civil action, including pretrial scheduling and planning (Rule 16) and discovery (Rule 26(f) . . . . In addition to the authority granted us by statute or by rule, we possess the inherent power to regulate the administration of justice.”<sup>97</sup>

Correspondingly, Federal Rule of Evidence 102, states: “These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”<sup>98</sup> In addition, Federal Rule of Evidence 403 provides a balancing test ensuring that a judge has the discretion to determine the relevancy of evidence and whether its probative value is substantially outweighed by, *inter alia*, a danger of unfair prejudice.

Illustrating this discretion, in *Seattle Times Co. v. Rhinehart*<sup>99</sup> the U.S. Supreme Court discussed a Washington state rule pertaining to protective orders in discovery. The Supreme Court of Washington had affirmed a protective order issued by the trial court compelling discovery of certain information regarding the members, contributors and clients of the Aquarian Foundation, a religious organization, which had sued the Seattle Times after the newspaper

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<sup>97</sup> 121 F.R.D. 284 (N.D. Tex. 1988) (en banc). We note that subsequent modifications to the Federal Rules of Civil Procedure in 1993 and 2000 though altering discovery in the federal courts in some respects did not in relevant part reduce the judges’ discretion to manage it. See Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform”*, 64 LAW & CONTEMP. PROBS. 197, 246 (2001).

<sup>98</sup> FED. R. EVID. 102 (“Purpose”).

<sup>99</sup> 467 U.S. 20 (1984)

published several articles about the organization.<sup>100</sup> The protective order prohibited the newspaper from “publishing, disseminating or using the information in any way except where necessary to prepare for and try the case,” however, “[b]y its terms, the order did not apply to information gained by means other than the discovery process.”<sup>101</sup> On review the Supreme Court concluded that the provision for protective orders in the Washington Rules required “no heightened First Amendment scrutiny,” noting that the rule follows the example set in Federal Rule 26(c), which “confers broad discretion on the trial court to decide when an order is appropriate and what degree of privacy protection is required.”<sup>102</sup>

While the Court in *Seattle Times* considered only the narrow question of whether a litigant had the right to disseminate information he obtained pursuant to a court order “that both granted him access to that information and placed restraints on the way in which the information might be used[.]”<sup>103</sup> its rationale evokes some of the policy considerations that might be brought to bear should a court be called upon to use its inherent authority to protect the confidentiality of certain ombudsman communications.<sup>104</sup>

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<sup>100</sup> *Id.* at 23.

<sup>101</sup> *Id.* at 27.

<sup>102</sup> *Id.* at 36.

<sup>103</sup> *Id.* at 32.

<sup>104</sup> An excerpt from the Court’s analysis in *Rhinehart*, reproduced below, fleshes out the rationale for imbuing the trial court with broad authority to fashion protective orders:

Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery. There is an opportunity, therefore, for litigants to obtain — incidentally or purposefully — information that not only is irrelevant but, if publicly released, could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of processes.

467 U.S. at 34-35 (footnotes and internal citations omitted).

Generally, cases in which judges have used this inherent authority to protect communication with ombuds are unreported and difficult to obtain. One exception is *Miller v. Regents of the University of Colorado*,<sup>105</sup> a sexual harassment case in which Miller, a university employee, alleged that her former supervisor had subjected her to workplace sexual discrimination. Due to the “sensitive nature” of the case, the defendants filed a motion for a protective order early on in the discovery process which the magistrate judge granted.<sup>106</sup> Subsequently, Miller filed a series of motions in order to compel the testimony of the university’s former ombudsperson. The district court denied the motions, holding that the ombuds was precluded from answering questions or revealing any information covered by an “ombudsman privilege,” which protected all communications “made with an expectation of privacy to the University ombudsperson.”<sup>107</sup> On appeal, Miller argued, *inter alia*, that the district court erred by “upholding a protective order which improperly limited her discovery rights . . . [and] limiting discovery pursuant to an ombudsman privilege.”<sup>108</sup> In affirming the district court’s rulings, the court of appeals did not reach the university’s claim of ombuds privilege. Instead, in support of its holding, the court turned to the balancing language in Rule 26(b) & (c) of the Federal Rules of Civil Procedure.<sup>109</sup> As a matter of broad principle, the appeals court held that the district court’s discretion to define the scope of discovery is wide because it is in the best position “to view firsthand the progression of the case, the litigants, and the impact of discovery on parties and nonparties.”<sup>110</sup> The court found it unnecessary to address

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<sup>105</sup> 1999 WL 506520, 188 F.3d 518.

<sup>106</sup> *Id.* at \*3.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 3.

<sup>109</sup> Specifically, the court referenced Rule 26(b)(2)(iii): “Courts have the power to limit discovery if ‘the burden or expense of the proposed discovery outweighs its likely benefit[.]’” and 26(c): “[d]istrict courts may also issue a protective order if ‘justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.’” *Id.* at \*12.

<sup>110</sup> *Id.*

the issue of ombuds privilege inasmuch as it found that the information precluded by the lower court pursuant to its finding of such a privilege concerned other employees and would not have saved the claims at issue from summary judgment.

### **C. Administrative Dispute Resolution Act (ADRA) of 1996**

In light of the current state of the case law surrounding ombuds privilege and the uncertain reception of requests to judges to exercise their authority over discovery to protect ombuds confidentiality, the primary protection for federal ombuds confidentiality is to be found in the Administrative Dispute Resolution Act (ADRA).<sup>111</sup> Apart from its recognition that the use of ombuds is a form of alternative dispute resolution, the chief practical impact of the inclusion of ombuds in the definition of “means of alternative dispute resolution”<sup>112</sup> in ADRA in 1996 is in the application of § 574 on “Confidentiality.” However, the inclusion of ombuds in the definition of means of alternative dispute resolution in ADR in § 571(3) does not assure that the confidentiality provisions in § 574 apply to everything that an individual with the title ombuds does.

Significantly, § 574 imposes obligations on the neutral and the parties with respect to confidentiality. It is not articulated as a privilege but rather as a proscription describing what neutrals and parties may and may not do and the specific exceptions to confidentiality that apply respectively. ADRA § 574 “does not provide a mere privilege or general endorsement of ‘confidentiality.’ It prohibits disclosure . . . .”<sup>113</sup> Further, § 574’s reach exceeds that of a privilege in that it is not limited to adjudicatory applications.

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<sup>111</sup> 5 U.S.C. §§ 571–584 (2012).

<sup>112</sup> *See* 5 U.S.C. § 571(3).

<sup>113</sup> AM. BAR ASS’N, AD HOC COMM. ON FED. ADR CONFIDENTIALITY, GUIDE TO CONFIDENTIALITY UNDER THE FEDERAL DISPUTE RESOLUTION ACT 17 (2005) (*ABA Guide to Confidentiality*).

Section 574(a) lays out the broad rule that a neutral as defined in the Act “shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral...”<sup>114</sup> This ban has four exceptions: (1) if all parties to the dispute and the neutral consent in writing to the disclosure;<sup>115</sup> (2) if the communication has already been publicly disclosed;<sup>116</sup> (3) if the dispute resolution communication is required by statute to be made public;<sup>117</sup> and (4) if a court determines that disclosure is necessary to “prevent a manifest injustice[,] help establish a violation of law[,] or prevent harm to public health or safety.”<sup>118</sup> The fourth exception also requires a court to perform a balancing test determining whether the magnitude of the potential harm “outweigh[s] the integrity of dispute resolution proceedings in general” so as not to “reduce the confidence of parties in future cases that their communications will remain confidential.”<sup>119</sup>

Section 574(b), covering parties to a dispute resolution proceeding, provides an almost identical blanket rule for confidentiality and four of the exceptions to this rule are identical to the ones listed under subsection (a).<sup>120</sup> However it includes additional exceptions. These exceptions are for disclosures made by parties when “the communication was prepared by the party seeking disclosure[,]”<sup>121</sup> when the communication is relevant to determining the existence of or enforcing

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<sup>114</sup> 5 U.S.C. § 574(a).

<sup>115</sup> 5 U.S.C. § 574(a)(1).

<sup>116</sup> 5 U.S.C. § 574(a)(2).

<sup>117</sup> 5 U.S.C. § 574(a)(3). However, this provision says that “a neutral should make such communication public only if no other person is reasonably available to disclose the communication.” The interpretation of § 574(a)(3) and its implications for ombuds are discussed further below as the report addresses the potential conflicts between § 574 and various other statutes.

<sup>118</sup> 5 U.S.C. § 574(a)(4)(A)–(C).

<sup>119</sup> 5 U.S.C. § 574(a)(4).

<sup>120</sup> See 5 U.S.C. § 574(b)(2-5). These are the exceptions based on consent, prior public disclosure, requirement by statute that information be made public, and a decision by a court that disclosure would prevent a “manifest injustice” as provided in § 574(a)(1)–(4).

<sup>121</sup> 5 U.S.C. § 574(b)(1).

an agreement or award that resulted from the dispute resolution proceeding[.]”<sup>122</sup> and, most notably, when, “except for dispute resolution communications generated by the neutral, the . . . communication was *provided to or was available to all parties to the dispute resolution proceeding.*”<sup>123</sup> The language of § 574(b)(7) effectively means that a party may freely disclose any documents or oral statements, made by anyone other than the neutral, as long as those communications were provided to or were available to all parties to the proceeding. The effect is that parties are protected from disclosure of dispute resolution communications by the neutral(s), but not from disclosure by each other under certain circumstances, including when communications are made during joint sessions with all parties present. Importantly, the Act also specifies that the parties may agree to alternative confidentiality procedures for disclosures by themselves<sup>124</sup> or by the neutral, provided they fully inform the neutral of their agreement.<sup>125</sup>

The ABA guidelines on confidentiality under ADRA raise a concern about the § 574 exception pertaining to parties for shared dispute resolution communications, finding potentially “detrimental impacts” compared to non-governmental settings in that this exception undermines the reasons why a party hoping to handle a dispute privately would choose an alternative to litigation.<sup>126</sup> The ABA cautions that “reduced candor in joint sessions, over-emphasis on “private caucus or evaluative styles of ADR, and confusion or detrimental surprise for unsophisticated participants” are possible negative results of this exception to the prohibitions on disclosure by parties.<sup>127</sup> For ombuds, to the extent that the ombud’s practices are covered by § 574, application of this exception to confidentiality for parties is likely limited inasmuch as most federal ombuds typically spend a minority of their time facilitating the functional equivalent of

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<sup>122</sup> 5 U.S.C. § 574(b)(6).

<sup>123</sup> 5 U.S.C. § 574(b)(7) (emphasis added).

<sup>124</sup> 5 U.S.C. § 574(b)(2).

<sup>125</sup> 5 U.S.C. § 574(d)(1).

<sup>126</sup> See *ABA Guide to Confidentiality*, *supra* note 113, at 21.

<sup>127</sup> *Id.*

mediation joint sessions. However, there may be occasions when it is important for an ombuds to inform a party who might share sensitive information with all the “parties” in the dispute resolution process of any possible limitations on the scope of the confidentiality obligations of the other parties.

The question remains as to what extent activities of federal ombuds are covered by § 574. As discussed below, there is as yet no unanimity among commentators about the extent to which ADRA § 574 applies to ombuds. Nonetheless, ombuds should be mindful of its requirements and prohibitions for themselves, for the constituent who seeks their assistance, and potentially for others that the ombuds may engage as part of the dispute resolution process.

Parsing the language of the statute itself, there are several words and phrases such as “alternative dispute resolution,” “issue in controversy,” “neutral,” “party,” and “administrative program” that are used throughout ADRA. Definitions of these terms and others are found in section 571 of the Act.<sup>128</sup> Starting with ADRA’s sole mention of ombuds, § 571(3) states “‘alternative means of dispute resolution’ means any procedure that is used to *resolve issues in controversy*, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof[.]”<sup>129</sup> None of these “means of dispute resolution” are defined in the statute but “issue in controversy” is defined as “an issue which is material to a decision concerning an administrative program of an agency[.]”<sup>130</sup> At § 571(2) “administrative program” is defined as including “a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation[.]”<sup>131</sup>

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<sup>128</sup> 5 U.S.C. § 571.

<sup>129</sup> 5 U.S.C. § 571(3) (emphasis added).

<sup>130</sup> 5 U.S.C. § 571(8).

<sup>131</sup> 5 U.S.C. § 571(2).



Section 574 (“Confidentiality”) specifically applies to the “neutral” and all “parties” in a “dispute resolution proceeding” and describes their rights and obligations with regard to “dispute resolution communications.”<sup>132</sup> In section 571 (“Definitions”), “dispute resolution communication” is defined as any “oral or written communication prepared for the purposes of a dispute resolution proceeding[.]”<sup>133</sup> A “neutral” is defined as “an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy[.]”<sup>134</sup> Additionally, in § 573 (“Neutrals”), neutrals are described as “a permanent or temporary officer or employee of the Federal Government or *any other individual who is acceptable to the parties* to a dispute resolution proceeding.”<sup>135</sup> Neutrals “shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.”<sup>136</sup>

The case law interpreting these provisions of ADRA is scant. Beginning with the question of what is a neutral under ADRA, case law provides no guidance as to what “neutral” means. ADR.gov, a website created by the Interagency Alternative Dispute Resolution Working Group under the aegis of the Department of Justice, suggests that the key definitional component is the matter of choice in the selection of an individual who assists the parties in dispute resolution: “The broad definitions of neutral, along with other parts of the FAR<sup>137</sup> and ADRA of

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<sup>132</sup> See 5 U.S.C. § 574(a)–(j).

<sup>133</sup> 5 U.S.C. § 571(5).

<sup>134</sup> 5 U.S.C. § 571. “Party” is defined at § 571(10) as: “(A) for a proceeding with named parties, the same as in section 551(3) of this title; and (B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding[.]” 5 U.S.C. § 551(3) stipulates that a “party”: “includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes . . . .”

<sup>135</sup> 5 U.S.C. § 573(a) (emphasis added).

<sup>136</sup> *Id.*

<sup>137</sup> *I.e.*, the Federal Acquisition Regulation, 48 C.F.R. §§ 1.00–51.205 (2016).

1996, ensure that parties can use a neutral of their choice, whether from an established forum, other agencies, other levels of government (state, local, and tribal), and the private sector.”<sup>138</sup>

Cases citing relevant provisions of ADRA tend to reinforce the statutory definitions but do not appreciably enhance them. In *United States v. Park Place Associates, Ltd.*<sup>139</sup> the court simply restated that the use of ADR processes under the Act is restricted to “an administrative program of an agency” and that the “issue in controversy” must be one “which is material to a decision . . . with which there is a disagreement.”<sup>140</sup> Likewise, *Park Place* merely repeats that “administrative program” is defined by § 571(2) to mean “a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation.”<sup>141</sup>

There is one case that does somewhat more than merely recite the statute, *In re Grand Jury Subpoena Dated December 17, 1996*.<sup>142</sup> As precedent, however, it is problematical. The case concerned a feature of the Agricultural Credit Act of 1987<sup>143</sup> that provides financial assistance to states for agricultural loan mediation programs to resolve disputes between farmers and their agricultural lenders. In Texas, the mediation program receiving federal assistance was administered by Texas Tech University and called the Texas Agricultural Mediation Program (“TAM”).<sup>144</sup>

In its proposal to perform loan mediation services, TAM agreed that it would operate in accordance with the confidentiality provisions of the Texas Alternative Dispute Resolution

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<sup>138</sup> See Contracted Neutral Services, ADR.GOV, at <https://www.adr.gov/adrguide/24-cns.html>.

<sup>139</sup> No. CV 04-8387 DT CTX, 2005 WL 6066062 (C.D. Cal. June 13, 2005), *rev'd on other grounds*, 563 F.3d 907 (9th Cir. 2009).

<sup>140</sup> *Id.* at \*16.

<sup>141</sup> *Id.*

<sup>142</sup> 148 F.3d 487 (5th Cir. 1998).

<sup>143</sup> Pub. L. No. 100-233, 101 Stat. 1568 (Jan. 6, 1988).

<sup>144</sup> *In re Grand Jury*, 148 F.3d at 489.

Procedures Act.<sup>145</sup> The Texas statute provides that communications relating to subject matter of civil or criminal disputes made in the course of alternative dispute resolution procedures are confidential, not subject to disclosure and “may not be used as evidence against the participant in any judicial or administrative proceeding.”<sup>146</sup> However, it further specifies that if the confidentiality provision conflicts with other legal requirements, the court having jurisdiction of the proceedings must consider whether or not under all the circumstances a protective order is warranted.<sup>147</sup>

The case at issue arose when the USDA (United States Department of Agriculture) Office of Inspector General (OIG) was conducting an audit of TAM and discovered irregularities suggesting criminal wrongdoing. These suspicions led to a grand jury investigation and the grand jury subpoenaed TAM, which then moved to quash the subpoena based on a claim of privilege. The district court, relying on the Agricultural Credit Act, the Texas ADR Procedures Act and ADRA, vacated a magistrate judge’s order that had refused the request of a party to one of the mediations to quash the subpoena.<sup>148</sup>

On appeal, the 5<sup>th</sup> Circuit Court of Appeals reversed the district court concluding that although the TAM mediations were confidential they were not privileged under the Agricultural Credit Act.<sup>149</sup> The court found that while that statute provided for confidentiality, there was no clear congressional intent to create an evidentiary privilege for mediations protecting them from disclosure in grand jury proceedings.<sup>150</sup>

On its facts, *In re Grand Jury* might be particularized in that it involves a criminal inquiry before a grand jury and therefore, on balance, is more compelling than civil proceedings.

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<sup>145</sup> See TEX. CIV. PRAC. & REM. §§ 154.001–073.

<sup>146</sup> See *In re Grand Jury*, 148 F.3d at 489 (citing and quoting TEX. CIV. PRAC. & REM. § 154.073(a)).

<sup>147</sup> See TEX. CIV. PRAC. & REM. § 154.073(d).

<sup>148</sup> See *In re Grand Jury*, 148 F.3d at 489–90.

<sup>149</sup> *Id.* at 492–93.

<sup>150</sup> *Id.* at 492.

Curiously, however, rather than apply the balancing test applicable to courts in § 574, the 5<sup>th</sup> Circuit panel held that neither ADRA nor the Texas statute were even applicable.<sup>151</sup> With regard to ADRA, the court held without analysis that the case did not involve an “issue in controversy” of the type contemplated by sections 571 and 572 of the Statute.<sup>152</sup> The court indicated, in dicta and again without explication, that if ADRA had applied, it would have ordered disclosure under the exception to confidentiality for disclosure when a court determines that disclosure is necessary to help establish a violation of the law of sufficient magnitude to outweigh the integrity of dispute resolution proceedings.<sup>153</sup>

An article by Charles Pou, Jr.<sup>154</sup> examines this case and the evolving nature of confidentiality in federal alternative dispute resolution. Of the ADRA confidentiality provisions, Pou begins by saying that “[m]ost observers have found them to reflect an appropriate balance between the openness needed for legitimacy and oversight and the confidentiality necessary for many sensitive negotiations.”<sup>155</sup>

Pou argues that the 5<sup>th</sup> Circuit’s ruling was in error in not applying ADRA to the case and notes that ADRA defines “issue in controversy” quite broadly. Pou also contends that the 5<sup>th</sup> Circuit ruling misses the larger point of ADRA and statutes like it. He states, “the 5<sup>th</sup> Circuit’s recent decision did not discuss, much less strike a balance between the important, but somewhat divergent, goals of furthering accountability and promoting flexible, efficient decision-

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<sup>151</sup> *Id.* at 491.

<sup>152</sup> *Id.* at 492 (citing 5 U.S.C. § 571(2) (defining “administrative program”); 5 U.S.C. §§ 8(A) & (B) (defining “issue in controversy”); 5 U.S.C. § 572(a) (describing general authority of an agency to use ADR “for the resolution of an issue in controversy that relates to an administrative program . . . .”). The court reached this conclusion without finding it necessary to discuss or discount the facts that the case involved subpoenas generated by a federal inspector general investigation, involved a federally funded mediation program and most of the mediations had the Farm Service Agency, part of the USDA, as a party.

<sup>153</sup> *Id.* at 493 (citing 5 U.S.C. § 574(a)(4)(B)).

<sup>154</sup> Charles Pou, Jr., *Gandhi Meets Eliot Ness: 5<sup>th</sup> Circuit Ruling Raises Concerns About Confidentiality in Federal Agency ADR*, 5 DISP. RESOL. MAG. 9 (Winter, 1998).

<sup>155</sup> *Id.* at 9.

making.”<sup>156</sup> Pou acknowledges that while the relationship between ADRA and the Inspector General Act would likely have had to have been assessed had ADRA been applied by the court, the court’s opinion finding ADRA inapplicable did so “without significant analysis or relevant citation . . . . As a result, the rationale for the court’s conclusions is unclear.”<sup>157</sup> Pou concludes that the decision is not helpful to those trying to understand the implications both of that case or the practical applications of ADRA generally.

Pou also questioned the arguments of the U.S. attorney, calling these arguments “dubious.”<sup>158</sup> They included arguments that: (1) ADRA was intended to apply only to programs created after its passage; (2) there is a relevant distinction between a “confidential” and a “privileged” communication, with the former being inferior to the latter; (3) disclosure of confidential information to a grand jury is not a “public” disclosure; and (4) ADRA was intended to be limited to civil cases and has no application in criminal investigations.<sup>159</sup> With regard to the question of privilege versus confidentiality, Pou explains that it is a distinction without a difference in this case because ADRA provides the applicable “comprehensive statutory scheme that defines the extent of protection to be afforded . . . .”

Pou points out that the intent of the passage of laws such as the ADRA by legislative bodies is to encourage parties to participate and to increase their existing participation in alternative dispute resolution, striking a careful balance between open government and confidentiality. These bodies also recognize that parties to ADR proceedings would be less forthcoming, and the proceedings therefore less effective, if they knew there was a significant possibility that communications made during them would be publicly disclosed or later used

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<sup>156</sup> *Id.* at 10.

<sup>157</sup> *Id.* at 10.

<sup>158</sup> *Id.* at 10.

<sup>159</sup> *Id.* at 10–11.

against them. Accordingly, ADRA puts disclosure decisions in the hands of the courts, rather than the hands of the person seeking the information. Pou concludes that by failing to meaningfully analyze and balance the competing interests, including those of future parties and mediators, the Fifth Circuit abdicated its responsibility to balance competing interests and in so doing created doubts and concerns that would extend far beyond that case.

*In re Grand Jury* was followed by *FDIC v. White*,<sup>160</sup> in which a party alleged that a settlement agreement had been coerced in the course of a mediation. Relying on *In re Grand Jury*'s treatment of ADRA, the district court held: "The Court does not read the ADRA or its sparse legislative history as creating an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation."<sup>161</sup> The court made no mention of the exception to confidentiality in ADRA § 574(b)(6) permitting disclosure where "relevant to determining the existence or meaning of an agreement or award . . . or to the enforcement of such an agreement or award."<sup>162</sup> Instead the court expanded on its rationale for declining to recognize a mediation privilege, explaining that "such a privilege would effectively bar a party from raising well-established common law defenses such as fraud, duress, coercion, and mutual mistake" to challenge a settlement agreement.<sup>163</sup> According to the court: "It is unlikely that Congress intended such a draconian result under the guise of preserving the integrity of the mediation process."<sup>164</sup>

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<sup>160</sup> 76 F. Supp. 2d 736 (N.D. Tex 1999).

<sup>161</sup> *Id.* at 738.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* See also *Hanson v. County of Kitsap*, 2014 WL 549833 (W.D. Wash.), where the court mentioned ADRA in a case shielding communications with an Employer Support for Guard and Reserve (ESGR) ombuds established under the Uniformed Services Employment and Reemployment Rights Act (USERRA). In *Hanson*, the plaintiff asked to interview the ESGR ombuds about communications between the ombuds and various agents of plaintiff's employer, Kitsap County. Under ESGR policy, the employer and the employee must both agree to such an interview; however, the county refused to participate. In discovery the plaintiff served a Notice of Deposition on defendants indicating his intention to solicit the identity of the county employee "who refused to go forward with the ESGR interview and the reasons for refusing . . ." The county moved for a protective order, arguing that all ESGR

In 2005, the ABA Ad Hoc Committee on Federal ADR Confidentiality issued a *Guide to Confidentiality Under the Federal Administrative Dispute Resolution Act*<sup>165</sup> that addressed many ADRA interpretive questions. As an initial matter, the Committee noted the change in language from the original more restrictive definition in the 1990 Act referring to ADR as a procedure used “in lieu of an adjudication,” with adjudication being by reference “an agency process for the formulation of an order.”<sup>166</sup> Noting the far broader language of the 1996 version of the Act regarding “issue[s] in controversy,” the Committee described the Act’s reach as including both “cases” and other disputes or conflicts either within the Federal government, before the government or offered or authorized by the government.<sup>167</sup>

The ABA Ad Hoc Committee also addressed the meaning of “neutral” under the Act. To the Committee, a neutral is anyone acceptable to the parties who “specifically assists parties to resolve a particular governmental dispute.”<sup>168</sup> The Committee found that neutrals perform a range of tasks including: acting to mediate, facilitate, find facts, and arbitrate as well as performing intake or convening in support of dispute resolution processes and advising potential parties about different dispute resolution processes.<sup>169</sup> The Committee delineated two types of neutral roles, acknowledging that the roles often overlap. One role is labeled as “administrative” or “program” neutrals, defined as those who administer or assist with ADR processes but do not

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dispute resolution proceedings are protected by ADRA § 571–584. The court did not reach the question of whether ADRA applied in this case, instead determining that the evidence plaintiff sought was unrelated to “the underlying issues” of whether defendants had “violated USERRA” or related laws. *See also Fields-D’Arpino v. Restaurant Associates, Inc.*, 39 F. Supp. 2d 412, 417-18 (S.D.N.Y. 1999) which also includes language interpreting ADRA (“The Alternative Dispute Resolution Act of 1998 requires each federal district court to authorize, by local rule, the use of alternative dispute resolution processes in all civil actions. . . . The Act requires that ADR processes be confidential and prohibits disclosure of confidential dispute resolution communications, though it does not make mediation communications privileged.”).

<sup>165</sup> Cited *supra* note 113.

<sup>166</sup> *Id.* at 22 n.21.

<sup>167</sup> *Id.* at 23.

<sup>168</sup> *Id.* at 23–24.

<sup>169</sup> *Id.* at 23–25. For the Committee’s findings on “administrative neutrals,” see *id.* at 26–36; for information on “session neutrals” see *id.* at 37-46.

actually participate in dispute resolution.<sup>170</sup> The other role is labeled as “session” neutrals, defined as those who preside over “party-to-party” sessions in a specific application of ADR such as mediation or facilitation, and may work with the parties between sessions.<sup>171</sup>

Regarding administrative neutrals, the Committee described them as primarily doing intake, convening dispute resolution processes, and performing a range of functions from technical assistance to recordkeeping. As the Committee deemed these individuals to be neutrals under the Act, it notes that a dispute resolution process “may commence well before the parties meet in a negotiation session[,]”<sup>172</sup> thus invoking the Act’s protections and prohibitions even before any dispute resolution session has convened or even in the event that such a session never comes about. By the same token, the Committee cautions that some activities relating to dispute resolution might not be protected. These would include generalized training about dispute resolution, establishing a roster of neutrals and some standard office functions presumably because none of these activities relate to a particular issue in controversy.<sup>173</sup>

Likewise, the Committee cautions that not all functions of designated “session” neutrals will necessarily be deemed the activities of a neutral under ADRA. In this regard, the Committee distinguishes, illustratively, a neutral who facilitates a generalized discussion to enhance a group’s mutual understanding or long range planning, from a neutral who works with a group to resolve conflict, indicating that only the latter should be considered acting as a neutral under the Act.<sup>174</sup>

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<sup>170</sup> *See id.* at 26–34.

<sup>171</sup> *See id.* at 37–45.

<sup>172</sup> *Id.* at 28. *See also IADRWG Guide supra* note 19, at 21 (“The confidentiality protections of the ADR Act start when the employee first contacts an ADR program staff member concerning a dispute.”).

<sup>173</sup> *Id.* at 29.

<sup>174</sup> *Id.*



While the Committee thus takes a somewhat narrow view of the requirement that a neutral “resolve an issue in controversy,” it takes a broader view of the meaning of neutrality itself. It posits that under ADRA’s own definitions, a “neutral need not even be ‘neutral’ so long as the parties accept and use her specifically to aid in resolving an issue in controversy.”<sup>175</sup>

Noting that ombuds have expressly been included in ADRA’s definition of “alternative means of dispute resolution” and are ADR professionals, the Committee concludes that many but not all ombuds activities fall under the Act’s confidentiality protections.<sup>176</sup> Specifically, “[t]he fact that ombuds personnel may only sometimes engage in ‘traditional mediation’ does not detract from their ADR status, or their status as neutrals in those cases where they do help resolve disputes.”<sup>177</sup> The Committee counters the suggestion that issues may be presented to an ombuds at too early a stage to constitute an issue in controversy by asserting that the Act’s broad definition includes no “ripeness” test.

Further, the Committee interprets ADRA’s “concerning an administrative program” broadly to include issues relating to the activities of a federal agency, an interpretation likely to cover most if not all issues — including internal disputes — within the mandate of any federal ombuds having an impact on, but only indirectly related to, government programs. Similarly, the Committee interprets the requirement that there be “parties” as consistent with the typical federal ombuds *modus operandi* in that the two parties would likely consist of the person who approaches the ombuds with a problem and the agency or agency official responsible for the decision or policy under which there is disagreement.<sup>178</sup> Accordingly, the ombuds is, by the definition of mutual acceptability, a neutral inasmuch as the agency has in effect committed in

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<sup>175</sup> *Id.* at 38.

<sup>176</sup> *Id.* at 59. *See also id.* at n.72 in which the Committee cites “numerous articles” stating “unequivocally that some ombuds activities fall under the cluster of processes known as ‘ADR.’”

<sup>177</sup> *Id.* at 60.

<sup>178</sup> *Id.* at 61.

advance to use the ombuds as a neutral and the visitor has done so by voluntarily approaching the ombuds with his or her issue.

The conclusions of the ABA Ad Hoc Committee with respect to federal ombuds contrast to some degree with those set forth by Professor Harold J. Krent in his article discussing federal agency ombuds and confidentiality.<sup>179</sup> In light of the “increasingly important role” of Federal ombuds “in agency life,” Krent argues that the promise of confidentiality serves as an important “inducement” for getting constituents to raise issues before the ombuds.<sup>180</sup> Krent also explains how the ambiguity about, or potential limitations on, the promise of confidentiality that a federal ombuds can authentically make may negatively affect ombuds practices and effectiveness.<sup>181</sup> To this end, Krent states that “a pledge of confidentiality may be fundamental to discharge of an ombud’s functions.”<sup>182</sup>

In this regard Krent discusses, *inter alia*, the threat of disclosure under the Federal Recordkeeping, Freedom of Information and Privacy Acts, discussed *infra*, as well as disclosure due to agency or congressional compulsion with respect to their potential to undermine a federal ombuds pledge of confidentiality. He concludes that the “degree to which ombuds fall under the ADRA . . . is unclear[,]” and further that “the Act’s criteria do not clearly apply to *many* activities of an ombud.”<sup>183</sup> Therefore he questions the extent to which ADRA may serve to shield ombuds communications and stand behind a federal ombud’s confidentiality pledge. Contrary to the ABA Ad Hoc Committee, Professor Krent suggests that many issues may be brought to an ombuds too early, before anyone has been affected substantially enough to give rise to an issue in controversy. Similarly, Krent questions whether personnel disputes or other

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<sup>179</sup> Harold J. Krent, *Federal Agency Ombuds: The Costs, Benefits, and Countenance of Confidentiality*, 52 AD. L. REV. 18 (2000).

<sup>180</sup> *Id.* at 22.

<sup>181</sup> *Id.* at 23–25.

<sup>182</sup> *Id.* at 25.

<sup>183</sup> *Id.* at 39–40 (emphasis added).

internal agency concerns might be deemed issues in controversy relating to an administrative program. Lastly, Krent notes that both ADRA § 573 defining “neutral” and § 574 addressing confidentiality refer to “parties” and that, in his view, inasmuch as typically only one party seeks access to the ombuds, there is no adversarial relationship in evidence.<sup>184</sup>

In light of these concerns, Professor Krent observes that while Congress amended the Act to include ombuds, it did not fully account for the differences between ombuds and other ADR practitioners. Accordingly, “ombuds currently rely on existing privileges at some peril.”<sup>185</sup> The ABA in its *Guide to Confidentiality* expressly took some issue with Professor Krent’s “negative conclusion” in his analysis of the ADRA’s applicability to the activities of federal ombuds.<sup>186</sup> As set forth above, the Committee generally interpreted ADRA’s provisions more inclusively, but while they found Krent’s conclusions “that most ombuds casework is not covered is unpersuasive,” they did not elaborate on this assessment considerably beyond what is set forth above.<sup>187</sup>

**Conclusions and Recommendations for Agency Officials and Ombuds Offices on the  
General Applicability of Privilege, Inherent Judicial Authority to Manage Discovery and  
ADRA to Federal Ombuds**

As we have discussed, the first line of legal defense, when there is a request to the ombuds for confidential information, in most instances will be ADRA. However, inasmuch as its reach for ombuds is not clearly established as yet, if such a request should come in the course of litigation, precedent on privilege and inherent judicial authority to manage discovery may be of importance.

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 41.

<sup>186</sup> See *ABA Guide to Confidentiality supra* note 113, at 59 n.74.

<sup>187</sup> *Id.*

Given the foregoing discussion of legal precedent, one can say that the law on privilege and confidentiality as it pertains to ombuds generally, and federal ombuds specifically, is less than clear and still evolving — if in an uncertain direction. This appears to be attributable to one or some of a variety of factors: the ombuds office in question was not structured and operated consistent with standards and in a way that would support confidentiality; sufficient evidence supportive of confidentiality was not provided to the tribunal; the court failed to fully analyze the law as applied to the evidence; and the evidence presented was not in the circumstances deemed sufficient to overcome the strong presumption against privilege and for public disclosure. Examining the cases leads to one overarching observation that pertains to both assertions of privilege and requests that a judge use his or her inherent authority. In short, it does matter how the ombuds and his/her agency respond to any request (in whatever form) in the course of litigation for documents or testimony concerning confidential ombuds information, specifically how well the purposes, structure, function and need for confidentiality on the part of that ombuds office, as well as ombuds generally, is both explained and documented for the tribunal.

Those mandating and establishing ombuds offices that offer confidentiality and the ombuds themselves should situate, structure and operate the ombuds office so that an expectation of confidentiality is created and strictly maintained. Should this confidentiality be challenged, the ombuds and legal counsel should attempt, if possible, to informally resolve the issues with the individual or entity requesting confidential documents or testimony. This might involve education about the ombuds office and a persuasive explanation of the need for whatever confidentiality is offered by the office. Further, alternative ways the information sought might be obtained from other sources could be explored with the requestor.

Failing an informal resolution, if the ombuds and his/her counsel seek to quash a subpoena or obtain a protective order, ample information with supporting documentation should be presented to the tribunal. This should include why and how the ombuds office was created and how it functions. Additionally, it is important to include any facts supporting independence, impartiality and confidentiality, as well as the reasons therefore and how these office standards are both practiced *and* communicated to constituents and actual visitors. Any court that might consider a qualified privilege, or that might be inclined to exercise its inherent authority to manage discovery, will look to what the ombuds and the ombud's agency have done to create an expectation of confidentiality. The strongest evidence would be a signed confidentiality agreement with the visitor seeking ombuds assistance, but charters, by-laws, office websites and brochures, and evidence of office practices designed to protect independence, impartiality and confidentiality would also be probative. What little precedent there is indicates that failure to respond cogently and compellingly may result in an unnecessarily negative outcome in that instance with implications for the profession as a whole.<sup>188</sup>

It cannot be sufficiently stressed that when there is a legal challenge to ombuds confidentiality, the ombuds should have access to independent, rather than agency, counsel. If an ombuds does not have independent counsel, the ombuds should be cautious about what dispute resolution communications are revealed to the agency's counsel should that counsel be called upon to defend ombuds confidentiality. Although attorney client privilege may apply, in a

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<sup>188</sup> See, e.g., *Carmen*, 114 F.3d 790 (finding that there is no ombudsman privilege); HOWARD, *supra* note 1. See also Ryan Spanheimer, *Justification for Creating an Ombudsman Privilege in Today's Society*, 96 MAR. L. REV. 659, 681–683 (2012).

given situation the agency’s interests and the ombud’s interests (in confidentiality) may not be the same, and thought should be given by all concerned as to how best to proceed.<sup>189</sup>

Turning to protections afforded by the statutory scheme created by ADRA, as noted the case law interpreting its provisions is scant, and there is no reported case law to date applying it to ombuds. With the 1996 reauthorization of ADRA, Congress clearly expressed its intent to include “use of ombuds” under the Act’s requirements and protections. Given the uncertainties in its application described above, Congress could reinforce and fully realize this intent by expressly aligning the Act’s provisions to embrace those ombuds functions that require confidentiality — thus ensuring the safe place for raising issues that is the ombud’s special purpose. Failing such an amendment, some basic principles of statutory interpretation must be considered in order to makes sense of the 1996 addition.<sup>190</sup>

The task of interpreting a statute begins with a thorough reading of the text. The language of the statute itself is the first and primary source for insight into its construction and meaning. From a strictly textual standpoint, the words of the statute alone embody what the law is, and what it means. “Congress’ intent is found in the words it has chosen to use.”<sup>191</sup> Any such examination must be done with the knowledge that what may be the “plain language” of the text to one reader may not be the only possible interpretation of what the statute means. It is also important to keep in mind the purposes behind the investigation of the statute in order to determine points of inquiry that are relevant to those goals.<sup>192</sup> In the case of ADRA, as we have discussed the “plain” meaning of the text as applied to ombuds is in some dispute. Although

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<sup>189</sup> HOWARD, *supra* note 1, at 305–07. See also ABA STANDARDS FOR ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES (2004) and accompanying Report, at 14 (“ombuds should have access to resources for independent legal advice and counsel”); *COFO Guide*, *infra* note 215, at 8.

<sup>190</sup> See generally LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2011), <https://www.fas.org/sgp/crs/misc/97-589.pdf>.

<sup>191</sup> Harbison v. Bell, 556 U.S. 180, 196 (2009) (slip op.) (Thomas, J., concurring).

<sup>192</sup> WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 832–33 (3d. ed. 2007).

“use of ombuds” is included in § 571 under the definition of “alternative means of dispute resolution,”<sup>193</sup> some ambiguities arise as the wide range of functions of federal ombuds are held up to the other definitions in that section and the language in § 574 itself. As others have noted, on its face it appears that the relevant portions of the statute may have been originally based on a mediation model, and these provisions were not *explicitly* realigned when “use of ombuds” was added to the statute.

In cases of such ambiguity, courts often look to the legislative history of a particular statute in order to determine the intent of the legislative body in drafting the law. The assumption is that this examination will give the persons interpreting the statute guidance as to how it should be applied.<sup>194</sup> However, as noted there appears to be no legislative history<sup>195</sup> that definitively resolves the questions that have been raised concerning which ombuds functions are covered by the amendment of ADRA to include “use of ombuds” as a form of alternative dispute resolution.<sup>196</sup> Accordingly the underlying presumption of statutory construction, which requires the body construing the statute to do so in a manner ensuring that the statute is internally consistent, may be employed. “A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .”<sup>197</sup>

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<sup>193</sup> 5 U.S.C. § 571(3).

<sup>194</sup> See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) (“Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute.”).

<sup>195</sup> See, however, S. Rep. 104-245, at 8 (1996): “To increase the effectiveness of the work of ombuds, the bill would extend the protections of the ADR Act’s confidentiality provisions to disputes in which they serve as neutral parties.” This statement underlines the intention of Congress to include ombuds under the umbrella of ADRA § 574 but does not clarify which ombuds functions are covered or what might have been meant by the somewhat contradictory term “neutral parties.”

<sup>196</sup> Nor is there legislative history that is particularly edifying on the confidentiality provisions of ADRA. Illustratively, at one point during the debate, a sponsor mentioned that “[t]he bill also provides for the confidentiality of the alternative dispute resolution process and prohibits the disclosure of such confidential communications.” 144 CONG. REC. H10457-01 (October 10, 1998) (statement of Rep. Coble). And the Senate report for the original Act recognizes that “protections are created to enable ADR proceedings to be forthcoming and candid without fear that frank statements will be used against them.” S. Rep. No. 101-543, at 11 (1990).

<sup>197</sup> *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

Likewise, with respect to statutory amendments, there is “a general presumption” that “when Congress alters the words of a statute, it must intend to change the statute’s meaning.”<sup>198</sup>

Professor Krent suggests that the attempt by Congress to shelter ombuds under the umbrella of dispute resolution by adding “use of ombuds” in 1996 failed in that the typical inquiry to an ombuds is made too early to constitute an issue in controversy; the personnel or other internal agency disputes handled by many federal ombuds do not relate to “an administrative program”; and the Act envisions “parties” in the plural while ombuds frequently deal with only one party in a dispute. Professor Krent concludes that “the congressional effort to assimilate ombuds to other dispute resolution officials ignored the substantial differences between ombuds and the others.”<sup>199</sup> Yet, one might alternatively read the statute so that the addition of ombuds to ADRA was not, in effect, “inoperative or superfluous, void or insignificant.” In the absence of any definitive case law or legislative history to shed light on the addition of ombuds to ADRA in 1996, such an alternate reading would give meaning to the amendment by looking to the language of the statute and attempting to reconcile seemingly inconsistent clauses and terminology.

As this study has shown, the broad spectrum of federal ombuds cover an impressive array of different activities, and a single ombuds may have a variety of responsibilities and numerous different arrows in his or her quiver. There are surely some ombuds functions that cannot easily be placed within the requirements and protections of § 574. These might include, for example, general conflict management training that is not part of an intervention or facilitation of agency conversations that are proactive (e.g. strategic planning) and not part of resolving existing conflicts. Some, though not all, of the systems work in which a subset of federal ombuds

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<sup>198</sup> See *United States v. Wilson*, 503 U.S. 333, 336 (1992); *Stone v. INS*, 514 U.S. 386, 397 (1995).

<sup>199</sup> Krent, *supra* note 179, at 41.



engage, would also likely be excluded from coverage depending on the extent to which it might be deemed part of a resolution process. On the other hand, there are certain functions characteristic of some ombuds that fall neatly within the mediation model that is the most obvious target of ADRA's protections and requirements, and therefore are clearly covered by ADRA.

Falling in between these two poles are a host of other ombuds functions that form part of the uniquely fluid and flexible approach to resolving issues that is the hallmark of ombuds practice. With regard to the issue of ripeness, there appears to be some consensus in federal guidance that the confidentiality provisions of ADRA begin to apply when the individual seeking assistance first approaches the dispute resolution office and raises his or her concern.

Illustratively, the 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.<sup>200</sup> Further, the *IADRWG 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 . . . .”<sup>201</sup> Inasmuch as many issues that are raised with ADR intake personnel never reach a dispute resolution session during which the neutral facilitates a discussion among the parties — whether because the constituent accepts a referral to a different process or decides not to pursue the matter — it must be presumed that ADRA's confidentiality provisions apply even when there is no later dispute resolution session among the parties that might be recognized as mediation, conciliation or adjudication. Absent that presumption, confidentiality would only attach after the fact once it is known whether or not a party raising an issue goes forward with a specific ADR

<sup>200</sup> See *Confidentiality in Federal Alternative Dispute Resolution Programs*, *supra* note 19, at 83,090.

<sup>201</sup> See *IADRWG Guide*, *supra* note 19, at 8.

session procedure like mediation. Such an approach would increase the uncertainty of potential users of ADR and diminish their willingness to approach the ADR office. Looking specifically to ombuds, it is logical to assume that the dispute resolution process commences when the constituent approaches the ombuds office with an issue and does not end until, in effect, “the case” is closed — whether or not a mediation-like process is ever a part of the ombud’s approach to resolving the issue.

With regard to the question of whether or not ombuds, including internal ombuds, resolve issues in controversy, certainly the statute’s definition of “issue in controversy” is very broad, requiring only that the issue be “*concerning* an administrative program” about which there is disagreement.<sup>202</sup> By the time the 1996 ADRA reauthorization, with attendant modifications, was proposed and passed, internal workplace mediation was a known quantity in the federal government and yet no modification to this definition of “issue in controversy” in order to expressly include “internal” conflict was deemed necessary.<sup>203</sup> Moreover, by the time the addition of ombuds to ADRA was proposed, federal internal ombuds were known to the Administrative Conference (ACUS),<sup>204</sup> which was instrumental in the initial passage of ADRA and in formulating the 1996 reauthorization,<sup>205</sup> and there were a number of organizational ombuds already in the government at that time. In fact, internal ombuds offices had been created

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<sup>202</sup> See 5 U.S.C. § 571(8).

<sup>203</sup> In fact S. Rep. 104-245, *supra* note 195, at 8 indicates that the proposed modification to the definition of “issues in controversy” in the bill was intended to include workplace mediations. Moreover, such mediations to resolve employment disputes in the federal government have become almost routine and are presumed covered by ADRA; a contrary interpretation would upend this broadly accepted view. Cf. INTERAGENCY ADR WORKING GROUP STEERING COMM., A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS 9 (2006) (“Unless a specific statute controls, the confidentiality standards of the ADR Act . . . will govern the confidentiality obligations in federal administrative mediations, and federal employee mediators should consider this statute to be the ‘applicable law’ . . .”).

<sup>204</sup> See, e.g., David R. Anderson & Larry Hill, *The Ombudsman: A Primer for Federal Agencies*, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1991, at 2.

<sup>205</sup> ACUS was defunded in 1995 but Congress never repealed the Administrative Conference Act of 1964. In 2004, ACUS was reauthorized by Congress and was officially re-established in 2010.

in the federal government as early as the 1970s.<sup>206</sup> Therefore, one can assume that those who drafted and those who passed the 1996 ADRA reauthorization intended to include both direct, explicit disputes about a government program and those that *concern* a government program less directly by virtue of their impact on federal budgets, contracts, processes or employees administering or executing federal government programs.<sup>207</sup>

Turning to the question of whether or not the use of “parties” in the plural precludes most ombuds activities from ADRA coverage, it must be said that the visible assistance offered to the constituent seeking help in resolving an issue may be limited to the ombud’s interaction with that visitor. Illustratively, the ombuds office may offer vital help in the form of a “reality check,” or by educating the visitor about his or her rights and options, or through coaching with an eye toward helping the visitor self-manage his or her conflict. By the same token, the ombuds may inquire and investigate the matter by separately questioning agency officials or staff, without actually bringing the visitor and relevant staff together or revealing the identity of the visitor to agency officials. Significantly, however, an “issue in controversy” by definition denotes a conflict between two or more parties, and accordingly the use of “parties” in the plural should not be an obstacle to coverage of this sort of assistance with dispute resolution. Further, one could conclude that the agency is always, in effect, *de facto* a party when the ombuds is, under the general terms of his/her appointment by the agency, assisting in the resolution of an issue concerning an agency program.<sup>208</sup> Support, by way of a less than perfect analogy, for this conclusion may be found in the federal sector EEO process. There was some concern in the ADR community when federal agencies began requiring agency managers and supervisors,

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<sup>206</sup> See Leah D. Meltzer, *The Federal Workplace Ombuds*, 13 OHIO ST. J. ON DISP. RESOL., 549, 551 (1998); see also Jeffrey S. Lubbers, *Ombudsman Offices in the Federal Government –An Emerging Trend?*, 22 ADMIN. & REG. L. NEWS, 6 (1997).

<sup>207</sup> See also *ABA Guide to Confidentiality*, *supra* note 113, at 60.

<sup>208</sup> *Id.* at 61.

without their consent, to participate in EEO mediations despite the generally accepted mediation standard that participation in mediations must be voluntary.<sup>209</sup> However the agency is technically *the* party in every case and thus the agency's "consent" to mediate EEO cases, and even assent to the individual mediator however selected or assigned, is considered sufficient to manifest the requisite self-determination in federal sector EEO mediations without regard to whether the involved agency management is actually amenable.<sup>210</sup>

Finally, there is the question of whether or not ombuds are "neutrals" within the meaning of ADRA. Under the Act, a neutral need only be someone who is acceptable to the parties and who assists in the resolution of issues in controversy. As the ABA Ad Hoc Committee noted, under ADRA "a neutral need not even be 'neutral'" so long as the parties agree.<sup>211</sup> Inasmuch as the constituent chooses to seek assistance from the federal ombuds, and the agency as another party employs (or contracts with) the ombud for purposes, *inter alia*, of resolving agency issues, both parties can be deemed thereby to have indicated consent. Hence, the ombud is a neutral under the Act's limited requirements.

We are left, then, contemplating the nexus of statutory interpretation with practical and policy considerations. The policy concerns surrounding ombuds and confidentiality tend to be

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<sup>209</sup> See, e.g., *Mandatory ADR for Managers? Minutes of the Council of Federal EEO & Civil Rights Executives*, MEDIATE.COM, Oct. 2002, <http://www.mediate.com/articles/fedcouncil.cfm>. The article begins by noting that "[a] major issue facing federal ADR programs is managerial participation. Should it be voluntary or mandatory?" The author, paraphrasing the statements of Jorge Ponce, co-chair of the Council of Federal EEO and Civil Rights Executives, wrote: "Mr. Ponce stressed that the parties in the EEO process were the aggrieved employee and the agency. Management officials were just witnesses in a complaint. Thus, the voluntariness part of ADR was fulfilled when an agency designed its own ADR Program and selected those instances in which ADR would not be appropriate or feasible."

<sup>210</sup> This is reflected in EEOC guidance to federal agencies, which states: "What role does the responsible management official have in ADR? Once the agency has determined that a matter is appropriate for ADR, it can decide who should represent the agency and can require the responsible management official (RMO), or the agency official directly involved in the case, to cooperate in the ADR process." See ADR QUESTIONS AND ANSWERS, EEOC, <https://www.eeoc.gov/federal/adr/qanda.cfm>; see also A GUIDE FOR FEDERAL EMPLOYEE MEDIATORS, *supra* note 202, at 5 ("These programs do not violate th[e] self-determination standard, because the agency, as one of the parties, has elected voluntarily to participate in the mediation, with the manager or supervisor attending as the agency party's representative.").

<sup>211</sup> *ABA Guide to Confidentiality*, *supra* note 113, at 60.

distinct from that of other ADR professionals in one key aspect. In many, if not most, ADR processes, the dispute has already surfaced and is on its way to becoming a “case” by the time “ADR” is invoked. Therefore the identity of the parties and the nature of the dispute are known (at least to the parties), and confidentiality becomes critical primarily to protect the process — to encourage frank discussion without fear that what is said during the ADR process will later be used against the party offering the communication in question. With an ombuds, however, confidentiality is of paramount importance as an incentive to get the constituent “in the door” and the issue raised in the first place, thereby affording the ombuds the opportunity to assist the constituent and the agency in resolving it before it escalates or festers with negative consequences for all concerned. Moreover, ombuds often are able, without breaching confidentiality, to ensure that the agency is apprised of serious issues brought by constituents for whom anonymity is a necessary inducement. This would not be possible were ombuds unable to make credible pledges of confidentiality.

As manifest elsewhere in this study, the typical ombuds approach includes a variety of techniques and practices for providing assistance that may range from merely discussing and referring the visitor to other informal or formal channels, all the way to looking into the matter, shuttle diplomacy or mediation, or beyond. Moreover, the ombud’s dispute resolution process is a fluid one. There is no set sequence of practices and, in fact, an ombuds may go back and forth among them. In other contexts, some have questioned the inclusion under ADRA coverage of certain techniques used by ombuds and others. One example is conflict management coaching. It has been argued that when practiced in and of itself by a conflict management coach, coaching is excluded from ADRA’s coverage because by definition it deals with only one party to a

conflict for the duration.<sup>212</sup> At the same time, other ombuds practices would be considered as included under ADRA by most commentators. Given this parsing of different techniques under ADRA, one could theorize that an ombuds should discuss confidentiality with the constituent visitor at every shift back and forth in technique as it occurs throughout the resolution process, if the shift might conceivably affect confidentiality, and even when the distinctions in the moment are less than clear. As a practical matter, however, it is difficult to envision how the purposes of ombuds confidentiality under ADRA § 574 could be served were confidentiality to attach, detach, and then reattach at uncertain intervals during a dynamic dispute resolution process, depending on what practice is being deployed at a given time.<sup>213</sup> The uncertainty, confusion and the necessity for the ombuds to stop and explain the nuances of confidentiality at every step could well dissuade reluctant constituents from raising or pursuing sensitive issues, even those that the agency would most benefit from having the opportunity to address.

Accordingly, and in light of all of the above, a practical and reasonable interpretation of the addition of “use of ombuds” to ADRA would entail a reading that would look at the ombuds dispute resolution process as a whole, having the coverage of § 574 begin when the visitor first approaches the ombuds with a concern, and ending when the ombuds has ceased to be involved by virtue of resolution of the issue, the visitor’s withdrawal from the ombuds process, or when the ombuds remains involved but with the visitor’s consent, or under a § 574 exception, breaches confidentiality. Moreover, this would be so without regard to which techniques are used in the interests of resolving the issue. As noted above, those ombuds functions that are not a part of

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<sup>212</sup> See, e.g., UNITED STATES AIR FORCE, CONFLICT MANAGEMENT COACHING POLICIES AND GUIDANCE 1 (“CMC is not Alternative Dispute Resolution.”), <http://www.adr.af.mil/shared/media/document/AFD-130926-019.pdf>.

<sup>213</sup> Cf. Jennifer M. Gartlan, *The Collaborative and Facilitative Processes Committee: The Cutting Edge of Government ADR*, 4 RESOLVING CONFLICT 2 (2016).

assisting in the resolution of agency conflicts broadly construed would, however, not come within the coverage of § 574.

In sum, those who mandate and create ombuds offices should be mindful of how they are structured and maintained. Further each ombuds office should consider for itself the office's standards, the full gamut of roles it plays and functions it performs in light of ADRA's definitional requirements and § 574's limitations. Some, and in most cases many but not all, office functions will likely be covered by ADRA. It is important to understand what these are, what this means for constituents, the agency and the ombuds, and what options the ombuds has given the legal environment in its entirety. For those functions covered by ADRA, § 574 imposes obligations and requirements with specified exceptions. Compliance with these obligations and requirements, along with whatever professional or office standards are adhered to by the office, may be challenged as the ombuds attempts to balance them with other unrelated statutory, regulatory and agency requirements. These challenges are discussed below.

### **III. Federal Ombuds and the Affirmative Duty to Report**

Generally accepted ombuds standards of practice require that ombuds not voluntarily disclose or be required to disclose any confidential information, except when the ombuds determines it is necessary to warn of an imminent risk of serious harm.<sup>214</sup> By the same token, ADRA § 574(a) bars disclosure of confidential dispute resolution communications by a neutral

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<sup>214</sup> See, e.g., ABA STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES § (C)(3) (2004) [hereinafter *2004 ABA Standards*] (“An ombuds does not disclose and is not required to disclose any information provided in confidence, *except to address an imminent risk of serious harm.*”); IOA STANDARDS OF PRACTICE (2009) (“The only exception to th[e] privilege of confidentiality is where there appears to be an imminent risk of serious harm, *and where there is no other reasonable option.* Whether this risk exists is a determination to be made by the Ombudsman.”) (emphasis added). Although the two standards are similar, the IOA’s proviso expressly gives the ombuds discretion to determine when there is a potential threat. See also UNITED STATES OMBUDSMAN ASSOCIATION (USOA), MODEL SHIELD LAW FOR OMBUDSMAN § 3(b) (1997) (stating that confidentiality “privilege” does not apply where an “imminent risk of serious harm is communicated directly to the Ombudsman or his/her staff[.]”).

except, *inter alia*, in cases where a communication is required *by statute* to be “made public.” While both protect confidentiality, the definitions of their respective exceptions to the rule are not the same, and accordingly there may be occasions in which one conflicts with the other. Moreover, in addition to statutory duties to report certain information, for the majority of federal ombuds who are federal employees, there are regulations and agency policy directives that impose obligations to report different kinds of information. Because non-statutory duties to disclose do not come within the exception in § 574(a)(3) for statutory requirements, the general prohibition against disclosure in § 574 potentially poses a challenge to some reporting obligations ombuds have as federal employees.<sup>215</sup> Nevertheless, with forethought, federal employees’ duties to disclose, ombuds professional standards and the requirements of ADRA may be substantially harmonized.

There are few statutes that clearly fall within ADRA § 574(a)(3)’s exception for information that “is required by statute *to be made public*.”<sup>216</sup> At one point, the “made public” language in ADRA seemed to be interpreted literally, often in connection with the Clean Air Act, which requires that “[a]ny records, reports or information obtained under . . . this section shall be made available to the public.”<sup>217</sup> The evolving consensus appears to be that the exception relates more to the use of the word “statute” in § 574(a)(3) than to the “to be made public” language.<sup>218</sup>

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<sup>215</sup> Some commenters have noted the potential for conflict between ADRA and other sources giving rise to a duty to disclose. *See, e.g., Confidentiality in Federal Alternative Dispute Resolution Programs, supra* note 19, at 83,093–94 (“In summary a tension among these authorities exists. The issues of statutory interpretation between these differing authorities have not yet been considered in an appropriate forum.”); The Coalition of Federal Ombudsmen (COFO) and Federal Interagency ADR Working Group Steering Committee, *A Guide for Federal Employee Ombuds*, at 8 (2006) [hereinafter *COFO Guide*] (“A federal Ombuds thus may be presented with a conflict between (1) his/her confidentiality obligations and (2) his/her obligations to report . . .”).

<sup>216</sup> 5 U.S.C. § 574(a)(3) (emphasis added).

<sup>217</sup> 42 U.S.C. § 7414(c). *See, e.g., Confidentiality in Federal Alternative Dispute Resolution Programs, supra* note 19, at 83,093–94 (citing the Clean Air Act as an example of one of the “handful of statutes which require certain classes of information to be made public” under 5 U.S.C. §§ 574(a)(3) and 574(b)(4)).

<sup>218</sup> *See, e.g., IADRWG Confidentiality Guide, supra* note 19, at 52–3 (“In addition, there are other statutes that may be read to impose an affirmative obligation on federal employees to disclose certain classes of information. These include, but are not limited to, 18 U.S.C. § 4 . . . and 28 U.S.C. § 535 . . .”).



The two statutes, other than possibly the Inspector General Act, most commonly assumed to fall within ADRA's exception are 18 U.S.C. § 4, which makes it unlawful for any person — including federal employees — to fail to report knowledge of a felony to appropriate authorities,<sup>219</sup> and 5 U.S.C. § 535(b), which requires executive branch employees to report the crimes of other government officers and employees.<sup>220</sup> Agency-specific statutes requiring disclosure, such as the Clean Air Act quoted above, would also fall within this exception under ADRA. The same can be said for statutes that impose disclosure obligations on particular kinds of ombuds, so ombuds that have been created by statute should be mindful of any requirements specific to them.<sup>221</sup>

In addition to statutory conflicts there are also non-statutory sources that create a duty to disclose certain information. These include various regulations such as 5 C.F.R. § 2635.101(b)(11),<sup>222</sup> providing that all federal executive branch employees “shall disclose waste,

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<sup>219</sup> “Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other civil or person in military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.” 5 U.S.C. § 4. Note that an affirmative act of concealment is required – mere failure to report the felony is not sufficient to support a conviction under the statute. *See Branzburg v. Hayes*, 408 U.S. 665, 696 n.36 (1972).

<sup>220</sup> “Any information, allegation, matter, or complaint witnessed, discovered, or received in a department or agency of the executive branch of the Government relating to violations of Federal criminal law involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, or the witness, discoverer, or recipient, as appropriate . . . .” 5 U.S.C. § 535(b). The D.C. Circuit has interpreted the § 535(b) to suggest that “all government employees . . . are duty-bound not to withhold evidence of federal crimes.” *See In re Lindsey*, 158 F.3d 1263, 1274 (D.C. Cir. 1998).

<sup>221</sup> For example, 42 U.S.C. § 7261c provides elliptically that the Technology Partnerships Ombudsman: “shall report quarterly on the number and nature of complaints and disputes raised, along with the ombudsman’s assessment of their resolution, consistent with the protection of confidential and sensitive information.” The Technology Partnership Ombudsman was created as part of the Technology Transfer Commercialization Act of 2000, Pub. L. 106-404 (codified at 15 U.S.C. §§ 3701–3722). The office functions according to the principles of “independence, impartiality, confidentiality and informality as defined by the International Ombudsman Association (IOA).” *See Technology Partnership Ombudsman, Roles, Responsibilities, Authorities, and Accountabilities*, at 2 (2011).

<sup>222</sup> Note that Executive Order 12647, § 101(k) (as amended by Executive Order 12731) (1989), authorized the Office of Government Ethics (OGE) to establish uniform standards of ethical conduct for executive branch employees. In 1992 OGE published the Standards, codified at 5 C.F.R. § 2635.

fraud, abuse, and corruption to appropriate authorities.”<sup>223</sup> Reinforcing this government-wide regulation, some agencies have promulgated their own regulations containing reporting requirements concerning similar conduct.<sup>224</sup>

Other regulatory disclosure requirements may be agency-specific. For example, under regulations applicable to the Department of Veterans Affairs (VA): “All VA employees with knowledge or information about actual or possible violations of criminal law related to VA programs, operations, facilities, contracts, or information technology systems shall immediately report such knowledge or information[.]”<sup>225</sup> Similarly, Department of Health and Human Services (HHS) employees have a duty to report information relating to any “possible offense against the United States by an employee of [HHS][.]”<sup>226</sup>

In lieu of, or in addition to, regulations, some federal agencies have established a duty to disclose through management directive, policy manual, employee handbook, or a combination

<sup>223</sup> Another example is the duty to disclose “suspected violations” of the federal Gratuities Clause as specified in the Federal Acquisition Regulations. *See* 48 C.F.R. § 3.203 (“Agency personnel shall report suspected violations of the Gratuities clause to the contracting officer or other designated official in accordance with agency procedures.”).

<sup>224</sup> *See, e.g.*, 18 C.F.R. § 3c.3(a) (Federal Energy Regulation Commission: “Employees shall, in fulfilling the obligation of 5 CFR 2635.101(b)(11), report fraud, waste, abuse, and corruption in Commission programs . . . .”); 5 C.F.R. § 6701.107 (“General Services Administration: “[E]mployees shall disclose immediately any waste fraud, abuse, and corruption to appropriate authorities, such as the Office of Inspector General.”); 28 C.F.R. § 0.29b (Department of Justice: “Employees shall report evidence and non-frivolous allegations of waste, fraud, or abuse relating to the programs and operations of the Department . . . .”). We note in this regard that it is not always clear what constitutes waste, fraud, abuse, or corruption within the meaning of the regulation; nor is it obvious what the penalties are for willfully or negligently failing to disclose such conduct. *Cf. United States v. White Eagle*, 721 F.3d 1108, 1118 (9th Cir. 2013) (“[a]lthough [5 C.F.R. § 2635.101(b)(11)] discusses reporting ‘fraud’ and ‘corruption,’ . . . it does not provide specifics on what kind of information should be reported or to whom. Nor does it discuss criminal liability for failing to abide by its provisions.”).

<sup>225</sup> *See* 38 C.F.R. § 1.201.

<sup>226</sup> *See* 45 C.F.R. § 73.735-1301 (“Responsibility for reporting possible criminal violations.”). The full text of the regulation provides:

An employee who has information which he or she reasonably believes indicates a possible offense against the United States by an employee of the Department, or any other individual working on behalf of the Department, shall immediately report such information to his or her supervisor, any management official, or directly to the Office of the Inspector General. Offenses covered by the preceding sentence include, but are not limited to, bribery, fraud, perjury, conflict of interest, misuse of funds, equipment, or facilities, and other conduct by a government officer or employee, grantee, contractor or other person which is prohibited by title 18 of the United States Code. Employees and supervisors should refer to chapter 5-10 of the Department’s General Administration Manual for procedures regarding the reporting and handling of such information.

thereof. For example, Federal Aviation Administration (FAA) employees must disclose instances of government wrongdoing pursuant to an administrative order, FAA Order 3570.7.<sup>227</sup> Expanding on the Order, the FAA’s employee manual requires employees to “immediately report known or suspected violations of law, regulations or policy[,]” including: “operational error or deviation[,]” and “threats of violence, violent incidents, dangerous horseplay, irrational or other inappropriate behavior[.]”<sup>228</sup>

As noted, many federal ombuds offices adhere to ethical and professional standards allowing an exception to confidentiality to warn of a threat of imminent risk of serious harm.<sup>229</sup> Generally, in the United States there is no common law duty to warn others of a foreseeable risk of harm. However, it should be noted that although ombuds may not be under a legal obligation, as such, to warn, there is some legal authority finding an obligation when there is a “special relation”<sup>230</sup> and a specific threat. The most widely cited case on this issue is *Tarasoff v. Regents of University of California*,<sup>231</sup> in which the California Supreme Court held that a psychotherapist has a duty to warn third parties who are the targets of a patient’s credible, specific threat of violence, notwithstanding the therapist’s professional confidentiality obligations. The court reasoned that the “special relation between a patient and his doctor or psychotherapist . . . may support affirmative duties for the benefit of third persons[.]”<sup>232</sup> The holding in *Tarasoff* has become the basis for a number of state court cases and for some state statutes codifying the duty to warn for therapists and other health care professionals, and has been credited as the “origin of a duty to disclose otherwise confidential communications, such as the rule that is embodied in

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<sup>227</sup> See Federal Aviation Administration, *Ethical Conduct and Financial Disclosure Order 3750.7*, at 11 (1998) (“Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.”).

<sup>228</sup> See Federal Aviation Administration, Human Resources Policy Manual (HRPM) Volume 4: Employee Relations ER-4.1, at 2–3, 10 (effective July 2008; updated March 2011).

<sup>229</sup> See *supra* note 213 and accompanying text.

<sup>230</sup> See also RESTATEMENT (SECOND) OF THE LAW OF TORTS § 315 (1965).

<sup>231</sup> 551 P.2d 334, 340 (1970).

<sup>232</sup> *Id.* at 343.

the IOA Code of Ethics.”<sup>233</sup> A discussion of the extent to which liability attaches to federal employees is beyond the scope of this study and, in any event, it is unlikely that such a special relationship would be found between federal ombudsmen and their visitors. However, these cases serve to underline the gravity of the ombuds’ responsibility when information brought to them in confidence might suggest a threat of serious harm, imminent or otherwise.

### **Conclusions and Recommendations for Agency Officials and Ombuds Offices on the Affirmative Duty to Report**

To the extent that ombuds communications are covered under ADRA, where a *statutory* duty to report information conflicts with confidentiality, the duty to report prevails under § 574(a)(3) even if it conflicts with professional standards on confidentiality, and whether or not there is an imminent risk of serious harm.<sup>234</sup> The same would be true for many of the reporting obligations found in non-statutory sources that merely echo the statutory duties to disclose criminal or potentially criminal behavior. However, where the duty to report is not contained in a statute, the prohibitions in ADRA *against* disclosure arguably would prevail. In this regard, some regulations and management policies are not reflected in statutory requirements. For example, not all “waste” is potentially criminal, and the federal employee duty to report fraud, waste and abuse is not “required by statute.”

Congress indicated the notably high value it placed on confidentiality in dispute resolution processes by, *inter alia*, restricting the exception at issue to statutory conflicts and, therefore, agencies should not attempt to impose additional agency specific obligations on ombuds to report information obtained during communications that would otherwise be

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<sup>233</sup> See HOWARD, *supra* note 1, at 356, 359–60.

<sup>234</sup> Note that the statutes requiring federal employees to report criminal activity similarly apply to government attorneys notwithstanding the attorney-client privilege. See James E. Moliterno, *The Federal Government Lawyer’s Duty to Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633, 636 (2005).

confidential. However, given that some non-statutory obligations to report are of general application across the government and not insignificant, it is important to consider how these obligations might be harmonized with prohibitions against disclosure under ADRA. Ombuds should consider with counsel and agency leadership what non-statutory legal and ethical reporting obligations are applicable in light of the standards and exigencies of the office and other pertinent factors. Any discussion should, for most ombuds, include the caveats that where possible at the outset all efforts will be made to encourage the visitor to report the information him or herself through appropriate channels and that, should the visitor decline and the ombuds affirmatively be obligated to report, it will be done by the ombuds in a manner that protects confidentiality to the fullest extent possible. In the end if there is a clear mutual understanding with the agency on the parameters of confidentiality, and this understanding is shared in a timely fashion with constituents and visitors, an argument can be made that the parties have implicitly agreed to “alternative confidential procedures for disclosure” under ADRA § 574(d)(1)<sup>235</sup> rendering a subsequent consistent disclosure by the ombuds permissible under § 574.

#### **IV. The Federal Ombud’s Representative Status and the Question of Notice to the Agency**

The concept of notice to an organization, and the related question of agency between the ombuds receiving the information and his or her agency, are important for federal ombuds in a number of respects. The confidentiality and both the perceived and actual impartiality and independence of the ombuds office may depend on the extent to which the ombuds is, or is not, deemed to be an agent for purposes of notice to the agency. If a disclosure to an ombuds *is*

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<sup>235</sup> 5 U.S.C. § 574(d)(1) (“The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding . . .”).

considered notice to the agency, the ombud's failure to transmit the information acquired may result in negative consequences to the agency. It may have implications both for notice with respect to time limits for initiating formal legal process against the organization and for liability. Moreover, even when an ombuds does not transmit information consistent with a pledge of confidentiality, the ombuds' knowledge might be imputed to, and considered notice to, the organization. Conversely, if the ombuds does transmit the information without the consent of the constituent who has shared it, the ombuds may be breaching a pledge of confidentiality. Additionally, any uncertainty on the part of the constituent about the status of the ombuds as an agent for purposes of notice to the agency may have legal consequences should the constituent assume that disclosure to the ombuds tolls the filing period for legal action or otherwise serves as legal notice.

As with other issues of legal consequence, the specific analysis of these questions for a given ombuds office depends on the nature and functions of the individual ombuds office at issue. The following analysis applies to the majority of federal ombuds who depend on their independence, impartiality and respective approaches to confidentiality to establish their credibility with constituents and effectively accomplish their missions.

Both the ABA and the IOA have weighed in on the question of ombuds agency. The Coalition of Federal Ombudsmen (COFO) has been more circumspect in articulating its position, but essentially agrees that ombuds generally should not be considered agents of the organization that employs them.

The ABA Standards state that "no one, including the entity in which the ombuds operates, should deem the ombuds to be an agent of any person or entity, other than the office of

the ombuds, for purposes of receiving notice . . .”<sup>236</sup> The Report accompanying the 2004 Standards explains that when an ombuds operates with the confidentiality and independence required by the Standards, then communications with the ombuds are not transmitted to the employing entity, and “it would not be appropriate or accurate to impute it to the entity — that is holding the entity responsible for knowing something it cannot know.”<sup>237</sup> The Report stresses that the standards are designed “to ensure that the person approaching the ombuds office . . . understands that protecting rights may depend on just when formal action is initiated and whether notice is given to the entity. Working with the ombuds does not change that requirement or the specific time when the action must be started. In addition, the ombuds should advise persons that communications to the ombuds will not constitute notice to the entity *unless the ombuds contacts the entity.*”<sup>238</sup>

With regard to Standard F(2), the ABA thus qualifies its conclusion that ombuds typically lack agency by noting that if an ombuds communicates the facts of “a specific allegation and the identity of the complainant,” the ombuds may be providing actual notice to the entity. The ABA expands on this concept by stating that an entity can be put on notice when an ombuds communicates with sufficient detail to the entity “allegations by multiple complainants” that may reflect a pattern of unlawful or inappropriate behavior.<sup>239</sup> Significantly, at § F(2)(b) the Standards provide that “whether or not the communication constitutes notice to the entity is a question that should be determined by the facts of the communication.”

The IOA also provides at Standard 3.8 of IOA’s Standards of Practice:

Communications made to the Ombudsman are not notice to the organization. The Ombudsman neither acts as agent for, nor accepts notice on behalf of, the organization

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<sup>236</sup> See 2004 ABA Standards, *supra* note 213, at § (F)(3)(a).

<sup>237</sup> *Id.* at 18.

<sup>238</sup> *Id.* at 17 (emphasis added).

<sup>239</sup> *Id.* at 18.

and shall not serve in a position or role that is designated by the organization as a place to receive notice on behalf of the organization.

In its response to the ABA standards, however, the IOA specifically takes issue with the ABA's Standard and accompanying Report to the extent that the ABA is "suggesting that circumstances may exist in which an Ombuds places an organization on notice other than by disclosing a specific allegation and the identity of the complainant or allegations by multiple complainants" and that this question should be determined by "the facts of the communication."<sup>240</sup> In the IOA's view, this "imprecise catch-all provision" could "inadvertently invite courts to more closely examine communications to the ombuds" thereby threatening ombuds confidentiality and effectiveness.<sup>241</sup> Accordingly, the IOA takes the position that communication to the ombuds *never constitutes notice to the organization.*<sup>242</sup> However, the ombuds may choose to take action to put the entity on notice, in which case the communication between the ombuds and the entity may serve as notice. In that instance, the notice is strictly limited to the substance of the communication between the ombuds and the entity and never includes communications between the constituent and the ombuds. It is not the constituent's "privilege to waive."<sup>243</sup>

In its guide for federal ombuds, COFO states that "[i]t is recognized that, in more instances than not, if the complainant remains anonymous, the communication by the Ombuds to the agency/entity may not have the effect of placing the agency/entity on notice."<sup>244</sup> The COFO

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<sup>240</sup> *Guidance for Best Practices and Commentary on the American Bar Association Standards for the Establishment and Operation of Ombuds Offices, Revised February 2004*, International Ombudsman Association (IOA), 2006, at 12.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 13 (emphasis in original).

<sup>243</sup> *Id.* at 14.

<sup>244</sup> See *COFO Guide*, *supra* note 214, at 12–13. Additionally, on its website, the CFO states that ombuds: "[D]o[] not provide notice to the agency, except generically." See COFO, Frequently Asked Questions, [http://federalombuds.ed.gov/federalombuds/ombuds\\_FAQs.html](http://federalombuds.ed.gov/federalombuds/ombuds_FAQs.html).



guidance advises ombuds to “direct” employees who “do[] not wish to remain anonymous” to the appropriate office so that they can “provide his/her own notice” to the agency.<sup>245</sup>

The Restatement (Second) of the Law of Agency, which is frequently used as guidance on the question of notice, summarizes the common law of agency. Section 1 (“Agency”) of the Restatement outlines three factors for determining who is an agent: (1) manifestation by the principal that the agent shall act for him; (2) acceptance by the agent of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking.<sup>246</sup> On the subject of notice, Section 268 (“Notice through Agent”) provides:

- (1) [A] notification given to an agent is notice to the principal if it is given:
  - (a) to an agent authorized to receive it;
  - (b) to an agent apparently authorized to receive it;
  - (c) [to an agent who usually receives such notice], unless the one giving the notification has notice that the agent is not authorized to receive it. . . .
- (2) The rules as to the giving of notification to an agent apply to the giving of notification by an agent.<sup>247</sup>

Relatedly, Section 275 (“Agent Having Duty to Reveal Knowledge”) of the Restatement states: “[T]he principal is affected by the knowledge which an agent has a duty to disclose to the principal or another agent of the principal to the same extent as if the principal had the information.”<sup>248</sup> According to the Restatement, imputed notice turns on whether the agent has a duty to disclose, or on whether it appears that the agent is an official conduit of notice to the organization.<sup>249</sup> Note as well that notice may *not* be imputed if it is shown that the agent is not authorized to receive notice.

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<sup>245</sup> *Id.* at 12. See also generally memorandum by Sharan Lee Levine and Paula A. Aylward as participants in a conference entitled “Does a Report to an Ombuds Constitute Notice to an Entity?”, August 9, 2002.

<sup>246</sup> RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 1 (1958). Although the American Law Institute published a new Restatement of Agency in 2006, the sections relevant to this analysis do not differ in substance from the Restatement Second. See, e.g., Restatement (Third) of the Law of Agency §§ 1.101, 5.03 (2006).

<sup>247</sup> *Id.* § 268.

<sup>248</sup> *Id.* § 275.

<sup>249</sup> See also HOWARD, *supra* note 1, at 195–97 (discussing agency law).

Therefore, knowledge may be provided directly by an ombuds who discloses it to agency officials, or it may be imputed when an ombuds is considered an agent under a duty to disclose and has knowledge of the relevant facts. Further, notice may be imputed if an ombuds has “apparent” authority to receive it, i.e., is perceived as an official conduit of notice.

Concern for and awareness of these common law principles of agency, in particular a concern about imputed notice, is reflected in the ABA and IOA Standards. They recommend that ombuds offices be chartered so that they have no official management duties or responsibilities such that they might be or be perceived to be an official conduit for notice, and suggest that ombuds publicize through literature and other disclaimers that they are independent from, and do not receive notice on behalf of, the organization. In the strongest case, visitors would expressly agree that they have sought the ombud’s services voluntarily and with the knowledge that the ombuds is *not* an agent, authorized to receive notice on the agency’s behalf or in any sense a conduit of information absent the visitor’s permission to pass on confidential information.

Turning to the case law on notice, research has revealed few cases that have directly, or even indirectly, addressed whether an ombuds is an agent of the employing entity or whether communications with an ombuds should be imputed to the employing organization. In *Ault v. Oberlin*,<sup>250</sup> the U.S. District Court for the Eastern District of Ohio appeared to find that the ombuds had given actual notice to Oberlin in a discrimination case involving two Oberlin College employees who met with the college’s ombuds to discuss allegations of sexual harassment. After speaking with the employees, the ombuds contacted an Oberlin administrator

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<sup>250</sup> 2014 WL 4245991 (N.D. Ohio), *aff’d on other grounds*, 620 Fed. Appx. 395 (2015).

in order to arrange a meeting between the parties to discuss the allegations.<sup>251</sup> However, at some point prior to that meeting, the employees canceled and decided to retain private counsel.

At trial Oberlin argued that the plaintiffs’ contact with the ombuds — and no other Oberlin employees by virtue of having canceled the meeting with administration — was not sufficient to put Oberlin on notice of the harassment. In support of its contention, Oberlin presented evidence from an independent report which stated that the ombuds “enjoys independence and has a duty to confidentially preserve information it receives from faculty, staff and students.”<sup>252</sup> The court disregarded that evidence, stating that it was “likely hearsay, as the author merely repeats [the ombud’s] description of her office in the report.”<sup>253</sup> The court went on to say: “Oberlin offers no evidence or legal authority establishing that the independence of the ombudsperson’s office was such that plaintiffs’ complaints to [the ombuds] were insufficient to put Oberlin on notice . . . .”<sup>254</sup> However, the court went on to find that, in arranging the meeting between the employees and Oberlin, the ombuds arguably “notified the individuals at Oberlin who were charged with responding to sexual harassment.”<sup>255</sup>

Turning to the question of imputed notice, in *Holly D. v California Institute of Technology*,<sup>256</sup> the Ninth Circuit Court of Appeals refused to impute to the university an ombud’s knowledge of claims of sexual harassment. In that case, the plaintiff had mentioned the harassing conduct in a “confidential meeting” with a Caltech ombuds.<sup>257</sup> Subsequently, the plaintiff filed a formal complaint with the EEOC, and the EEOC issued a right-to-sue letter

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<sup>251</sup> *Id.* at \*2.

<sup>252</sup> *Id.* at \*14. The report was filed as part of an investigation into the plaintiffs’ allegations and contained “a general description of the ombudsperson’s duties and roles at Oberlin, as related by [the ombuds] to the author of the report.”

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> 339 F.3d 1158 (2003).

<sup>257</sup> *Id.* at 1164.

against Caltech. In its recitation of the facts, the court stated that Caltech was put on notice of the harassment allegations “by way of the EEOC letter.”<sup>258</sup> Although it is not express, an inference might be drawn that the court chose not to impute the ombud’s knowledge of the harassment to Caltech.

Similarly, in the 2006 case of *Grother v. Union Pacific Railroad Co.*,<sup>259</sup> a federal district court in Texas declined to impute to the company claims allegedly made to a company ombuds. The plaintiff in *Grother* claimed that he had been retaliated against for engaging in protected conduct after meeting with the ombuds to discuss several workplace-related complaints. The two supervisors responsible for Grother’s negative performance evaluation stated that they were unaware of the employee’s meeting with the company ombuds. The court took the statements at face value and found that there could not have been retaliation for protected activity inasmuch as the employer had no knowledge of the plaintiff’s complaints made to the ombudsman. Again, without explanation, the court did not impute the ombud’s knowledge to the employer for purposes of notice although it is unclear how convincing an inference might be drawn from this.<sup>260</sup>

Also of uncertain import, in *Norden v. Samper*,<sup>261</sup> the plaintiff sued the Acting Secretary of the Smithsonian Institution for failing to accommodate her disability, which was acquired after the plaintiff contracted a rare, near-fatal disease while conducting business for the Smithsonian Institution abroad. An issue in the case was whether the plaintiff had exhausted the administrative procedures required under EEOC regulations before filing the EEOC complaint — specifically whether the plaintiff had complied with 29 C.F.R. § 1614.105(a), which requires

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<sup>258</sup> *Id.* at 1165.

<sup>259</sup> 2006 U.S. Dist. LEXIS 38415 (S.D. Texas, Houston Div., June 9, 2006).

<sup>260</sup> *See also* Palomo v. Trustees of Columbia University, 2005 U.S. Dist. LEXIS 14428 (S.D.N.Y. July 20, 2005).

<sup>261</sup> 503 F. Supp. 2d 130 (D.D.C. 2007).

an aggrieved person to contact an agency EEO counselor within 45 days of the alleged discriminatory conduct. Prior to filing the complaint, the plaintiff had met with the Smithsonian ombuds, and sent emails to numerous agency employees regarding her need for accommodations. The plaintiff argued that these various discussions satisfied the § 1614.105(a) requirement that an employee provide notice of allegations to an EEO counselor before filing a formal EEO complaint. The court did not agree, stating, “[i]nformal efforts to resolve employment disputes outside the EEO process do not satisfy the requirements of § 1614.105(a).”<sup>262</sup> The Court additionally found:

This argument is also unavailing. In order to satisfy the exhaustion requirement, an employee must contact an EEO Counselor. . . . There is no dispute that none of the individuals who Dr. Norden contacted before April 2003, including [the ombuds], was designated as an EEO counselor. . . . Moreover, *the substance of the contacts in question was insufficient to put the Smithsonian on notice that Dr. Norden was raising an EEO claim*; the evidence shows only that Dr. Norden and the Smithsonian employees were engaged in the interactive process required by the Rehabilitation Act to determine what, if any, reasonable accommodations would allow Dr. Norden to return to work.<sup>263</sup>

As quoted above, the court in *Norden* found the *substance* of the communications with the ombuds insufficient to put the agency on notice because the employee and the agency “were engaged in the interactive process” required to resolve the issue short of a claim being filed.<sup>264</sup> Thus the court was focused somewhat narrowly on the interplay of the interactive process required to explore reasonable accommodations under the Rehabilitation Act in finding that this process did not constitute the required legal notice under § 1614. Additionally, the court relied on its finding that the individuals consulted were not “counselors” under § 1614. However, *Norden* has some relevance to federal ombuds in that the court also found that informal

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<sup>262</sup> *Id.* at 147.

<sup>263</sup> *Id.* at 147 (emphasis added).

<sup>264</sup> *I.e.*, required by the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of the 29 U.S.C. and 31-41c U.S.C.), which is administered under Title VII.

employment dispute resolution processes outside EEO processes did not “put the Smithsonian on notice that Dr. Norden was raising an EEO claim . . . .”<sup>265</sup>

There are, in addition, several federal cases<sup>266</sup> that do not involve ombuds but may be relevant to the extent that they indicate that plaintiffs who voluntarily and knowingly avail themselves of confidentiality cannot subsequently argue that communications made during confidential conversations constitute notice to the entity. In September 1988, the plaintiff in *Karibian v. Columbia University*<sup>267</sup> consulted a member of Columbia University’s Sexual Harassment Panel and an employee at the university’s EEO office to discuss allegations of sexual harassment against her supervisor. The university’s policies provided that these discussions would be kept confidential, and the plaintiff specifically requested in both conversations that the allegations not be investigated.<sup>268</sup> Subsequently the plaintiff complained to a higher-level manager, at which point the university investigated the complaint and took disciplinary action against the plaintiff’s supervisor. Shortly after, the employee filed a lawsuit claiming the existence of a hostile work environment. The plaintiff alleged the university had knowledge of the unlawful conduct because of her conversations with the Sexual Harassment Panel and EEO office.<sup>269</sup> The court stated:

The information which certain Columbia employees learned in September 1988 was obtained in the course of consultations which were intended to be completely confidential. It cannot be said that this was “knowledge” on the part of Columbia of the kind that gave Columbia the duty to inquire and take remedial action. . . . Columbia could

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<sup>265</sup> *Id.* at 148.

<sup>266</sup> These cases, discussed *infra* notes 267, 271, as well as several other federal and state cases where reference is made to the implications of a request for confidentiality on notice or the obligation to take action were identified by HOWARD, *supra* note 1, at 198–202.

<sup>267</sup> 812 F. Supp. 413 (S.D.N.Y. 1993), *vacated on other grounds*, 14 F.3d 773 (2d Cir. 1994).

<sup>268</sup> *Id.* at 415.

<sup>269</sup> *Id.* at 416–17.

hardly be expected to act against [the plaintiff’s supervisor] as a result of the confidential communications of September 1988.<sup>270</sup>

In *Torres v. Pisano*,<sup>271</sup> the plaintiff alleged to Pisano, a supervisor in a different unit, in writing and orally that her own supervisor engaged in racial and sexual harassment. The plaintiff repeatedly had asked that Pisano keep these complaints confidential. In describing the question before it the court stated: “we are called upon to determine whether the employer can be held liable despite the fact that the victim specifically asked the person to whom she reported the harassment to keep the matter confidential and to refrain from taking action for the time being.”<sup>272</sup> While the court found that Pisano’s knowledge of the harassment could be imputed to the university,<sup>273</sup> it held that, in light of plaintiff’s repeated requests that her complaints be kept confidential, “as a matter of law . . . Pisano behaved reasonably in honoring Torres’ request for confidentiality and in failing to act immediately to end the harassment.”<sup>274</sup> Notably, the court discussed the right of Title VII complainants to “make reasonable decisions to delay — at least for a time — pursuing harassment claims, perhaps for privacy or emotional reasons, until they are ready to do so.”<sup>275</sup>

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<sup>270</sup> *Id.* at 417.

<sup>271</sup> 116 F.3d 625 (2d Cir. 1997).

<sup>272</sup> *Id.* at 628.

<sup>273</sup> The court listed three situations where an employee’s knowledge will be imputed: 1) An official is at a sufficiently high level in the management hierarchy to qualify as a proxy for the entity; 2) the official is charged with a duty to act to stop harassment; 3) the official is charged with a duty to inform the entity of the harassment. *See id.* at 636–37.

<sup>274</sup> *Torres*, 116 F.3d at 639; *accord* *Hooker v. United Parcel Servs.*, 77 F. Supp. 2d 753 (S.D. W. Va. 1999).

<sup>275</sup> *Id.* at 639. This proposition has also been relied on by at least one state’s highest court. *See, e.g., Elezovic v. Ford Motor Co.*, 472 Mich. 408 (2005) (“[I]f an employee is sexually harassed in the workplace, it is that employee’s choice whether to pursue the matter . . . the victim of harassment ‘owns the right’ whether to notify the company and start the process of investigation.”).

## **Conclusions and Recommendations for Agency Officials and Ombuds Offices on Ombuds Agency Status and Notice to the Employer**

Turning first to the Restatement and generally recognized black letter law on agency, there may be few, if any, situations in which federal ombuds are clearly authorized by statute or charter to receive notice on behalf of the employing agency. Moreover, there is usually some effort to avoid the appearance of apparent authorization, whether through disclaimers on the part of the ombuds or by communications from the agency and the ombuds, affirming the ombud's independence from the agency's management structure. Communications disavowing the ombud's authority to accept notice should be explicit and effectively disseminated. Most importantly, the ombuds should not be assigned to a position or given collateral responsibilities that would be inconsistent with such disavowals of agency. If these conditions are met, the ombuds can be fairly confident that, under the Restatement, he or she will be found to have neither actual or apparent authority.

Nonetheless, echoing the cautions expressed by the ABA and IOA, federal agencies and their ombuds should be extremely cautious when they articulate to constituents and at large about their standards, mission and functions. Subtle variations may make a difference. Communications about most ombuds offices stress that they are safe, confidential places to raise issues of concern. It has also been suggested that ombuds may be part of an organization's effort to provide safe avenues for potential whistleblowers. However, in touting these beneficial and sometimes unique attributes, it is very important to avoid any implication that the ombuds has authority to receive complaints or otherwise serve as an official conduit of information (assuming that to be the case). Likewise, when communicating about the scope and benefits of the confidentiality offered by the ombuds office, it is important that constituents understand the



trade-offs of this feature, that if confidentiality is sought and maintained it will not put the agency on notice. Concomitantly, ombuds must be informed themselves, and inform the constituent, about what other options there might be for reporting a concern and seeking formal investigation and/or redress if the ombuds cannot provide these services.

As noted above, the directly relevant case law is scant and inconclusive. There is some case law of interest indicating, by inference, that courts might decline to find agency on the part of some ombuds and that courts may entertain a “you can’t have it both ways” argument when employees seek confidentiality in a given conversation or conversations and then attempt to rely on these conversations as legal notice to the employer and/or as imposing an obligation to act. These cases may be useful in fashioning defensive arguments should a litigant allege either actual or apparent agency on the part of the ombuds. Such arguments would be reinforced were there evidence that the visitor was asked to agree that the ombuds is not an agent or conduit of communication with the agency as a condition of the visitor’s voluntary use of the ombuds office.

Federal ombuds differ widely in purpose and structure and these differences may have particular significance with respect to agency. While most federal ombuds will be able to make the case that they are not agents, it is possible that some offices bearing the ombuds title, particularly among those that serve external constituents, are situated, structured and promoted as a conduit of information to their respective agencies or may reasonably be perceived as such absent effective communications articulating facts that would negate agency status.

## V. Federal Ombuds and Federal Sector Labor Law<sup>276</sup>

Federal sector labor law is relevant not only to internal ombuds but also to those external ombuds who may have cause to engage represented employees as well as management in the course of looking into issues. Further, to the extent that employment case law discusses confidentiality under ADRA § 574 in the employment context, it may shed light on its interpretation generally.

The Coalition of Federal Ombudsman (COFO) cautions in its guidance to federal ombuds that they should be aware that certain “statutory provisions and . . . regulatory provisions or internal agency guidance . . . may impact on the Ombuds’ functions in dealing with bargaining-unit employees, in particular those under the [FSLMRS] . . . .”<sup>277</sup> COFO identifies in particular § 7114(a) of the Federal Service Labor-Management Relations Statute (FSLMRS ).<sup>278</sup> Section 7114(a) affords to an exclusive bargaining representative the right to be represented at “formal discussion[s]” between one or more representatives of the agency and one or more represented employees concerning any grievance or other terms and conditions of employment<sup>279</sup> and during “any examination” of a represented employee if (1) the examination is conducted by a "representative" of the employing agency and (2) the employee requests representation and

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<sup>276</sup> We note that research has revealed no cases in which the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB) has considered ADRA § 574 on confidentiality with respect to ombuds.

<sup>277</sup> See *COFO Guide*, *supra* note 215, at 6.

<sup>278</sup> 5 U.S.C. § 7114(a)(2) (2012).

<sup>279</sup> 5 U.S.C. § 7114(a)(2)(A). Note that the right inherent in § 7114(a)(2)(A) is not the employee’s right to representation but rather the union’s right to represent the interests of the entire bargaining unit inasmuch as these interests may be affected by resolutions in individual cases. Relatedly the FLRA has determined that the FSLMRS does not grant unions a right to represent individual employees in EEO proceedings. Individual employees may select their own representative who may or may not be a union official. FLRA, GUIDANCE ON APPLYING THE REQUIREMENTS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE TO PROCESSING EQUAL OPPORTUNITY COMPLAINTS 29 n.83 (1999) [hereinafter FLRA Guidance on EEOC Complaints].

reasonably believes that the meeting may result in disciplinary action, the so-called *Weingarten* right.<sup>280</sup>

Should the ombuds be found to be an agency representative as defined under the FSLMRS and the other threshold factors for the union’s right to be present under §7114(a)(2)(A) be met, then the nexus between the union’s right to be present and ombuds confidentiality comes into play. However, importantly even if the ombuds is *not* deemed to be a representative for purposes of § 7114, its strictures may be applicable when in the course of an ombuds’ work both management and unit employees are engaged. Therefore, in order to understand the union’s rights pursuant to § 7114(a)(2)(A), it is important to consider cases in which courts have addressed the union’s rights with regard to confidential conversations whether the confidentiality originates under ADRA § 574 or under confidentiality provisions in, for example, EEOC regulations and management directives. Under ADRA, the impact on confidentiality may depend on whether or not the union is deemed a “party” for purposes of the constraints on parties in § 574.

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<sup>280</sup> 5 U.S.C. § 7114(a)(2)(B). There is a difference of opinion between the ABA on the one hand, and the IOA and COFO on the other as to whether or not federal ombuds should handle issues brought to them by represented constituents that might also be cognizable within an existing collective bargaining relationship or may arise under any federal or state labor or employment laws. The ABA Standards suggest that ombuds refrain from dealing with *any* issues that fall within a collective bargaining agreement or which may arise under any federal or state labor or employment laws. *See 2004 ABA Standards, supra* note 214, at § D(6). In contrast, the IOA states that ombuds should be able to address employment-related issues — regardless of the union’s potential interests in the matter — and notes that ombuds routinely deal with such issues in day to day practice. *See GUIDANCE FOR BEST PRACTICES AND COMMENTARY ON THE AMERICAN BAR ASSOCIATION STANDARDS FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES 7-9* (Int’l Ombudsman Ass’n 2006). Similarly, COFO advises that: “Many federal Ombuds are chartered specifically to deal with employment concerns. Consistent with collective bargaining obligations and agreements, Ombuds’ charters also may authorize Ombuds to participate in the resolution of bargaining-unit employee disputes. In this regard, the collective bargaining agreements should address the Ombuds role in employment dispute resolution.” *See COFO Guide, supra* note 215, at 6. Although we offer no opinion on this disagreement, we note that this study confirms that there are numerous federal ombuds that do handle employment issues in represented environments without evident injury to employee or union rights and obligations. We echo COFO, however, in urging federal ombuds, particularly organizational ombuds, to explore with bargaining representatives who represent their constituents how their respective legal and ethical requirements might be met and the interests of these constituents best be served by both entities.

Turning first to the question of whether or not an ombuds might be considered a “representative” of an agency for purposes of union representation or participation under §7114, we note that while the question of representative status under the FSLMRS is analogous to that of agency and notice discussed in the previous section, the analysis is not identical. Typically, the individual conducting the meeting or investigation involving a bargaining unit employee is someone within the same management unit or chain as the employee and, accordingly, the representative status of that individual is not under question. However, there are a number of cases that have examined the representative status of individuals who the union argues are agency representatives but are separate from that employee’s management structure. In this regard, the FLRA (Federal Labor Relations Authority) has developed a “function and control” test to determine whether an individual is an agency “representative.” The FLRA administers the Federal Service Labor-Management Relations Statute (FSLMRS), which sets forth the labor management system for federal employees and their collective bargaining representatives. It decides representational issues in the federal sector and has jurisdiction over unfair labor practice (ULP) charges brought against federal agencies or unions.<sup>281</sup> The FLRA will find an individual to be a “representative” of the agency where the individual: 1) performs an agency function; and 2) operates under the control of the agency.<sup>282</sup>

In *NASA v. FLRA*,<sup>283</sup> the Supreme Court considered whether an investigator employed in NASA’s Office of Inspector General (NASA-OIG) was a “representative of the agency” within the meaning of the FSLMRS. Although this case should be read skeptically given the immense and relevant differences between ombuds and Inspector General offices, the court’s dicta is of some significance. In *NASA*, the NASA-OIG investigator permitted a union representative to

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<sup>281</sup> See 5 U.S.C. § 7116.

<sup>282</sup> See *NTEU v. FLRA*, 754 F.3d 1031, 1037 (D.C. Cir. 2014).

<sup>283</sup> 527 U.S. 229 (1999).

attend the interview of a NASA employee being investigated for suspect activities, but limited the union representative's participation in the interview. The union subsequently filed a charge with the FLRA, alleging that NASA-OIG's investigator committed an unfair labor practice by limiting the representative's participation in the interview. Defending against the charge, NASA argued that its OIG was not a "representative of the agency" within § 7114(a)(2)(B)'s meaning and thus the union had no statutory right to participate in the interview. The Administrative Law Judge (ALJ) found that the OIG investigator was a "representative" of NASA and held that NASA had violated the employee's right to union representation. The FLRA agreed with the ALJ on review, and the Eleventh Circuit affirmed.

In a 5-4 decision, the Supreme Court held that NASA-OIG investigators are "representatives" of NASA within the meaning of § 7114 when acting within the scope of their employment. The Court disagreed with NASA's assertion that the term agency "representative" referred only to a "representative of agency management — *i.e.*, the entity that has a collective bargaining relationship with the employee's union," finding instead that, "[b]y its terms, § 7114(a)(2)(B) is not limited to investigations conducted by certain 'entit[ies]' within the agency in question."<sup>284</sup> The Court noted that "[a]s an organization, an agency must rely on a variety of representatives to carry out its functions and, though acting in different capacities, each may be acting for, and on behalf of, the agency."<sup>285</sup> Thus, the Court determined that the term "representatives" is not limited to those who "represent[] an 'entity' that collectively bargains with the employee's union."<sup>286</sup>

NASA and NASA-OIG further had claimed that the result of the conflict between the two statutes, the Inspector General Act and the FSLMRS, is that OIG personnel are precluded from

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<sup>284</sup> *Id.* at 233–34.

<sup>285</sup> *Id.* at 236.

<sup>286</sup> *Id.* at 237.

being treated as “representative[s]” of the agencies they audit and investigate under the FSLMRS.<sup>287</sup> Nevertheless, while the Court recognized that “Congress certainly intended that the various OIG’s would enjoy a great deal of autonomy,” it went on to state that, “an OIG’s investigative office, as contemplated by the IGA, is performed with regard to, and on behalf of, the particular agency in which it is stationed. . . . In common parlance, the investigators employed in NASA’s OIG are unquestionably ‘representatives’ of NASA when acting within the scope of their employment.”<sup>288</sup>

NASA and NASA-OIG also had raised confidentiality concerns about permitting union representation at employee investigations. The Court did not downplay the risk to confidentiality but rather explained:

NASA and its OIG are no doubt correct in suggesting that the presence of a union representative at an examination will increase the likelihood that its contents will be disclosed to third parties. That possibility is, however, always present: NASA and NASA-OIG identify no legal authority restricting an employee’s ability to discuss the matter with others. . . . Though legitimate, NASA and NASA-OIG’s confidentiality concerns are not weighty enough to justify a non-textual construction of § 7114(a)(2)(B). . . .<sup>289</sup>

In contrast, in *NTEU v. FLRA*,<sup>290</sup> the D.C. Circuit affirmed the FLRA decision below finding that covered Internal Revenue Service (IRS) personnel are not entitled to union

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<sup>287</sup> *Id.* at 237.

<sup>288</sup> The dissent disagreed: “In light of the IG’s independence — guaranteed by statute and commonly understood as a practical reality — an investigator employed within NASA’s OIG will not, in the usual course, represent NASA’s management within the meaning of § 7114(a)(2)(B). Perhaps there are exceptional cases where, under some unusual combination of facts, investigators of the OIG might be said to represent agency management, as the statute requires.” *Id.* at 262.

<sup>289</sup> *Id.* at 243–244. Thus the Court appears to rely chiefly on its textual construction of § 7114(a)(2)(B). Although the Court did not discuss the law of agency, its reasoning may have some basis in common law agency principles — the Court’s language, referring to OIG work as being performed “with regard to, and on behalf of” the agency, is suggestive of the agent/principal relationship. Note also that the D.C. Circuit Court of Appeal’s decision in *Dover Air Force Base v. FLRA*, 316 F.3d 280, 286–87 (D.C. Cir. 2003) (*Dover AFB*) discussed further *infra*, note 358, rejected allegations that union representation at formal discussions under § 7114(a)(2)(A) violates an employee’s expectations of confidentiality under ADRA § 574, Title VII, and EEOC regulations. The *Dover* court found that whatever potential confidentiality issues there might be were not substantial enough to warrant proscribing the union’s right to be present.

<sup>290</sup> 754 F.3d 1031 (D.C. Cir. 2014)

representation at suitability interviews conducted by the Office of Personnel Management (OPM) investigators because OPM investigators do not act as "representatives" of the IRS during the interviews. The court considered whether the FLRA "properly applied" its function and control test and summarized the FLRA's application of its test to the facts in the case, stating:

[T]he Authority first concluded that OPM investigators 'were performing an OPM function' (and not any IRS function) when 'interviewing and investigating covered [OPM personnel] . . . . The Authority also determined that OPM investigators do not operate under agency control during interviews of covered personnel because . . . OPM investigators are "legally independent" of the IRS and the IRS has "no basis or authority . . . to tell OPM how its investigators should go about conducting their investigatory interviews."<sup>291</sup>

The D.C. Circuit rejected the union's argument that the FLRA's function and control test was "unreasonably at odds" with the Supreme Court's holding in *NASA* "that investigators can be 'representatives' of an agency even when they are operating under their own legal authority and insulated from agency interference or control." In distinguishing *NASA* from the facts of *NTEU*, the D.C. Circuit Court stated that "[d]espite the considerable autonomy enjoyed by the NASA-OIG investigators, they were nonetheless employed by NASA and supervised by the NASA Administrator. . . . Here, the OPM investigators are not IRS employees and are not supervised by the IRS Commissioner."<sup>292</sup>

The court also considered whether the FLRA acted arbitrarily in finding that OPM investigators do not perform an IRS "function" or operate under IRS "control" during suitability interviews of covered IRS employees. On the first point, the court found that the OPM investigators did not perform an IRS "function" because of federal regulations that "expressly entrust[] to OPM the role of conducting suitability investigations of covered personnel."<sup>293</sup> On the second point, the court held that the IRS did not "control" the investigators because the

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<sup>291</sup> *Id.* at 1037.

<sup>292</sup> *Id.* at 1044.

<sup>293</sup> *Id.* at 1046.

agency neither “tell[s] OPM how its investigators should go about conducting their investigatory interviews,” nor has the authority to “alter OPM’s decision to not permit union participation at the interviews.”<sup>294</sup> Thus, the court concluded that that the FLRA “reasonably construed the ‘representative of the agency’ language in 5 U.S.C. § 7114(a)(2)(B) to support a function and control analysis in determining its applicability *vel non* . . . and that the Authority’s application of its interpretation to OPM-conducted suitability interviews of covered IRS personnel is not ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.’”<sup>295</sup>

In another FLRA case, *Pension Benefit Guaranty Corp., Washington D.C. (PBGC)*,<sup>296</sup> the Authority considered whether a “neutral” EEO investigator could be a “representative of the agency” when interviewing unit employees. In *PBGC*, the agency had used a contractor to investigate an employee’s formal EEO complaint. During the course of the investigation, the contractor interviewed 11 unit employees. The union was not notified of or given the chance to participate in any of the interviews, and subsequently filed an unfair labor practice charge with the FLRA claiming that the agency had violated its formal discussion right under § 7114(a)(2)(A).

The PBGC argued that the EEO investigator could not be a “representative of the agency” within the meaning of § 7114 because all employees in its EEO office must be “neutral.”<sup>297</sup> Conversely, the union claimed that the case was analogous to *SSA Boston*,<sup>298</sup> in which the FLRA had held that contract EEO investigators are “agency representatives” when interviewing covered employees during the course of an EEO investigation. In both *SSA Boston*

<sup>294</sup> *Id.* (internal quotations and citation omitted).

<sup>295</sup> *Id.* at 1047 (citing Nat’l Treasury Emps. Union, 414 F.3d 50 (D.C. Cir. 2005) (internal citation omitted); Am. Fed’n of Gov’t Employees, Local 2343, 144 F.3d 85 (D.C. Cir. 1998) (internal citation omitted)).

<sup>296</sup> 62 FLRA 219 (2007) (*PBGC*).

<sup>297</sup> *Id.* at 220.

<sup>298</sup> Soc. Sec. Admin. Office of Hearings & Appeals, Boston Region, 59 FLRA 875 (2004) (*SSA Boston*), *recon. granted* 60 FLRA 105 (2004).



and *PBGC*, the contractors were appointed under memorandum agreements with identical language, which required agency employees “to ‘provide complete cooperation in the investigation[.]’ and . . . ‘to furnish testimony under oath, without a pledge of confidence, about matters pertaining to the complaint.’”<sup>299</sup> Further, the memoranda directed the respective contractors to provide weekly reports to the agency EEO Manager and to submit the completed investigative file to the agency. The FLRA concluded that its finding in *SSA Boston* applied in *PBGC* to the effect that “Respondent had an official obligation to investigate these EEO complaints, and the fact that a contractor, rather than an agency employee, was designated by the agency to conduct these investigations does not diminish the relationship with the Respondent.”<sup>300</sup>

Although in *SSA Boston* the FLRA had not commented on whether neutrality affects an employee’s status as an agency representative, it analyzed the issue at length in *PBGC*. The FLRA began its discussion of neutrality in *PBGC* by noting that “neutrality” is not relevant to the status of a contractor as an agency “representative.” In *PBGC*, the FLRA explained that, in *SSA Boston*, “[t]he fact that the contractor . . . was required to remain neutral did not preclude or otherwise affect the Authority’s finding that he served as a representative of the agency.”<sup>301</sup>

The FLRA rejected the Administrative Law Judge’s (ALJ’s) conclusion that a “neutral” agency employee “is quite different” from one serving in a “prosecutorial role” or performing a “personnel function” and therefore as the EEOC investigator in *PBGC* “was acting essentially as a neutral[,] . . . the Union’s presence at the . . . [investigative] interviews [was] neither beneficial to the EEO process nor required by [the FSLMRS].”<sup>302</sup> In its decision, the FLRA countered that

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<sup>299</sup> *PBGC*, 62 FLRA at 223 (citing *SSA Boston*, 59 FLRA at 880).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 223.

<sup>302</sup> *Id.* at 238 (opinion of Richard A. Pearson, A.L.J.).

“the Judge’s acknowledgement that unions have a right to attend discussions involving ‘personnel functions’ undercuts the [PBGC’s] claim that the neutrality of a representative insulates an agency from this statutory requirement, as personnel functions may, in many instances, be characterized as neutral.”<sup>303</sup>

Additionally, the FLRA rejected the contention that EEO investigators cannot be “representatives” under § 7114 because EEOC guidance expressly prohibits EEO investigators from being “representatives” of the agencies they serve. In concluding that the investigators could be representatives within meaning of the FSLMRS, the FLRA stated:

EEOC guidance requires that each agency set up independent lines of authority for its EEO and personnel programs to assure the independence of the EEO process and to avoid “intrusion on the investigations and deliberations of EEO complaints by agency representatives and offices responsible for defending the agency against EEO complaints.” The guidance thus uses the term “representative” in a particular context, that of agency advocate, and does not imply that employees serving under the EEO function are not, in a general sense, representing an agency’s interests. As the regulations that govern EEO investigations make clear, these investigations are “conducted by the Agency,” in accordance with EEOC directives.<sup>304</sup>

Many of the cases that consider the form and substance of interactions to which the union’s rights under § 7114 attach as they relate to confidentiality under ADRA involve workplace discrimination or harassment. It is therefore important to understand the EEO (equal employment opportunity) complaint process in the federal sector as it differs from that in the private sector in several pertinent respects.

The EEO complaint process for the federal sector places specific emphasis on informal resolution of complaints. To that end, federal employees must try to resolve their allegations of discrimination during a “pre-complaint” process before filing a formal complaint with the EEOC (Equal Employment Opportunity Commission). The process begins when an employee contacts

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<sup>303</sup> *Id.* at 224.

<sup>304</sup> *Id.* (internal citations omitted).

an agency EEO counselor. The EEO counselor will meet with the employee about the allegations and explain the EEO process. At this point, the employee must attempt to resolve the complaint informally either through “traditional” counseling with the EEO counselor or by participating in the agency’s EEO Alternative Dispute Resolution program. If the matter cannot be resolved at the completion of counseling or ADR, the EEOC issues to the employee a notice of the right to file a formal complaint, at which point the employee has 15 days either to file a formal complaint or to choose not to pursue the matter further.

Filing a complaint begins the “formal complaint process.” Once notified by the EEOC that a formal complaint has been filed, the agency has 180 days to assign an EEO investigator to investigate the incident and issue a report on its findings.<sup>305</sup> After the investigation is completed, the complainant may request a hearing before an EEOC Administrative Judge or elect to receive a final agency decision without a hearing. In either event, the agency will issue a final order based on its findings and the decision of the EEOC Administrative Judge, if there was a hearing. The employee may appeal the agency’s final order to the EEOC within 30 days of receiving it. If the complainant is not satisfied with the EEOC’s appellate decision, the complainant may file a request for reconsideration with the EEOC or may file suit in the appropriate federal district court within 90 days of receiving the decision.

Significantly, the pre-complaint stage is known as the “informal” stage, contrasting with the “formal” stage, once the complaint is filed.<sup>306</sup> Title VII itself provides for confidentiality by prohibiting unauthorized disclosure of information obtained by employees of the EEOC or its

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<sup>305</sup> Note that an EEO investigator is not the same as an EEO counselor. An EEO investigator acts as a neutral fact finder who collects and discovers information relating to the claim (or claims) in the complaint under investigation and prepares an investigative report for submission to the agency. On the other hand, an EEO counselor is an agency or contracted individual who, serving as a neutral, provides an environment for open discussion leading to an attempt at informal resolution prior to the filing of a complaint. *See* MD 110, *infra* note 316, at Ch. 2 §§ I.A, D.

<sup>306</sup> As indicated in some of the case law discussed *infra*, the use of “informal” and “formal” to denominate the two stages of federal sector EEO processing may in some instances have distorted the analysis for tribunals attempting to interpret “formal” in FSLMRS § 7114(a)(2)(A).

agents in the federal government at the “informal” pre-complaint stage. Under Title VII, the Commission:

[S]hall endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. . . .<sup>307</sup>

In addition, Title VII’s confidentiality provisions impose criminal penalties on any EEOC employee who discloses information obtained in an EEOC investigation to the “public.”<sup>308</sup>

Although Title VII protects against unauthorized disclosure of EEO information by the government, it does not otherwise guarantee confidentiality in the EEO process.<sup>309</sup>

The EEOC has implemented Title VII’s nondisclosure provisions through its regulations.<sup>310</sup> For example, 29 C.F.R. § 1601.26 (“Confidentiality of endeavors”) provides:

**(a)** Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. This provision does not apply to such disclosures to the representatives of Federal, State or local agencies as may be appropriate or necessary to the carrying out of the Commission’s functions under title VII, the ADA, or GINA: *Provided, however,* That the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosures will not serve the purposes of the effective enforcement of title VII, the ADA, or GINA.

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<sup>307</sup> 42 U.S.C.A. § 2000-5(b) (2012). Interpreting the provision on non-disclosure in the text of Title VII, the court in *Mosley v. General Motors Corp.*, 1975 WL 437160 (E.D. Mo. July 21, 1975) stated: “Congress felt that confidentiality was important where charges of employment discrimination are concerned. . . . The clearest and most absolute prohibition is . . . in [§ 2000e-5] which prohibits the disclosure of the charges [of discrimination] themselves.”

<sup>308</sup> See 42 U.S.C. §§ 2000e-5(b), 2000e-8.

<sup>309</sup> See *Sofio v. Sec’y of Treasury*, EEOC Appeal No. 01873285 (1988) (“[N]othing in [Title VII] . . . guarantees federal employees confidentiality in pursuing complaints brought thereunder.”).

<sup>310</sup> See 29 C.F.R. § 1601.26 (repeating the language in Title VII: “Nothing that is said or done during and as a part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be made a matter of public information . . .”).

(b) Factual information obtained by the Commission during such informal endeavors, if such information is otherwise obtainable by the Commission under section 709 of title VII, for disclosure purposes will be considered by the Commission as obtained during the investigatory process.

In the federal “pre-complaint” process EEOC rules provide: “The [EEO] counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.”<sup>311</sup> Further, EEOC hearings conducted as part of the formal complaint process are “part of the investigative process and are thus closed to the public.”<sup>312</sup> In addition, EEOC rules prohibit public disclosure of certain records.<sup>313</sup>

The EEOC’s 1614 regulations mandate the use of Alternative Dispute Resolution (ADR) in the federal EEO process and require that all federal agencies, “establish or make available an alternative dispute resolution program.”<sup>314</sup> ADR must be offered “for both the pre-complaint and the formal complaint process.”<sup>315</sup> The EEOC’s mandatory guidance for federal agency EEO programs, Management Directive 110 (MD 110), includes the EEOC’s ADR “core principles,” which provide that any agency EEO ADR program must include confidentiality.<sup>316</sup>

Significantly, MD 110 refers to the provisions of ADRA § 574 at Chapter II.A.3

(“Confidentiality”):

Confidentiality is essential to the success of all ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in § 574 of ADRA, specifically exempting qualifying dispute resolution communications from disclosure

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<sup>311</sup> 29 C.F.R. § 1614.105(g) (2010).

<sup>312</sup> 29 C.F.R. § 1614.109(e).

<sup>313</sup> See 29 C.F.R. § 1610.17. The Commission has stated in this regard: “EEOC will not disclose to the public charges of employment discrimination, charge conciliation information or unaggregated EEO survey data. Federal sector complaint files are not disclosable to third parties . . . .” See *FOIA Frequently Asked Questions*, EEOC, <https://www.eeoc.gov/eeoc/foia/faq.cfm#q15>.

<sup>314</sup> 29 C.F.R. § 1614.102(b)(2).

<sup>315</sup> *Id.*

<sup>316</sup> EEOC MANAGEMENT DIRECTIVE 110, Ch. 3 § II(A)(3) (emphasis added) [hereinafter MD 110].

under the Freedom of Information Act. Parties who know that their ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of ADR information. . . . Confidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution, and by any neutral third party involved in the proceeding. The EEOC encourages agencies to issue clear, written policies protecting the confidentiality of what is said and done during an ADR proceeding.<sup>317</sup>

In light of these robust confidentiality requirements in federal EEO ADR proceedings, the treatment of this confidentiality under federal labor law may be instructive for ombuds who also offer confidentiality. The FLRA has interpreted § 7114(a)(2)(A) concerning the union’s right to notice and an opportunity to be present at “formal” discussions with employees in the context of both the formal and informal stage of EEO proceedings and, to a lesser extent, in the context of agency investigations of cases before the Merit Systems Protection Board (MSPB).<sup>318</sup>

To defend against a charge alleging that the union was denied its right to be present at formal discussions under § 7114(a)(2)(A), an agency must show that not all of the required statutory elements were present at the time of the meeting at issue in the charge. Two elements, in addition to the question of representative status discussed above, in particular merit closer analysis here.<sup>319</sup> The first is whether or not a meeting constitutes a “formal” discussion within the meaning of § 7114(a)(2)(A). Although the FLRA examines the totality of circumstances in

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<sup>317</sup> *Id.* at Ch. 3 § II.A.3. In addition to confidentiality, MD 110 cites to the provisions of ADRA defining ADR “Neutrals.”

<sup>318</sup> The MSPB is an independent, quasi-judicial agency charged with protecting federal merit systems. It adjudicates allegations of partisan political and other prohibited personnel actions within the civil service and provides federal employees with an opportunity to appeal alleged abuses by agency management. *See* ABOUT MSPB, [www.mspb.gov/About/about.htm](http://www.mspb.gov/About/about.htm).

<sup>319</sup> With respect to the “discussion” element, the FLRA has stated that the term “discussion” is synonymous with “meeting.” *See* 149<sup>th</sup> TAC Fighter Group, Kelly Air Force Base, 15 FLRA 529, 532 (1984) (*Kelly AFB*). Virtually any meeting involving unit employees and management will satisfy the discussion element — there does not have to be an actual dialogue, debate, or conversation. *See* FLRA, GUIDANCE ON MEETINGS 2 (2015), <https://www.flra.gov/system/files/webfm/OGC/Guidances/MEETINGS%20GUIDANCE%208-28-15%20final.pdf>; *see also, e.g.*, U.S. Veterans Admin., Wash., D.C. and VA Med. Ctr., Brockton Div., Brockton, Mass., 37 FLRA 747, 754 (1990) (finding that a meeting held by management to distribute copies of new work schedules to employees satisfied the “discussion” element.)

each case to determine formality, it has identified a number of relevant factors to aid in this analysis. Such factors include:

(1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.<sup>320</sup>

These factors are meant to be illustrative and other factors may be persuasive in a particular case.<sup>321</sup> The FLRA’s Office of General Counsel has stated in guidance: “In general, the more significant the subject matter of the discussion, the less the Authority will rely upon the enumerated factors to establish formality. Thus, in some situations, the ‘purpose of the discussion [is] sufficient in itself to establish formality.’”<sup>322</sup>

The FLRA has found a range of discussions, including some that might be considered in the vernacular to be informal, to be “formal” discussions. Additionally, it has determined that discussions held in the context of alternative dispute resolution procedures under § 7114 can be *formal* discussions.<sup>323</sup> With respect to mediations and other facilitated discussions, the FLRA has stated that formality is *not* diminished when the format of the discussion consists of private caucuses between the parties and the neutral.<sup>324</sup> Further in *Luke I*, the FLRA rejected the

<sup>320</sup> General Servs. Admin., Region 9, 48 FLRA 1348, 1355 (1994).

<sup>321</sup> See, e.g., F.E. Warren Air Force Base and AFGE, Local 2354, 52 FLRA 149 (1996) (*Warren AFB*). In *Warren AFB* the FLRA concluded it was “highly implausible” that the agency would hold an informal meeting to inform employees that they were targets of a reduction-in-force because of the “gravity” of such an important announcement. *Id.* at 156.

<sup>322</sup> See GUIDANCE ON MEETINGS, *supra* note 319, at 3 (quoting *Warren AFB*, 52 FLRA at 156).

<sup>323</sup> See, e.g., *Dover AFB*, 316 F.3d 280 (holding that mediation session to resolve employee’s EEO complaint was a “formal” discussion).

<sup>324</sup> See *Luke Air Force Base, Ariz.*, 54 FLRA 716, 725-26 (1998) (*Luke I*), *rev’d sub nom.* *Luke Air Force Base, Ariz. v. FLRA*, 208 F.3d 221 (9<sup>th</sup> Cir. 1999) (unpublished table decision) (*Luke II*), *cert. denied* 121 S.Ct. 60 (2000) (*Luke AFB*). Three *Luke* cases are discussed in this analysis. In *Luke I*, the FLRA determined that a mediation of a formal EEO complaint was a formal discussion concerning a grievance within the meaning of § 7114(a)(2)(A). In *Luke II*, the Ninth Circuit overturned the FLRA’s earlier decision in *Luke I*, holding that EEO complaints are not grievances under § 7114 because they are governed by separate and distinct statutory procedures. In *Luke Air Force Base, Ariz.*, 58 FLRA 528 (2003) (*Luke III*), the Authority, relying on the D.C. Circuit’s 2003 decision in *Dover*

contention “that a facilitated discussion in general, or a mediated negotiation in particular, can never be ‘formal’ under section 7114(a)(2)(A) . . . .”<sup>325</sup> The FLRA stated there that “a union’s statutory right to notice and an opportunity to be present during a discussion is not diminished when the discussion between employees and agency representatives is conducted in a non-confrontational manner through a neutral third party.”<sup>326</sup>

Illustratively, the FLRA has found the following to be “formal” meetings<sup>327</sup>:

- A mediation of an employee’s formal EEO complaint; attendance was voluntary; the agency representative present was outside the employee’s chain of command; the session lasted several hours; and notes from the meeting were destroyed.<sup>328</sup>
- A 20-minute phone interview conducted by an EEO investigator of a unit employee to obtain information about another employee’s EEO complaint; the employee was notified in advance of the call and informed it would be tape-recorded.<sup>329</sup>
- A meeting to advise an employee of his workplace duties, held in accordance with an MSPB settlement, and which was attended by the second-level supervisor; the

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*AFB*, held that a mediation of a formal EEO complaint was a formal discussion concerning a grievance which the union had a right to attend pursuant to § 7114(a)(2)(A).

<sup>325</sup> See *Luke I*, 54 FLRA at 729.

<sup>326</sup> *Id.* In *Luke I*, the agency’s representative was not present at the mediation and the parties communicated solely through the EEO counselor who attempted to mediate the case. The FLRA stated:

[I]t is clear that [the parties] were engaged in responding to each other’s settlement positions, and that they were no less engaged than if they had been speaking face-to-face. . . . The Union’s interest and right to be represented at face-to-face negotiations of a grievance . . . applies as well, in our view, to a negotiation conducted through a mediator. Under these circumstances, the [agency representative] was effectively present at the January 19 mediation/investigation session. Thus, the nature of the communication during the mediation/investigation session on January 19 does not undermine the overall formality.

<sup>327</sup> Ample FLRA authority exists on this subject, and the FLRA has noted that variations in factual circumstances affect its analysis of formality. See *Warren AFB*, 52 FLRA at 157. For further discussion and examples of cases, see generally the FLRA’s GUIDANCE ON MEETINGS, *supra* note 319.

<sup>328</sup> U.S. Dep’t of Agric., Forest Serv., Los Padres Nat’l Forest, Goleta, Cal., 60 FLRA 644, 651-53 (2005).

<sup>329</sup> Soc. Sec. Admin., Office of Hearings and Apps., Bos. Reg’l Office, 59 FLRA 875, 878-79 (2004).



meeting lasted approximately one hour and the employee’s attendance was mandatory.<sup>330</sup>

In contrast, meetings are less likely to be “formal” if they are short in duration,<sup>331</sup> unscheduled,<sup>332</sup> employee-initiated,<sup>333</sup> conducted within the employee’s workspace,<sup>334</sup> without a formal agenda,<sup>335</sup> or there was no transcript or notes taken of the meeting.<sup>336</sup> In addition, the FLRA has stated that certain “highly personal” meetings — such as routine employee counseling sessions — would not constitute “formal” discussions.<sup>337</sup>

The second important element of § 7114(a)(2)(A) relates to the “subject matter” of a discussion as described by the statute: a “grievance, personnel policy or practice, or general condition of employment.” The term “conditions of employment” is defined in the FSLMRS as “personnel policies, practices, and matters . . . affecting working conditions.”<sup>338</sup> Authority precedent has established that the term “conditions of employment” is effectively synonymous with the term “working conditions,” which would cover most if not all internal employment issues that are likely to come to an ombuds.<sup>339</sup> Despite the breadth of “conditions of employment,” the FLRA and the courts have struggled to define the scope of the term

<sup>330</sup> U.S. Dep’t of Labor, Office of the Assistant Sec’y for Admin. & Mgmt., Chi., Ill., 32 FLRA 465, 470 (1988).

<sup>331</sup> See Def. Logistics Agency, Def. Depot Tracy, Cal., 14 FLRA 475, 477 (1984) (meeting held to announce changes in sick leave policy; lasted “no more than” 10 minutes); Marine Corps Logistics Base Barstow, Cal., 45 FLRA 1332, 1335-36 (1992) (meeting held to request volunteers for overtime assignment; lasted 10 minutes).

<sup>332</sup> See U.S. Dep’t of Energy, Rocky Flats Field Office, Golden, Col., 57 FLRA 754, 755 (2002) (Employee “just dropp[ed] by” desk of EEO representative to discuss employee’s pending EEO complaint).

<sup>333</sup> *Id.*

<sup>334</sup> See Soc. Sec. Admin., Balt., Md., 15 FLRA 525, 527 (1984) (meeting lasted less than 5 minutes).

<sup>335</sup> See Def. Logistics Agency, Def. Distrib. Region West, 48 FLRA 744, 745 (1993).

<sup>336</sup> See Immigration & Naturalization Serv., N.Y. Office of Asylum, Rosedale, N.Y., 55 FLRA 1032, 1034 (1999).

<sup>337</sup> See Soc. Sec. Admin., 14 FLRA 28, 28 (1984). The FLRA reached this conclusion based on its review of the legislative history of the FSLMRS, in which the word “formal” was added before “discussion” in the “Udall substitute” — enacted into law as § 7114(a)(2)(A) — “in order to make clear [Congress’s] intention that this subsection does not require that an exclusive representative be present during highly personal, informal meetings such as counseling sessions . . . .” *Id.* (citing 124 Cong. Rec. 29187 (1978)).

<sup>338</sup> 5 U.S.C. § 7103(a)(14).

<sup>339</sup> See Davis Monthan Air Force Base and AFGE Local 2924, 64 FLRA 85, 90 (2009).

“grievance” in the context of determining whether and to what extent EEO dispute resolution processes are covered by § 7114.<sup>340</sup> A “grievance” is described in § 7103 of the FSLMRS as:

- (9) “grievance” means any complaint —
- (A) by any employee concerning any matter relating to the employment of the employee;
  - (B) by any labor organization concerning any matter relating to the employment of any employee; or
  - (C) by any employee, labor organization, or agency concerning —
    - (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
    - (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment . . . .

The D.C. Circuit has construed the term “grievance” to include complaints brought under statutory appeal processes and negotiated grievance procedures,<sup>341</sup> and the FLRA later adopted this position.<sup>342</sup> However, the Ninth Circuit has held that complaints of discrimination brought under EEO procedures do *not* constitute grievances within the meaning of the FSLMRS.<sup>343</sup>

<sup>340</sup> See *Nuclear Regulatory Comm’n*, 29 FLRA 660, 662-63 (1987); see also *U.S. Dep’t of Health and Human Servs., Dall., Tex.*, 23 FLRA 104 (1982) (meeting to discuss implementation of group performance standards); *Dep’t of the Army, New Cumberland Army Depot, New Cumberland, Pa.*, 38 FLRA 671 (1990) (meeting to discuss implementation of compressed working schedule); *Veterans Affairs Med. Ctr., N.Y.*, 47 FLRA 1072 (1993) (meeting to announce change in the procedures for shipping and receiving) in which the Authority found these discussions concerned grievances. In contrast, the Authority has also found a “grievance” can involve a “particularized application” of a policy to one employee and still be covered under § 7114(a)(2)(A). See *NTEU v. FLRA*, 774 F.2d 1181, 1186 (1985) (*NTEU*).

<sup>341</sup> See *NTEU*, 774 F.2d at 1184–89 (“The impact of these individual complaints on the bargaining unit will be felt regardless of whether the aggrieved employee opts to pursue a negotiated grievance procedure or an alternative statutory procedure.”); *Dover AFB*, 316 F.3d at 287 (“With support from our precedent in *NTEU*, 774 F.2d at 1186–87, we read section 7103(a)(9)’s broad definition of ‘grievance’ as encompassing both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures.”).

<sup>342</sup> See *Bureau of Prisons, Fed. Corr. Inst., Ray Brook, N.Y.*, 29 FLRA 584, 590 (1987) (*FCI Ray Brook*) (“[C]onsistent with the rationale in the D.C. Circuit’s decision in *NTEU v. FLRA*, we conclude that a “grievance” within the meaning of section 7114(a)(2)(A) can encompass a statutory appeal.”); see also *Luke III*, 528 FLRA at 533 (“We reaffirm the Authority’s previous view set forth in *Dover*, as affirmed by the D.C. Circuit in *Dover AFB v. FLRA*, that the broad definition of ‘grievance’ under the [FSLMRS] encompasses complaints filed under a N[egotiated] G[rivance] P[rocedure] as well as complaints filed under alternative statutory procedures of the EEOC.”).

<sup>343</sup> See *infra* note 353 and accompanying text; see also *Luke II*, 208 F.3d 221 (“[C]omplaints brought pursuant to EEOC procedures . . . are discrete and separate from the grievance process to which 5 U.S.C. [§] . . . 7714 [is] directed.” (internal quotations omitted)).

In *Internal Revenue Service, Fresno, Cal. v. FLRA*,<sup>344</sup> the Ninth Circuit Court of Appeals considered whether the union had the right under §7114(a)(2)(A) to attend a conciliation conference held to resolve an employee’s pre-complaint allegations of discrimination. The employee in *IRS Fresno* contacted the agency’s EEO counselor to complain of gender discrimination after being informed that she would be forced to accept a grade reduction if she accepted a new training position. The counselor held a conciliation session between the employee and an IRS representative in an attempt to resolve the matter informally.

Notwithstanding the fact that the conciliation occurred at the EEO “informal” pre-complaint stage, the union filed an unfair labor practice charge (ULP) with the FLRA, alleging that the IRS violated section 7114(a)(2)(A) by conducting “a formal discussion concerning a grievance or condition of employment” without providing the union an opportunity to be present.<sup>345</sup> The FLRA below had determined that the conciliation was “formal” because “it was held in an IRS conference room, was scheduled in advance and so was not impromptu, and was attended by [the employee’s] supervisor.”<sup>346</sup> The FLRA also found that the meeting concerned a “grievance” based on the term’s definition in § 7103(a)(9) of the FSLRMS, “which defines a grievance as ‘any complaint by . . . an employee concerning any matter relating to the employment of the employee . . . .’”<sup>347</sup> In light of its findings, the FLRA held that the IRS violated the union’s right under § 7114(a)(2)(A) by failing to provide the union with notice and an opportunity to attend the conciliation.<sup>348</sup>

On appeal to the Ninth Circuit the IRS contended that the FLRA erred in finding that the meeting was “formal” and concerned a “grievance,” and claimed that the union’s presence at the

<sup>344</sup> 706 F.2d 1019 (9th Cir. 1983) (*IRS Fresno*).

<sup>345</sup> *Id.* at 1022.

<sup>346</sup> *Id.* at 1023.

<sup>347</sup> *Id.* at 1024.

<sup>348</sup> *Id.* at 1022. The parties did not dispute the fact that the meeting was a “discussion” and attended by a “representative” of management.

conciliation would violate EEOC regulations requiring confidentiality in the pre-complaint EEO process. In reversing the FLRA, the court held that “[t]he union representation requirements of 5 U.S.C. § 7114(a)(2)(A) do not apply to an EEO precomplaint conciliation conference . . . .”<sup>349</sup>

The court first addressed whether the meeting was “formal,” noting that under EEOC regulations governing the pre-complaint process an EEO counselor is required to seek a resolution of the matter on an informal basis. “This opportunity for informal resolution is clearly a key element in the EEOC complaint procedure; the EEOC requires employees alleging discrimination to exhaust the precomplaint procedures of [29 C.F.R. § 1614.105] before filing a formal complaint and activating formal steps in the EEOC process.”<sup>350</sup> The court went on to state:

[W]hile the Authority acknowledged that the purpose of the meeting was to resolve *informally* a discrimination dispute in which a formal complaint had not yet been filed with the EEOC, it failed to give adequate consideration to this *most critical circumstance*. The meeting was convened by [the EEO counselor] under the EEOC procedure . . . by

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<sup>349</sup> *Id.* 1022.

<sup>350</sup> *Id.* at 1024. But see Timothy J. Tuttle, *Three’s a Crowd: Why Mandating Union Representation at Mediation of Federal Employees’ Discrimination Complaints is Illegal and Contrary to Legislative Intent*, 62 A.F. L. REV. 127, 161 (2008) in which Air Force Major Timothy J. Tuttle, argues that in the EEO context federal courts have failed “to differentiate between an ‘informal’ complaint and an ‘informal process’ of dispute resolution . . . .” He states:

Congress intended for “informal methods of conference, conciliation, and persuasion” to be used to resolve discrimination complaints after “investigation,” which takes place after a formal complaint has been filed. Thus, the mandate directing government agencies to engage in informal methods of resolution clearly continues to be in force after a charge has been filed. The *IRS Fresno* court seemed to recognize this as it analyzed the facts and discussed how the attempt at settling the dispute using mediation is resolving it on an “informal basis.”

But Tuttle goes on to say:

Later in the [*IRS Fresno*] opinion, however, the court seems to get confused about the difference between a formal complaint and informal resolution of the dispute. . . . While the Civil Rights Act requires an attempt at informal resolution of a discrimination complaint after a formal charge has been filed, the court in *IRS Fresno* seems to be saying that after a formal complaint is filed, the “formal steps in the EEOC process” are activated, implying that all steps from there on are “formal.” In actuality, the Civil Rights Act mandates an “opportunity for informal resolution” throughout the process, even after the complaint is filed. . . . Had the *IRS Fresno* court’s decision focused on the text of [Title VII], it could have established that informal settlement processes are to be attempted throughout the complaint cycle and created a more useful precedent.

which an EEO counselor seeks to resolve discrimination charges in the precomplaint stage on an “*informal basis*.”<sup>351</sup>

In light of the “basis and purpose of the meeting,” the court held that the discussion was informal rather than formal.<sup>352</sup>

Second, the court addressed whether the meeting involved a “grievance.” In holding that *pre-complaint* allegations of discrimination do not concern a grievance, the court found:

The union's interest in the statutory EEOC procedure is not the same as its interest in the contractual grievance process. It has duties and obligations under the negotiated grievance mechanism, for example, but it has no such institutional role in the EEOC process. Similarly, there is no reason it should have the same rights in the EEOC procedure as it does in the contractual grievance process. . . . [W]e decide that the EEOC claim of discrimination in this case did not constitute a "grievance" within the meaning of 5 U.S.C. § 7114(a)(2)(A).<sup>353</sup>

Turning to confidentiality, the *IRS Fresno* court acknowledged that EEO regulations “prohibit[] an EEO counselor from revealing the identity of a person consulting him before the person files a formal complaint of discrimination,” and stated that “[r]equiring such confidentiality during early stages of an employment discrimination claim serves to facilitate informal resolution of disputes and to encourage employees with discrimination complaints to pursue and explore their claims without fear of retribution.”<sup>354</sup> The court noted that the comparable provisions of Title VII governing private sector EEO procedures support its interpretation:

Those provisions, and their legislative history, stress voluntary compliance with [Title VII] and prohibit public disclosure of discrimination complaints prior to the institution of formal proceedings. . . . Although these provisions relate to discrimination in the private sector rather than in federal employment, they illustrate Congress’ concern with the

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<sup>351</sup> *Id.* at 1023.

<sup>352</sup> *Id.* at 1023–24.

<sup>353</sup> *Id.* at 1025.

<sup>354</sup> *Id.* at 1023.

confidentiality of EEOC investigations and its belief that confidentiality is important in achieving voluntary compliance with the goals of Title VII.<sup>355</sup>

Almost twenty years after *IRS Fresno*, in an unpublished decision the Ninth Circuit in *Luke II*<sup>356</sup> considered whether the union had a statutory right to be present at a mediation of a covered employee's EEO complaint of discrimination, *i.e.*, a mediation during the EEO "formal stage." Relying on its earlier precedent in *IRS Fresno*, the court found that the topic of the meeting — the EEO complain — did not concern a "grievance" within the meaning of the FSLMRS. Thus, the court held that because the union failed to establish all four elements of § 7114(a)(2)(A) it had no right to be present at the mediation even after a complaint had been filed.<sup>357</sup>

The FLRA and the D.C. Circuit have declined to follow the Ninth Circuit. In 2003, the D.C. Circuit Court of Appeals decided *Dover Air Force Base v. FLRA*,<sup>358</sup> on the union's right under § 7114(a)(2)(A) to notice and an opportunity to attend discussions of formal EEO complaints. *Dover AFB* involved a complaint of discrimination filed by Jones, an Air Force employee and member of the bargaining unit at Dover AFB. Jones requested mediation of his complaint pursuant to EEOC regulations, and the Air Force assigned a mediator to the dispute. Prior to the mediation, Jones and the agency representative, an Air Force Judge Advocate General attorney, signed a confidentiality agreement that applied to the mediation. The

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<sup>355</sup> *Id.* at 1024.

<sup>356</sup> *Luke II*, 208 F.3d at 221.

<sup>357</sup> In a one-page analysis, the *Luke II* court stated:

Under *IRS, Fresno Serv. Ctr. v. FLRA* . . . "grievances" within the meaning of Section 7114(a)(2)(A) do not include [the employee]'s complaints because they were brought pursuant to EEOC procedures, which are "discrete and separate from the grievance process to which 5 U.S.C. [§ ] . . . 7114 [is] directed." The fact that the collective bargaining agreement explicitly excludes discrimination claims from the grievance procedure also suggests that these claims are not "grievances." *See id.* Because the January 19 meeting did not concern "grievances" within the meaning of Section 7114, the meeting did not satisfy the fourth element of Section 7114. The union therefore had no right of representation at the meeting. As such, Luke did not violate Section 7114 when it failed to give the union notice of the January 19 meeting.

*Id.*

<sup>358</sup> 316 F.3d at 280.

mediation was conducted by a mediator between Jones and the agency attorney and lasted approximately six hours, the majority of which was spent in individual caucuses between the parties and the mediator. The union was not given notice or the opportunity to attend the mediation. Subsequently, Jones' union filed an unfair labor practice complaint with the FLRA, alleging that the Air Force had violated the union's § 7114 rights.

The FLRA found below that the EEO mediation was a "formal discussion" that concerned a "grievance" within the meaning of §7114(a)(2)(A). On the grievance issue, the FLRA held that the "broad definition" of grievance in the FSLMRS "include[s] *any* employment-related complaint, regardless of the forum chosen."<sup>359</sup> The FLRA rejected the Ninth Circuit's decision in *IRS Fresno*, which held "that the formal discussion right does not apply during EEOC proceedings because those complaints are 'discrete and separate from the grievance process'" to which the FSLMRS is directed.<sup>360</sup> Instead the FLRA relied on the D.C. Circuit's precedent in *National Treasury Employees Union v. FLRA*.<sup>361</sup> In *NTEU* the court had held that "section 7121 [of the FSLMRS] provides that a grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures."<sup>362</sup>

Importantly, the FLRA concluded that there was "no conflict" in the case between the union's formal discussion right under § 7114 and confidentiality provisions in ADRA § 574 or EEOC regulations and guidance, including MD 110. The Air Force had argued that the union, which was not acting as Jones's personal representative in the EEO matter, was not a "party" to

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<sup>359</sup> *Id.* at 319.

<sup>360</sup> *Id.* (quoting *IRS Fresno*, 706 F.2d at 1024).

<sup>361</sup> 774 F.2d at 1181.

<sup>362</sup> *Id.* at 1187.

the EEOC proceedings as defined under ADRA.<sup>363</sup> Noting that the confidentiality provisions of ADRA apply only to the “parties” and to the “neutral” in an ADR proceeding, the Air Force contended that allowing the union to participate in the EEO mediation would undermine confidentiality and harm the EEO ADR process.

The FLRA disagreed with the Air Force, holding that the union “was a party under the ADR Act because it was ‘entitled as of right to be admitted[.]’ [to the mediation] . . . pursuant to its formal discussion rights under section 7114(a)(2)(A) of the [FSLMRS].”<sup>364</sup> The FLRA noted, in the alternative, that ADRA contemplates the attendance and participation of “nonparty participants.”<sup>365</sup> Lastly, the FLRA dismissed the Air Force’s arguments as premature and “conjectural” in the absence of any actual disclosure of confidential information.<sup>366</sup>

The Air Force appealed to the D.C. Circuit Court and the court affirmed the FLRA’s decision. With respect to the grievance question, the court turned to its *NTEU* precedent for its “holding that a grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures.”<sup>367</sup> The D.C. Circuit also cited *NTEU* for its holding that “section 7114(a)(2)(A) provides that an exclusive representative has the right to be present at *any* formal discussion of a grievance between management and a

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<sup>363</sup> See 5 U.S.C. §§ 551(3), 571(10) (A), (B). ADRA provides that a “‘party’ includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes[.]” as well as persons who “will be significantly affected by the decision” and who participate when the proceeding is without named parties.

<sup>364</sup> 316 F.3d at 284 (citing 5 U.S.C. § 551(3)).

<sup>365</sup> *Id.* (citing 5 U.S.C. § 574(a)(1), (e)). Section 574(a)(1) provides that a neutral shall not disclose any communication without written consent of all the parties, or, “if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing[.]” Note also that Section 574(e) states that, “[i]f a demand for disclosure . . . is made upon a neutral . . . the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants . . . . Any party or affected nonparty participant who receives such notice and . . . does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.”

<sup>366</sup> *Id.* at 285. *Cf. NASA*, 527 U.S. at 243 (“NASA and its OIG are no doubt correct in suggesting that the presence of a union representative at an examination will increase the likelihood that its contents will be disclosed to third parties.”).

<sup>367</sup> *Id.* (citing *NTEU*, 774 F.2d at 1185–88).



bargaining unit employee.”<sup>368</sup> Although the Air Force attempted to distinguish *NTEU* because it involved an MSPB proceeding rather than an EEO proceeding, the *Dover AFB* court stated:

“[O]ur analysis in *NTEU* relied upon the text, structure, and legislative history of the [FSLMRS] and did not rest on the type of grievance in question. . . . We find no reason to distinguish *NTEU*; we will read the term ‘grievance’ as we did in that case.”<sup>369</sup>

After determining that the mediation concerned a grievance, the court addressed the Air Force’s argument that union attendance at EEO proceedings would conflict with confidentiality provisions of ADRA and the Privacy Act. The court explained:

This argument fails because neither of the statutes cited by the Air Force prohibits union attendance at ADR proceedings. The provisions of the ADR Act cited by the Air Force concern only the confidentiality of communications made at an ADR proceeding and do not address what persons or parties may attend an ADR proceeding. 5 U.S.C. § 574. Similarly, the Privacy Act concerns the confidentiality of records rather than what parties may attend an ADR proceeding, 5 U.S.C § 552a, and this case does not present a situation where the presence of a union representative in an ADR proceeding would result in the revelation of confidential information in violation of the Privacy Act. In other words, neither the ADR Act nor the Privacy Act creates a conflict (much less a direct conflict) with section 7114(a)(2)(A).<sup>370</sup>

Further the court considered the Air Force’s argument that the EEOC’s “ADR core principles” require that “[c]onfidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution.”<sup>371</sup> The Air Force had contended that “union presence at [EEO] ADR proceedings would undermine the confidentiality of the process.”<sup>372</sup> The court disagreed:

This argument amounts to nothing more than the Air Force’s doubt that union representatives can keep confidential matter confidential. Union representatives are often in the position of having to maintain confidentiality. More importantly, even assuming that an inconsistency between an agency manual and a statute constitutes a conflict, the

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<sup>368</sup> *Id.* at 285–86.

<sup>369</sup> *Id.* at 285.

<sup>370</sup> *Id.* at 286–87 (internal citations omitted).

<sup>371</sup> *Id.* at 287 (citing MD 110, Ch. 3 § VII.A.3).

<sup>372</sup> *Id.*

Air Force again fails to show a conflict with the FLRA's construction of section 7114(a)(2)(A).<sup>373</sup>

With regard to the Air Force's argument that the FLRA's construction of § 7114(a)(2)(A) conflicts with EEOC regulations and MD 110 and that under EEOC regulation 29 C.F.R. §1614.109(e), attendance at EEOC hearings "is limited to persons determined by the administrative judge to have direct knowledge relating to the complaint," the court stated that "this regulation says nothing about what happens at ADR proceedings."<sup>374</sup>

Of possible additional interest to some ombuds, the FLRA and circuit courts have found that the term "grievance" under the FSLMRS extends to interviews of employees by agencies preparing for MSPB and other hearings and that such interviews are also "formal" meetings under §7114(a)(2)(A).<sup>375</sup> "The Authority and the courts have consistently held . . . that when agencies interview unit employees in preparation for arbitration, unfair labor practice and MSPB hearings, they must allow the union to participate."<sup>376</sup>

These interviews were deemed to fall within § 7114(a)(2)(A)'s "formal discussions" even though they were not an "examination" of unit employees under § 7114(a)(2)(B). Section 7114(a)(2)(B) provides that represented employees have the right to union representation at "any examination" of a represented employee if (1) the examination is conducted by a "representative" of the employing agency and (2) the employee requests representation and reasonably believes that the meeting may result in disciplinary action, the so-called *Weingarten* right. This provision would only apply to a federal ombuds should he or she possess statutory or other formal

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<sup>373</sup> *Id.*

<sup>374</sup> *Id.* (internal quotations omitted).

<sup>375</sup> *Dep't of Veterans Affairs Med. Ctr., Long Beach, Cal. v. FLRA*, 16 F.3d 1526 (9th Cir. 1994). The Tenth Circuit and D.C. Circuits have adopted this position as well. *See Dep't of Veterans Affairs Med. Ctr., Denver, Col. v. FLRA*, 3 F.3d 1386 (10th Cir. 1993) (finding that interviews of covered employees by agency attorney in preparation for MSPB hearing constituted formal discussions concerning a grievance); *NTEU*, 774 F.2d at 1185–88 (finding that interview of employee who was scheduled to testify on behalf of another employee at an upcoming MSPB hearing was in connection with a grievance).

<sup>376</sup> *PBGC*, 62 FLRA at 235–36 (opinion of Richard A. Pearson, A.L.J.) (citations omitted).

authority on behalf of the employer to “investigate” and report on issues that could result in potential discipline of a bargaining unit employee and then interviews said employee in the course of the investigation. Study data indicates that such a circumstance is unlikely to exist among current federal ombuds.

### **Conclusions and Recommendations for Agency Officials and Ombuds Offices on Federal Sector Labor Law**

It goes almost without saying that ombuds are not a substitute for collective bargaining any more than they are a substitute for the MSPB or even informal EEO processes. Visitors to the ombuds office should be informed by the ombuds office of other options, both formal and informal, and their requirements and the ombuds office should not engage in behavior that could mislead employees about the respective roles of the ombuds and these other entities. While not interchangeable, however, the ombuds can complement these other processes when a visitor raises internal issues. Moreover, the question of the application of § 7114 is not relevant solely to internal ombuds dealing primarily with employee issues. Rather, it is relevant for all those ombuds that either have represented employees among their constituents or may have cause to engage with represented employees as well as management on issues affecting the terms and conditions of the bargaining unit in the course of resolving issues that have been brought to them.

The FSLMRS cases under § 7114 owe much to the particular features of federal sector labor law generally and are bound to the FLRA’s interpretation of its own statute and the courts’ deference to this interpretation.<sup>377</sup> Accordingly their implications beyond the confines of that statute are not obvious or inevitable. Moreover, the variability of federal ombuds as to structure

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<sup>377</sup> See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (establishing rules for judicial review of federal agency interpretations of statutes).

and function dictates that determination of the applicability of § 7114 must be made on a case by case basis. The question is not an either/or proposition. Even given the FLRA's broad interpretation of § 7114, some but far from all of what the subset of ombuds who may be dealing with represented employees do will require union notice and an opportunity to be present.

Of interest in itself and by way of analogy are the cases involving representative status under the FSLMRS. For internal ombuds or those external ombuds who may talk to represented federal employees in the course of gathering facts about cases, this precedent may give some hint of where an ombuds might fall on the spectrum of representatives under the FSLMRS. Although *NASA* and the other cases are distinguishable on their facts, their parsing of the significance of "independence" (the OIG at issue in the Supreme Court's decision in *NASA*) and "neutrality" (the EEO investigators at issue before the FLRA in *PBGC* and *SSA Boston*) is of interest. In neither instance were these attributes, even when originating in statute or regulation, found in themselves to preclude a finding of representative status with regard to the union's right to notice and an opportunity to be present at meetings with bargaining unit employees.

In its guidance to federal ombuds COFO limits its consideration of the impact of FSLMRS § 7114 on federal ombuds to those circumstances in which an ombuds serves as a mediator. Noting that both the FLRA and the DC Circuit Court of Appeals have found EEO mediations at the "formal" stage to constitute formal discussions under § 7114(a)(2)(A), COFO advises that federal ombuds "should consult" with an appropriate labor official or counsel when "confronted with an issue of union attendance in a federal mediation pursuant to its [§7114(a)(2)(A)] 'formal discussion' rights and to assure compliance with all such statutory, regulatory or other requirements."<sup>378</sup>

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<sup>378</sup> *COFO Guide*, *supra* note 215, at 6.

Widening that analysis to consider the full range of federal ombuds functions, while it is not clear as to which ombuds, if any, would be considered agency representatives under § 7114, it is evident that even if an ombuds is not deemed to be a representative under § 7114, the statute's strictures may apply when, in the course of an ombud's dispute resolution process, both management representatives and unit employees are engaged whether or not the technique being employed is mediation within the most precise definition of the word. Therefore, it is necessary to consider which ombuds functions might meet other criteria under the statute. Most significant is the distinction between formal and informal discussions.<sup>379</sup>

While courts differ as to the threshold for "formal discussions," the FLRA has been consistently expansive in its interpretation. The Authority looks to the totality of the circumstances, examining a variety of facts and factors in deciding whether or not a discussion is formal. Under FLRA law, the initial contact with a constituent, especially if initiated by the employee and "highly personal" in nature, is unlikely to be found to be a formal discussion by the Authority even if that particular ombuds might be deemed to be an agency representative under FSLMRS § 7114. If and as the process managed by the ombuds moves further toward resolving the constituent's issue, however, if the resolution directly or indirectly affects the terms and conditions of employment of other bargaining unit employees and if a given discussion includes both bargaining unit employees and management officials (whether or not it is face-to-face in an actual mediation), the Authority is more likely to find that the union has a right to notice and an opportunity to be present at the discussion. In this regard, the Authority discounts the contention that the presence of a union representative threatens confidentiality under ADRA

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<sup>379</sup> The statute's language describing the requisite subject matter — grievance or any personnel policy or practices or other general condition of employment — is broad enough to include any employment related issue. It should be noted that the potential impact on the bargaining unit of resolution rather than the genesis of the issue or whether the concern could be grieved under the collective bargaining agreement appears to be the key factor relevant to the Authority's criteria for finding a "grievance" under 5 U.S.C. § 7114.

§ 574. In the first instance the FLRA has concluded that the union representative is a party bound by the confidentiality constraints in § 574. Alternatively, it opines that ADRA contemplates the participation of non-parties in confidential dispute resolution proceedings without offering a theory as to how the actual presence of a non-party unbound by § 574's constraints might be accountable to them.

The union's right to notice and an opportunity to be present at certain discussions involving covered employees pursuant to § 7114 may have consequences for the anonymity and confidentiality of ombuds discussions, although once management is engaged and the discussions advance toward "formal discussions," it is less likely that the constituent will have remained anonymous and his or her concern still undisclosed. Any threat to confidentiality would therefore have been diminished.

While the case precedent makes clear that the factual and legal circumstances in which the union's right is triggered are complex and multivariate, it is unlikely that most discussions involving an ombuds and bargaining unit employees satisfy the statutory requirements of § 7114 such that union representation is required. As a practical matter whether or not ombuds are found to have representative status, many if not most meetings with ombuds will not qualify as meetings at which a bargaining representative has a right to be present. Most conversations with ombuds will not meet the criteria for "formal discussion[s]" under § 7114 (a)(2)(A). Moreover, unlike an Inspector General, most ombuds do not "examine" employees in investigatory interviews under § 7114 (a)(2)(B). Nevertheless, ombuds who might be subject to § 7114 should work with legal counsel to develop office protocols for determining when the interactions of the ombuds with the represented constituent and management on an issue might be seen as more

formal efforts at resolution, triggering the union’s right to notice and right to be present on behalf of the bargaining unit it represents.

## **VI. The Inspector General Act and Ombuds**

The IADRWG Guide on the confidentiality of dispute resolution proceedings notes that “[e]xperience — and anecdotal reports — suggests that few ADR program administrators have ever received a request for information protected by the ADR Act based on statutory authority, and it is anticipated that formal requests will continue to be rare.”<sup>380</sup> In this regard, the evidence of an actual conflict occurring between the confidentiality offered by a federal ombuds, whether under ADRA or pursuant to professional standards, and the responsibilities of an Inspector General (IG) under the Inspector General Act of 1978<sup>381</sup> appears to be essentially anecdotal and difficult to substantiate. Nevertheless, the possibility of conflict<sup>382</sup> is certainly there and the ramifications of such a conflict are potentially significant.

The purpose of the IG Act is to “create independent and objective units”<sup>383</sup> within the Executive Branch that promote the integrity and performance of executive agencies by keeping executive officials and Congress informed about agency operations. IG’s can perform audits on particular programs and operations and investigate waste, fraud and abuse in agency programs and processes. They investigate allegations of criminal wrongdoing and misconduct on the part of agency employees or others whose actions have a direct impact on the agency. The ambit of their inquiries may include the activities of outside entities, such as contractors, who do business with the government or obtain a benefit from it. IG’s make reports to agency leadership and

<sup>380</sup> See *IADRWG Guide*, *supra* note 19, at 52.

<sup>381</sup> Pub. L. No. 95-452 (Oct. 12, 1978) (codified as amended at 5 U.S.C. app (2015)) (“IG Act”).

<sup>382</sup> See *IADRWG Guide*, *supra* note 19, at 52–57. The ABA Ad Hoc Committee (which included representatives from Inspector General offices) noted in its Confidentiality Guide that some commentators had expressed concern about potential conflicts between the IG Act and ADR confidentiality. *ABA Guide to Confidentiality*, *supra* note 113, at 40 n.39.

<sup>383</sup> See 5 U.S.C. § 2 (2015).

Congress and make recommendations for corrective action concerning any deficiencies or problems they have identified. At § 6(a)(1), the IG Act very broadly authorizes Inspectors General “to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available” to the agency and relevant to the programs and operations that the IG is reviewing.

Two facets of the IG Act are of particular interest here. First, while IG’s can ask for information from federal employees, and agencies often have policies mandating cooperation, IG’s cannot presently<sup>384</sup> use their administrative subpoena authority against federal employees as they can with someone who is not a federal employee. Second, at § 7(b) the IG Act states: “[t]he Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.” As a practical matter, while IG’s often attempt to protect the identity of individuals who raise issues to them and those who provide information in the course of their investigations, they are not always able to do so consistent with their obligations to investigate and report. Hence, the confidentiality that attaches to the IG is not coextensive with that promised by many federal ombuds, nor entirely consistent with it.

As discussed above, at least some and possibly much of what most ombuds in the federal government do is covered by § 574 of ADRA on confidentiality. Section 574(a)(3) includes an exception to its prohibition on disclosure of dispute resolution communications by neutrals when

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<sup>384</sup> This is so even in pending legislation. The Inspector General Empowerment Act of 2016, H.R. 2395, 114th Cong. § 6A (as passed by House, June 21, 2016), includes a provision stating that “[a]n Inspector General may not require by subpoena the attendance and testimony of any *current* Federal employees, but may use other authorized procedures.” (emphasis added). The companion to the House bill, Inspector General Empowerment Act of 2015, S. 579, 114th Cong. § 6A (as reported by S. Comm. on Homeland Sec. and Gov’t Affairs, May 5, 2015) would authorize IGs to subpoena federal government contractors, federal grant recipients, and former federal employees, but not current Federal employees. As of this writing, no further action has been taken on either bill.



“the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication . . . .” While ADRA specifically provides an exemption, at § 574(j), from disclosure pursuant to the Freedom of Information Act,<sup>385</sup> it provides no similar exemption from disclosure under the IG Act. Hence the potential for conflict between the imperatives of the two statutes exists.

The meaning of the language in § 574(a)(3) “required to be made public” has been discussed earlier in this analysis with respect to the relationship of ombuds confidentiality to the affirmative duty of federal employees to report certain kinds of information. Here we are discussing instead the question of the relationship between ombuds confidentiality and a request for confidential information from an IG. A literal reading of “to be made public” would suggest that an IG request for information under the IG Act made in the course of an investigation would not likely be seen as equivalent to making the information *public* and therefore would not come within the exception to ADRA for statutory conflicts. “Nor does the legislative history of the ADR Act provide an apparent solution, as it does not appear to contain any mention of this conflict” between ADRA and the IG Act.<sup>386</sup> The *ABA ADRA Confidentiality Guide*, however, does note this exchange between two of ADRA’s sponsors with the USDA’s Office of Inspector General:

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<sup>385</sup> Specifically, 5 U.S.C. § 552(b)(3).

<sup>386</sup> The Department of Justice’s Federal Alternative Dispute Resolution Council discussing the comments received on the draft of *Confidentiality in Federal Alternative Dispute Resolution Programs*, *supra* note 19, at 83,086, in response to its publication in the Federal Register:

There does not appear to be an easy answer to the tension between these authorities. While the ADR Act’s confidentiality provisions are clear, the access provisions of other statutes are equally clear. Standard techniques for resolving statutory conflicts do not provide a ready answer in this situation. For example, arguments have been made on both sides as to which statute is more specific. While the ADR Act specifically addresses the types of processes to which it applies, some have argued that other acts, such as the Inspector General Act, do the same by specifically describing the types of information that may be requested and the purposes for which a request can be made. Nor does the legislative history of the ADR Act provide an apparent solution, as it does not appear to contain any mention of this conflict.

Senators Grassley and Durbin wrote to USDA's Office of Inspector General (OIG) in 1995 concerned that allowing access to DR communications could create doubts and concerns that would extend far beyond any single mediation program. They stated, "During last year's debate over the re-authorization of the ADRA Act, a great deal of consideration and effort was extended to strengthening the confidentiality provisions of the act. We, therefore, question your authority under sec. 574 of the Act to request mediator neutrals to release the names and addresses of mediation participants and documentation of the mediation services provided to them, including the final disposition of their cases... Indeed, misguided precedents set under this particular program could undermine the entire administrative dispute resolution process." Letter to James R. Ebbitt, Assistant Inspector General for Audit, OIG/USDA, dated July 16, 1997, from Senators Charles Grassley and Richard Durbin.<sup>387</sup>

A recent controversy<sup>388</sup> in another arena may shed some light on the potential reach of IG

access to information under IG Act § 6(a)(1). In a July 20, 2015 Memorandum Opinion for the Deputy Attorney General, the Department of Justice's Office of Legal Counsel addressed the question of whether the Department of Justice might lawfully provide access to the Office of Inspector General (OIG) to documents containing certain kinds of statutorily protected information.<sup>389</sup> Specifically, the query concerned certain categories of information protected by the Federal Wiretap Act;<sup>390</sup> Rule 6(e) of the Federal Rules of Criminal Procedure; and section 626 of the Fair Credit Reporting Act<sup>391</sup> ("FCRA").<sup>392</sup>

<sup>387</sup> *ABA Guide to Confidentiality*, *supra* note 113, at 17 n.7. *Cf. In re Grand Jury Subpoena*, 148 F.3d at 487, discussed *supra* note 59 and in the section generally addressing ADRA. That case involved a USDA OIG investigation and related grand jury subpoena of a mediation program in Texas. As the court found ADRA inapplicable and the subpoenas were issued by a grand jury, the case is not particularly instructive with regard to the issues discussed in this section.

<sup>388</sup> *See, e.g.*, Charles S. Clark, *Inspectors General Win a Round in Fight Over Access*, GOVERNMENT EXECUTIVE, (May 5, 2016), <http://www.govexec.com/management/2016/05/inspectors-general-win-round-fight-over-access/128075/>; Eric Lichtblau, *Justice Dept. Takes Steps to Restore Watchdogs' Access to Records*, N.Y. TIMES, (May 3, 2016), [http://www.nytimes.com/2016/05/04/us/justice-dept-restoring-inspectors-access-to-records.html?\\_r=0](http://www.nytimes.com/2016/05/04/us/justice-dept-restoring-inspectors-access-to-records.html?_r=0).

<sup>389</sup> *Dep't of Justice Inspector General's Access to Info. Protected by the Fed. Wiretap Act, Rule 6(e) of the Fed. Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act*, 35 Op. O.L.C. \_\_ (July 20, 2015) [hereinafter *Memorandum*], <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/07/23/2015-07-20-doj-oig-access.pdf>. The *Memorandum* notes: "[W]e do not address in this opinion whether and, if so, under what circumstances the Department could lawfully withhold information it is legally permitted to disclose." *Id.* at 4 n.3. As with § 574 in ADRA, the statutes considered in the *Memorandum* prohibited disclosure.

<sup>390</sup> Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510–2522) ("Title III").

<sup>391</sup> Pub. L. No. 91-508, 84 Stat. 1127 (Oct. 26, 1970) (codified at 15 U.S.C. § 1681u).

<sup>392</sup> *Memorandum*, *supra* note 389, at 1.

The Department of Justice OIG had argued that § 6(a)(1) grants an unqualified right of access to information relevant to its audits, investigations and reviews notwithstanding the limitations on disclosure under the other statutes.<sup>393</sup> While acknowledging for varying reasons that much of the information sought by the OIG could lawfully be proffered by the Department, the *Memorandum* concluded that § 6(a)(1) would not override all of the prohibitions on disclosure in the other statutes. In this regard, “[u]nder longstanding interpretive principles, general access provisions like section 6(a)(1) are generally construed not to override specific, carefully drawn limitations on disclosure” like those found in the other statutes “unless Congress has clearly indicated that it intends the general access provision to have that effect.”<sup>394</sup> The *Memorandum* concludes that “[t]he Act’s legislative history, moreover, affirmatively indicates that Congress expected an inspector general’s right of access to be subject to statutory limits on disclosure.”<sup>395</sup>

The *Memorandum’s* statutory analysis is lengthy and detailed and worth considering in the context of ADRA. Ombuds should rely on its conclusion with caution, however. First, as a matter of statutory construction, the prohibitions on disclosure at issue were particularly compelling as they prohibited agency disclosure on pain of contempt, administrative and civil sanctions and, in some instances, criminal penalties. Additionally, the IG Act itself at § 8E includes special provisions pertaining to certain sensitive information possessed by the Department of Justice indicating an understanding of the particular constraints of its law enforcement and other functions.<sup>396</sup>

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<sup>393</sup> OIG also disputed the scope of the statutory exceptions at issue. *See id.* at 2.

<sup>394</sup> *Id.* at 3.

<sup>395</sup> *Id.*

<sup>396</sup> *See* 5 U.S.C. app. § 8E(a)(1).

Further, the *Memorandum* was challenged in a letter from the Council of the Inspectors General on Integrity and Efficiency dated August 3, 2015 and addressed to the chairmen of, respectively, the House Committees on Homeland Security and Governmental Affairs and on Oversight and Government Reform and their ranking members.<sup>397</sup> The Council asserts that the language in IG Act §6(a) is “unequivocal.”<sup>398</sup> It urges Congress to “immediately pass legislation” that would affirm the authority of Inspectors General to access all information and data in an agency’s possession deemed necessary for the IG’s oversight functions notwithstanding any law or provisions restricting access to information unless that law or provision expressly restricts IG access.<sup>399</sup>

Subsequently, Congress enacted the Consolidated Appropriations Act, 2016.<sup>400</sup> Division B of that statute, the CJS Appropriations Act, appropriates funds to the Department of Justice and OIG, as well as several additional entities, “for the fiscal year ending September 30, 2016,” commonly referred to as fiscal year 2016.<sup>401</sup> Section 540 of the CJS Appropriations Act provides that no funds under that appropriations bill might be used by the Department to deny the OIG access to agency information except where a statute prohibiting disclosure expressly denies such access to the Inspector General.<sup>402</sup>

On April 27, 2016, the Office of Legal Counsel issued a supplementary memorandum opinion for the Deputy Attorney General in response to the appropriations bill.<sup>403</sup> The

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<sup>397</sup> Letter from the Council of the Inspectors General on Integrity and Efficiency, to House Comms. on Homeland Sec. and Governmental Affairs and Oversight and Govt. Reform (Aug. 3, 2015), <https://www.ignet.gov/sites/default/files/files/CIGIE%20Letter%20to%20HSGAC%20HOGR%20-%208-3-15.pdf>.

<sup>398</sup> *Id.* at 2.

<sup>399</sup> *Id.* at 1.

<sup>400</sup> Pub. L. No. 114-113 (Dec. 18, 2015).

<sup>401</sup> See Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, 129 Stat. 2286–2333.

<sup>402</sup> See § 540, 129 Stat. 2332.

<sup>403</sup> *Authority of the Dep’t of Justice to Disclose Statutorily Protected Materials to Its Inspector General in Light of Section 540 of the Commerce, Justice, Sci. and Related Agencies Appropriations Act, 2016*, 35 Op. O.L.C. \_\_\_, at \*8

memorandum acknowledges that “an appropriations act may be construed to override the limitations on disclosure” in the other statutes given the clear and unambiguous statement in the law.<sup>404</sup> It therefore concludes that it “may (and must) disregard the limitations in those statutes in making disclosures to OIG for the remainder of the year.”<sup>405</sup>

### **Conclusions and Recommendations for Agency Officials and Ombuds Offices on Ombuds and the Inspector General Act**

While the long-term outcome of this controversy involving the Department of Justice is unclear,<sup>406</sup> it should be considered a cautionary tale for federal ombuds. Therefore, ombuds should make every effort, proactively, to develop a positive working relationship with the Inspector General’s office having jurisdiction over their agency. It is important that the OIG understand the purposes, functions and ethical standards of the ombuds office. In particular, it is helpful to illustrate in what ways the OIG and the ombuds office are complementary and distinct, the importance of ombuds confidentiality to realizing the ombuds mission, and the prohibition applicable to neutrals under ADRA of disclosing dispute resolution communications even if considered to be pursuant to statutory compulsion unless “no other person is reasonably available to disclose the communication.”<sup>407</sup> 5 U.S.C. sections 574(a)(4) and (b)(5) which, respectively, set out for neutrals and parties the key substantive considerations for courts when considering compulsory disclosure under ADRA (preventing a manifest injustice, establishing a violation of the law, preventing harm to the public health and safety outweighing the integrity of dispute resolution proceedings in general) also may be a helpful starting point for mutual understanding.

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(Apr. 27, 2016), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/04/28/2016-04-27-disclosure-to-ig.pdf>.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> No additional legislation on the question of IG access to agency information has been enacted as of this writing.

<sup>407</sup> 5 U.S.C. § 574(a)(3); *see also IADRWG Guide, supra* note 19, at 52–55.

## VII. Ombuds Records and Confidentiality — The Impact of the Federal Records Act, FOIA and the Privacy Act

There are several statutes that have an impact on how federal ombuds create and manage documents — the Federal Records Act of 1950 as amended,<sup>408</sup> the Privacy Act,<sup>409</sup> and the Freedom of Information Act.<sup>410</sup> As federal ombuds differ markedly in their missions and functions, there is no one-size-fits-all prescription for how to approach and comply with these statutes. Nonetheless, ombuds should be cognizant of the requirements of each of these statutes in order to be in compliance and because of their potential impact on whatever confidentiality commitments the office makes to constituents. Depending on how an ombuds manages documentation pertaining to confidential communications, they may be more or less vulnerable to compulsory or even inadvertent disclosure. Ombuds offices should be actively engaged with legal counsel and records management officials in their agency to establish a workable recordkeeping system for the office consistent with the law and office standards and practices.<sup>411</sup>

The Federal Records Act of 1950, as amended, establishes a system for the management of government records. It requires every agency to determine what types or “series” of government records are created in the course of agency business, how long each series must be retained for agency business needs and legal requirements, and then which series are of permanent value and should therefore be transferred to the National Archives and Records Administration (NARA). Each series of agency records must have a “schedule” that includes

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<sup>408</sup> 44 U.S.C. Chapters 21, 22, 29, 31, and 33.

<sup>409</sup> 5 U.S.C. § 552a (2012).

<sup>410</sup> 5 U.S.C. § 552 (2012).

<sup>411</sup> It is beyond the scope of this study to address the implications for records retention and disclosure of the advent of electronic communications. Suffice to say that federal ombuds who offer confidentiality should be particularly sensitive to who might have access to electronic communications and documents and how such items might best be backed up and stored. Cf. Craig B. Mousin, *Ombuds in a Cloud of Exabytes — Understanding the Ombuds’ Digital Trail*, 4 J. OF THE INT’L OMBUDSMAN ASS’N, no. 2, 2011, at 19.

time frames after cut off<sup>412</sup> for those records to be retained and then either transferred or destroyed.

Only documents that are deemed federal records must be retained under this system so it is important for an ombuds office to determine what documents created within the office constitute “agency records” within the meaning of the Act. Federal records are documentary materials that agencies create and receive while conducting business that provide evidence of the agency's organization, functions, policies, decisions, procedures, and operations, or that otherwise contain information of value. A federal record is defined broadly in the Act as follows:

Records include all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the data in them.<sup>413</sup>

The above definition is the one contained in the 2014 amendment to the Act that was intended, *inter alia*, to shift the emphasis from physical media to information being stored in any form.<sup>414</sup>

While it would seem that much of the documentation, in whatever form, that resides in an ombuds office would be an agency record, there is an exception that would apply to certain

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<sup>412</sup> To “cut off” records in a file means to break, or end, the record at regular intervals to permit disposal or transfer in complete blocks and, for correspondence files, to permit the establishment of new files. Cutoffs are needed before disposition instructions can be applied because retention periods usually begin with the cutoff, not with the creation or receipt, of the records. In offices that keep case files, the cutoff is typically when the case is resolved or at least closed insofar as that office's action is required. For some documents, the cutoff may be when the document is published, superseded or otherwise becomes obsolete.

<sup>413</sup> 44 U.S.C. § 3301 (2012), *amended by* Pub. L. No. 113–187, § 5(a), 128 Stat. 2009 (2014). Federal records are created and maintained by government employees and in appropriate circumstances, federal contractors.

<sup>414</sup> *See* S. REP. NO. 113-218, at 5 (2014).

informal notes on cases taken by the ombuds in connection with a case. Thus 36 C.F.R. §

1222.12(c) states:

(c) *Working files and similar materials.* Working files, such as preliminary drafts and rough notes, and other similar materials shall be maintained for purposes of adequate and proper documentation if:

(1) They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, follow-up, or to communicate with agency staff about agency business; and

(2) They contain unique information, such as substantive annotations or comments included therein, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

The inverse of this provision is generally interpreted to mean that the rough notes of a neutral would *not* be considered to be agency records *unless they are circulated* and used for the purposes noted above.<sup>415</sup>

If a document has been determined to be an agency record, then the agency must either manage the record in accordance with a general record retention 'schedule' already crafted by NARA, or the agency must fashion a schedule covering that series of records to submit to NARA for its approval. A schedule in essence defines the series (category) of a record, determines whether it is a permanent<sup>416</sup> or temporary record<sup>417</sup> and what the cutoff is for purposes of

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<sup>415</sup> See, e.g., *ABA Guide to Confidentiality*, *supra* note 113, at 71; *IADRWG Guide*, *supra* note 19, at 39. The Interagency ADR Working Group cautions that a neutral's notes that appear to be formal and detailed may be deemed agency records even if not circulated. See *IADRWG Guide*, *supra* note 19, at 40.

<sup>416</sup> The definition of permanent records in agency regulations is somewhat circular: *Permanent record* means any Federal record that has been determined by NARA to have sufficient value to warrant its preservation in the National Archives of the United States, even while it remains in agency custody. See 36 C.F.R. § 1220.18. In their "Strategic Directions Appraisal Policy" memorandum of September 2007, NARA adds that permanent records include those documenting the rights of citizens, documenting the actions of Federal officials and documenting the national experience. U.S. NAT'L ARCHIVES AND RECORDS ADMIN., DIRECTIVE 1441, APPRAISAL POLICY OF THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION (2007).

<sup>417</sup> The definition of temporary records in agency regulations is similarly unenlightening: *Temporary record* means any Federal record that has been determined by the Archivist of the United States to have insufficient value (on the basis of current standards) to warrant its preservation by the National Archives and Records Administration. This determination may take the form of:



initiating the retention period. If it is a permanent record, then the schedule articulates how soon after cutoff it must be transferred to the National Archives. If it is a temporary record, then the schedule determines when it must be destroyed. Critical in both instances is the determination of how long retention of the record is necessary for agency needs and the protection of individual rights before the document is either transferred or destroyed. It is important to note, however, that a requirement to retain a record is not the same thing as an obligation to disclose it.

NARA has issued one General Records Schedule for Alternative Dispute Resolution Files, General Records Schedule 1.27. It mirrors the definitional language from ADRA and thus includes “use of ombuds” as an alternative dispute resolution process:

**Alternative Dispute Resolution (ADR) Files.**

Alternative Dispute Resolution (ADR) is any procedure, conducted by a neutral third party, that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration and use of ombuds. The records covered by this schedule relate to techniques and processes used in an agency's ADR program in resolving disputes with or between its own employees.

[NOTE: This schedule does not apply to: 1. Administrative grievance files, 2. Adverse action files, 3. Formal and informal equal employment opportunity proceedings, 4. Traditional EEO counseling or other records included in the EEO file when a person chooses to go directly to ADR, or 5. Private party claims or EEOC's involvement with federal sector claims of non-EEOC employees against other federal agencies. These records are covered by other items in GRS 1. This schedule does not apply to ADR records that are produced as part of an agency's primary mission.]

- a. General Files: General correspondence and copies of statutes, regulations, meeting minutes, reports, statistical tabulations, evaluations of the ADR program, and other records relating to the agency's overall ADR program.

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(1) Records designated as disposable in an agency records disposition schedule approved by NARA (SF 115, Request for Records Disposition Authority); or

(2) Records designated as disposable in a General Records Schedule.

Destroy when 3 years old. Longer retention is authorized if records are needed for agency business. (N1-GRS-03-2 item a)

- b. Case Files: Records documenting ADR proceedings. These files may include an agreement to use ADR, documentation of the settlement or discontinuance of the ADR case, parties' written evaluations of the process and/or the neutral third party mediator, and related correspondence.

Destroy 3 years after settlement is implemented or case is discontinued. (N1-GRS-03-2 item b)<sup>418</sup>

An ombuds office may choose to use this schedule if it determines that its stipulations, particularly with regard to the length of the retention period, are consistent with office needs and maintenance of office standards. However, it should be noted that this schedule applies only when neutrals are utilized by an agency to resolve disputes “with or between its own employees.”

Alternatively, an ombuds office may elect to work with counsel and agency records management officials to submit an agency and office specific schedule to NARA for approval. In doing so, the ombuds office will want to differentiate between those records that are statistical, administrative and fiscal or relate to the establishment and function of the office on the one hand and, on the other hand, those records that are sensitive and relate to confidential discussions attempting to resolve issues that are raised to the ombuds by constituents or agency leadership. In the event that an agency elects to propose its own ombuds record retention schedule to NARA, its request would do well to take advantage of the opportunity provided by NARA to offer background information, such as a clear description of what the ombuds does, the nature of the confidentiality offered by the office and the reasons therefore.

As an example, one ombuds office has obtained NARA approval for a schedule characterizing records concerning the “establishment, mission and function” of the ombuds

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<sup>418</sup> National Archives & Records Admin., General Records Schedule 1.27 (2015).

office as permanent records with a cutoff when published, superseded, obsolete or no longer required for business purposes, and a transfer date to the National Archives at twenty-five years from cutoff. The same ombuds office has obtained approval for a characterization of records that relate to “the identification and information on concerns, disputes, and issues, presented to the . . . Ombudsman” as temporary with a cutoff upon resolution of the matter and a retention period requiring destruction immediately upon cutoff. This schedule, though describing series similar to those in the NARA general schedule for ADR, includes a far shorter period for retention of case records thereby reducing the potential for compulsory or inadvertent disclosure. At least two other ombuds offices have received approval for similar retention schedules providing for destruction of case records immediately upon cutoff.<sup>419</sup>

It should be noted that there is not yet unanimity on the question of whether and to what degree ombuds’ notes might constitute agency records for purposes of the FRA. In its 2006 *Guide for Federal Ombuds*, the Coalition of Federal Ombudsmen (COFO) along with the Federal Interagency ADR Working Group Steering Committee, stated that ombuds’ offices should draw a distinction among three categories of records: programmatic records, statistical data on conflicts and issue trends, and notes made in the context of work on specific issues brought to the ombuds office by constituents. COFO added that of the three solely the “[o]mbuds’ case notes ordinarily would not be regarded as ‘federal records’ pursuant to NARA

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<sup>419</sup> These three ombuds offices are at the National Geospatial-Intelligence Agency, the National Security Agency and the Federal Bureau of Investigation. The latter included emails as well as handwritten notes, and supporting documentation related to confidential communications as temporary case records requiring destruction upon cutoff. Note also that the schedule NARA approved in March 2016 for the National Security Agency ombudsman provoked allegations to the effect that the foreshortened retention schedule for documents related to preliminary issues raised to the ombudsman could help suppress information about retaliation against personnel. See Alliya Silverstein, *NSA Plan to Trash Employee Complaint Files Raises Concerns for Some*, NEXTGOV (May 4, 2016), <http://www.nextgov.com/cio-briefing/2016/05/nsa-plan-trash-employee-complaint-files-raises-concerns-some/128050/>. The role of the NSA ombudsman may not be well understood outside the agency and it is likely that those questioning such a records retention schedule lack understanding of both the role of this ombudsman and the general principles of and reasons for ombuds confidentiality.

regulations[,]” with the exception of those notes circulated for official purposes *and* containing unique information that adds to a proper understanding of the agency’s formulation and execution of basic policies, decisions, actions or responsibilities.<sup>420</sup> Similarly, the IADRWG Steering Committee *Guide on Confidentiality* suggests that neutrals take only rough notes on cases and the notes should not be shared by them with the parties or other neutrals. In the event that the neutral determines that the notes should be shared in a given instance or the notes otherwise rise to the level of agency records, the notes should be marked as sensitive documents and retained under a schedule requiring retention only until the dispute resolution process is terminated. As noted, NARA has approved such a schedule for at least three agency ombuds.

In contrast, Professor Krent states “[r]ecords made by an ombud within the course of his or her official duties plainly fall within the [Federal Records] Act.”<sup>421</sup> He notes that the form of the record is irrelevant to the determination and therefore argues that the neutral’s notes as well as written information provided by the constituent bringing the issue to the ombuds or provided by a third party would also become an agency record. Krent allows for the possible exception of personal papers such as calendars or journals but cautions that this exception would not include notations or summaries inasmuch as these would be documents created in the course of conducting agency business. Krent warns that federal recordkeeping requirements, inasmuch as they increase the risk of disclosure, have a profound impact on ombuds conduct.

Aside from the requirements of the Federal Records Act, the Privacy Act<sup>422</sup> should be considered when planning ombuds records management. The Privacy Act, with certain exceptions, bars disclosure of agency records of a personal nature kept within a system of records that are retrievable by the name of the individual or some other kind of identifier unless

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<sup>420</sup> See *COFO Guide*, *supra* note 214, at 9.

<sup>421</sup> Krent, *supra* note 179, at 26 *passim*.

<sup>422</sup> 5 U.S.C. § 552a.

the individual consents. In this respect, it could be argued that the Privacy Act provides an additional measure of confidentiality for ombuds records stored in this fashion.

Yet the Privacy Act also requires that records that are retrievable by the name of the individual or some other kind of identifier be provided to that individual should that person request them.<sup>423</sup> Thus ombuds offices that assist individuals with issues of a personal nature face a dilemma. Logic would suggest that dispute resolution related documents would be most easily retrievable if filed under the name of the constituent who raised the issue to the ombuds or another appropriate identifier. However, the Privacy Act does not contain any general exemption that protects a third party's privacy or any specific exemption for alternative dispute resolution communications.<sup>424</sup>

Some ombuds have eschewed filing records under the names of constituents or other identifiers or opted to take only informal, rough notes concerning the constituent's issue that are not shared and that are destroyed without ever being placed in a system of records. These ombuds are affording their dispute resolution communications the maximum protection possible, though at some potential cost to effectiveness and efficiency. When cases are ongoing or complex, multiple conversations with multiple individuals may take place. Rough notes may not suffice and more extensive or more formal documentation may be essential for purposes of resolving the issue or as an *aide de memoire*. However, disclosure of such a case file pursuant to a request under the Privacy Act has the potential to undermine the confidentiality of the office in

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<sup>423</sup> "Each agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence." 5 U.S.C. § 552a(d)(1).

<sup>424</sup> Moreover, ADRA § 574(3) includes an exception to confidentiality when "the dispute resolution communication is required by statute to be made public[.]" indicating that where the Privacy Act and § 574 conflict, the Privacy Act would prevail. Note that agencies do have a limited ability to redact information that would "constitute a clearly unwarranted invasion of personal privacy" of third parties. *See* 5 U.S.C. § 552(b)(6).

general and may well affect the level of candor the ombuds can expect from individuals the ombuds approaches to seek resolution in future cases.

Thus case related documents containing personal information under the Privacy Act that are maintained by an ombuds in a system of records under the name of the constituent or other identifier, may be accessible to that constituent under the Privacy Act. This might appear to be an anomalous result inasmuch as the same file, to the extent it is deemed to contain confidential dispute resolution communications under ADRA, is exempted from disclosure pursuant to FOIA<sup>425</sup> given that requests for personal information are often considered under the Privacy Act and FOIA in tandem.<sup>426</sup> That said, clearly ombuds should carefully consider if and how any case related documents are created, identified and stored in light of the extent of confidentiality they offer to constituents and others they might approach as part of the resolution process, and how this confidentiality might be affected by the interplay between the Federal Records Act and the Privacy Act.

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<sup>425</sup> ADRA specifies at § 574(j) on confidentiality that “[a] dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).”

<sup>426</sup> *But see* 5 U.S.C. § 552(a)(t):

(1) Effect of other laws.—

No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

In this regard, courts have held that documents that come within an exemption under either FOIA or the Privacy Act may still be accessible under the other. *See, e.g., Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 77-79 (D.C. Cir. 1982) (“[T]he Privacy Act and FOIA substantially overlap. However, . . . the two statutes are not completely coextensive; each provides or limits access to material not opened or closed by the other. . . . [S]ection (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access.”); *Shapiro v. Drug Enforcement Admin.*, 762 F.2d 611, 612 (7th Cir. 1985) (“Congress intends that the court construe the Privacy Act and the Freedom of Information Act separately and independently so that exemption from disclosure under the Privacy Act does not exempt disclosure under the Freedom of Information Act and *vice versa*.”); *see also Vest v. Dep’t of the Air Force*, 793 F. Supp. 2d 103, 115-16 (D.D.C. 2011) (“[J]ust because access to information is restricted under the Privacy Act does not necessarily mean it is also restricted under the FOIA; in fact, the [*Greentree*] court clarified that the Privacy Act protects third-party material from public access, absent ‘consent of the individual to whom the material pertains.’” (quoting *Greentree*, 674 F.2d at 80)).

The Freedom of Information Act (FOIA) is of additional relevance to this discussion. FOIA generally provides any person with the statutory right, enforceable in court, to obtain access to federal government information in executive branch agency records, provided that the information requested does not fall within any statutory FOIA exemptions. Unlike the Privacy Act, the request for access may come from any member of the public, regardless of citizenship. This includes individuals, corporations, associations, and state and local governments.

As noted previously § 574(j), added when ADRA was reauthorized in 1996, specifies that dispute resolution communications covered by § 574 are also barred from disclosure under FOIA.<sup>427</sup> The questions surrounding applicability of § 574 have been discussed above. Even under the more inclusive interpretation of § 574 suggested earlier in this analysis, it is clear that not all ombuds office documentation comes within the definition of dispute resolution communications, much less dispute resolution communications covered by ADRA. Accordingly, familiarity with FOIA is important for ombuds office organization and management.

Importantly, FOIA applies to existing agency records only. FOIA does not require agencies to create new records or to conduct research, analyze data, or answer questions when responding to access requests.<sup>428</sup> However, it is essential to be aware that the span of agency records under FOIA is not limited to the definition of agency records for purposes of retention and disposal under the Federal Records Act. Courts have been very reluctant to find any

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<sup>427</sup> See § 574(j): “A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).”

<sup>428</sup> For example, in *Forsham v. Harris*, 445 U.S. 169 (1980) petitioners requested under FOIA raw data from a study that had been funded entirely through federal grants. The data was available upon request to the agencies that had funded the study, but ultimately the data was “generated, owned and possessed by a privately controlled organization . . . .” The Supreme Court refused to compel the agency to access the data, finding that such an order would force the agency to “create” a record, thus overstepping the bounds of FOIA. See also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975) (concluding FOIA does not supply a duty on agencies to create records).

document created by an agency<sup>429</sup> and within its possession<sup>430</sup> to fall outside the ambit of agency records for purposes of FOIA.<sup>431</sup> There is some precedent for finding that “personal records” that are kept purely voluntarily and not circulated to, nor used by, anyone other than the authors, and are discarded or retained at author's sole discretion for their own individual purposes in their own personal files may not be agency records under FOIA.<sup>432</sup> This might apply to informal notes taken by an ombuds in the course of communications with a constituent and others about a case if they are not covered by ADRA § 574. It should also be considered when fashioning ombuds office records management.

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<sup>429</sup> See *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144 (1989) (“[A]n agency must either ‘create or obtain’ the requested materials to qualify as ‘agency records.’” (quoting *Forsham*, 445 U.S. at 182)). Note that under the test put forth by the Supreme Court in *Tax Analysts*, records that were not created by the agency still may fall under FOIA if the agency subsequently “obtains” them. See *Tax Analysts*, 492 U.S. at 144 (“To restrict the term ‘agency records’ to materials generated internally would frustrate Congress’ desire to put within the public reach the information available to an agency in its decision-making processes.” (citations omitted)). This could be relevant, for example, to ombuds who receive documents from members of the public bringing an issue to them absent other statutory protection or to ombuds who provide services to Federal agencies as independent contractors. In such a case, if the agency takes possession of records generated by the contractor-ombuds then those records might be subject to FOIA — despite the fact that the agency itself did not create them.

<sup>430</sup> See *id.* at 145 (“[T]he agency must be in control of the requested materials at the time the FOIA request is made. By control we mean that the materials have come into the agency’s possession in the legitimate conduct of its official duties.”).

<sup>431</sup> See *Consumer Fed’n of America v. Dep’t of Agric.*, 445 F.3d 283, 287 (D.C. Cir. 2006) [hereinafter *CFA*] (“[R]ecords are presumptively disclosable unless the government can show that one of the enumerated exemptions applies.” (quoting *Bureau of Nat’l Affairs v. U.S. Dep’t of Justice*, 742 F.2d 1484, 1494 (D.C. Cir. 1984) (internal quotation marks omitted)); *Tax Analysts*, 492 U.S. at 142 (“Congress sought to open agency action to the light of public scrutiny.”) (internal quotation marks omitted)). Notably, the President has issued a memorandum on FOIA directing all agencies to “adopt a presumption in favor of disclosure.” See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

<sup>432</sup> See *Tax Analysts*, 492 U.S. at 145 (“[T]he term ‘agency records’ is not so broad as to include personal materials in an employee’s possession, even though the materials may be physically located at the agency.” (citing *CFA*, 445 U.S. at 157)). See also *Porter Cnty. Chapter of the Izaak Walton League of America, Inc. v. U.S. Atomic Energy Comm.*, 380 F. Supp. 630, 633 (N.D. Ind. 1974) (holding that untitled, undated and uncirculated handwritten personal notes are not subject to FOIA disclosure); *Bureau of Nat’l Affairs*, 742 F.2d at 1846 (concluding that appointment materials, including desk calendars and telephone logs, “created solely for an individual’s convenience . . . [and] [which] may be disposed of at the individual’s discretion” do not constitute “agency records” for purposes of FOIA); *but cf.*, *Washington Post Co. v. U.S. Dep’t of State*, 632 F. Supp. 607, 610, 616 (D.D.C. 1986) (holding that typewritten logs chronicling the activities of Secretary of State Alexander Haig — which were created and used exclusively by aids and other staff and never personally by the Secretary — were “agency records” under FOIA).



FOIA includes a list of items that must automatically be disclosed by federal agencies including<sup>433</sup>:

1. Final opinions and orders made in the adjudication of cases;
2. Final statements of policy and interpretations which have not been published in the *Federal Register*;
3. Administrative staff manuals and instructions to staff that affect members of the public;
4. Copies of records that have been the subject of a FOIA request and that also are the subject of sufficient public interest or curiosity that the agency believes that other persons are likely to request (or already have requested) them; and
5. The agency's annual FOIA report — which includes such information as the number of FOIA requests received by the agency, the amount of time taken to process requests, the total amount of fees collected by the agency, information regarding the backlog of pending requests, and other information about the agency's handling of FOIA requests.
6. Any other records the agency deems appropriate for affirmative disclosure.

The Act also contains nine statutory exemptions to this right of access.<sup>434</sup> Described in brief these are:

1. classified documents;
2. documents related solely to the internal personnel rules and practices of an agency;
3. documents specifically exempted from disclosure by another statute;
4. trade secrets and privileged commercial or financial information;
5. inter-agency or intra-agency memos or letters that would be considered "privileged" for litigation purposes;
6. personnel and medical files (the "personal privacy" exemption);
7. records compiled for law enforcement purposes (but these are only exempt where they could reasonably be expected to interfere with enforcement proceedings, or would deprive a person of the right to a fair trial, or could reasonably be expected to endanger someone's life or physical safety, etc.);
8. reports made for regulatory purposes by financial institutions to the government; and
9. geological and geophysical information (including maps) related to oil and gas wells.

Most of these exemptions are not likely to be relevant to documents created in or obtained by an ombuds office. Three of them, however, Exemptions 3, 5 and 6 are worthy of consideration depending on the type of ombuds office at issue and the range of functions it performs.

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<sup>433</sup> 5 U.S.C. § 552(a).

<sup>434</sup> 5 U.S.C. § 552(b)(1)–(9).

Exemption 3, referring to records exempted (or barred) from disclosure by another statute, comes into play to the extent that § 574 of ADRA on confidentiality covers documents created in connection with the ombud's cases or other dispute resolution documents. To the extent it applies this merely serves to reinforce ADRA § 574(j) which, as noted, itself specifies that dispute resolution communications covered by § 574 are also barred from disclosure under FOIA. It also may come into play when the ombuds office is created by a statute which also contains confidentiality provisions.

FOIA exemption 5 exempts documents normally privileged in the civil discovery context.<sup>435</sup> Of particular relevance to ombuds that make recommendations or express opinions on legal or policy matters to decision makers in their respective agencies, Exemption 5 incorporates what is often referred to as the “deliberative process” privilege. The purposes of the exemption have been found to be to encourage open and frank discussions on matters of policy, to foreclose premature disclosure of proposed policies and to avoid public confusion that might result from disclosure of reasons or rationales that do not ultimately become part of the basis for agency action.<sup>436</sup> The documents reflecting opinions or recommendations must be predecisional<sup>437</sup> and

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<sup>435</sup> *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984).

<sup>436</sup> *See Sears*, 421 U.S. at 151 (“Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.”); *Missouri ex rel. Shorr v. U.S. Army Corps of Eng’rs*, 147 F.3d 708, 711 (8th Cir. 1998) (“[I]t was not improper for the [agency] to conclude that open and frank intra-agency discussion would be ‘chilled’ by public disclosure.”); *Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 775 (D.C. Cir. 1988) (en banc) (holding that information may be protectable if its release could result in the premature disclosure of “the recommended outcome of the consultative process . . . as well as the source of any decision.”); *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (“[The deliberative process privilege] protects the public from the confusion that would result from premature exposure to discussion occurring before the policies affecting it had actually been settled upon.”).

<sup>437</sup> I.e., “antecedent to the adoption of an agency policy.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (“Pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take of the deliberative process by which the decision itself is made.”). *Cf. Wolfe*, 839 F.2d at 772 (protecting records of agency decisions pending final approval of the decisions by the Secretary of HHS or OMB). The pre-decisional character of a record is not altered by the agency’s final decision, *Fed Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979), nor by the fact that the materials relate to proceedings “which do not ripen into [final] agency decisions[,]” *Sears*, 421 U.S. at 151 n.18, nor is the character affected by the passage of time in general, see *AGS Computers, Inc. v. U.S. Dep’t of Treasury*, No. 92-2714, slip op. at 13 (D.N.J. Sept. 16, 1993).

must be deliberative rather than merely factual.<sup>438</sup> It is sometimes difficult to separate or distinguish what is deliberative and what is factual and the latter may be exempt if so thoroughly integrated with the former that revealing one would likely disclose the other.<sup>439</sup>

Of particular interest to ombuds who do systems work that may not be covered by ADRA § 574, there is an additional question under Exemption 5 on which the courts diverge. This question is when the materials at issue involve a matter of “law or policy” such that they qualify as deliberative. On the one hand, the D.C. Circuit in *Petroleum Information Corp. v. United States Department of the Interior*<sup>440</sup> has held that the deliberative process privilege should be determined in part on the basis of whether or not the information relates to “some policy matter.”<sup>441</sup> Although *Petroleum Info.* involved purely factual data found not to fall within the deliberative process privilege, some courts have applied this ruling to cases involving deliberative materials that were determined not to be sufficiently connected to an agency

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In *Sears* the Supreme Court illuminated the distinction between pre-decisional and post-decisional materials as they relate to the agency’s deliberative process privilege. In that case certain memoranda written by NLRB staff attorneys were incorporated by reference into the General Counsel’s decision not to pursue an unfair labor practice charge with an enforcement proceeding. Under NLRB procedures, the purpose of such memoranda was to provide “an explanation to the Regional Director of a legal or policy decision already adopted by the General Counsel.” Finding that these materials were not protected, the Supreme Court held that “[d]isclosure of these memoranda would not intrude on predecisional processes . . . since when the memoranda are communicated to the Regional Director, the General Counsel has already reached his decision and the Regional Director who receives them has no decision to make — he is bound to dismiss the charge.” *Id.* at 155.

<sup>438</sup> Purely factual materials generally are not covered under Exemption 5 because the release of such information does not expose the deliberations or opinions of agency personnel. *See, EPA v. Mink*, 410 U.S. 73, 91 (1973). Factual materials are those that would “generally be available for discovery,” *id.*; they are neither “recommendatory in nature” nor do they constitute “a draft of what will become a final document.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Materials are not considered “factual” if their release would “stifle honest and frank communication within the agency.” *Id.*

<sup>439</sup> Where the factual and deliberative components of a record are highly entangled, the basic proposition is that if revealing the factual information is tantamount to revealing the agency’s deliberative process, then the facts are exempt. *See Nat’l Wildlife Fed’n v. Forest Serv.*, 861 F.2d 1114 (9th Cir. 1988) (“Factual materials . . . would . . . be exempt from disclosure [under Exemption 5] to the extent that they reveal the mental processes of decision makers.”).

<sup>440</sup> 976 F.2d 1429 (D.C. Cir. 1992).

<sup>441</sup> *Id.* at 1435.

“policy.”<sup>442</sup> On the other hand, the Ninth Circuit in *National Wildlife Federation v. United States Forest Service*<sup>443</sup> expressly declined to impose a requirement that documents contain “recommendations on law or policy to qualify as deliberative,” and other courts have since followed that approach.<sup>444</sup> Looking to the case law, it appears that the disparate treatment of this issue among the courts can be explained in part by differences among the courts as to what constitutes “policy,” with some courts interpreting the term broadly to include almost anything related to an agency’s deliberations, while others have limited the scope of the term to matters closer to the agency’s core substantive mission.

Exemption 6 exempts “personnel and medical files *and similar* files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy”<sup>445</sup> and also may apply to some ombuds records. Assessment of a FOIA request implicating personal privacy then requires a balancing of the public’s right to know with the individual’s right to privacy once it has been established that the requested records constitute the kinds of files envisioned in the exemption.<sup>446</sup> Application of Exemption 6 entails a 4-step sequential analysis: 1) is the information sought a medical, personnel or similar file? 2) if so, is there a significant privacy interest in the requested information? 3) what is the requester's asserted FOIA public interest in disclosure? 4) what is the balance among these interests and would disclosure result in

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<sup>442</sup> See, e.g., *People for the American Way Foundation v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 298 (D.C. Cir. 2007); *Ethyl Corp. v. U.S. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994) (holding that the “privilege does not protect a document which is merely peripheral to actual policy formulation.”).

<sup>443</sup> 861 F.2d 1114 (9th Cir. 1988).

<sup>444</sup> *Id.* at 1118; *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1095 (9th Cir. 1997); *Providence Journal Co. v. U.S. Dep’t of the Army*, 981 F.2d 552, 559 (1st Cir. 1992).

<sup>445</sup> 5 U.S.C. § 552(b)(6) (emphasis added).

<sup>446</sup> See *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976) (holding that Exemption 6 cases “require a balancing of the individual’s right of privacy against the preservation of the basic purpose of [FOIA] to open agency action to the light of public scrutiny”); see also *U.S. Dep’t of Defense v. FLRA*, 510 U.S. 487, 497 (1994) (“We must weigh the privacy interest of bargaining unit employees in nondisclosure of their addresses against the . . . extent to which disclosure of the information sought would ‘she[d] light on an agency’s performance of its statutory duties’ or otherwise let citizens know ‘what their government is up to.’” (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989))).

a clearly unwarranted invasion of personal privacy? In order to balance these interests, the agency must look to the nature and weight of the requestor's interest in disclosure,<sup>447</sup> the public's interest in disclosure,<sup>448</sup> the degree of invasion of personal privacy<sup>449</sup> and the availability of alternative means through which the requestor might obtain the information.<sup>450</sup>

Note that the privacy interest at stake belongs to the individual and not the agency holding the information.<sup>451</sup> Therefore the requestor's rights under the Privacy Act to documents pertaining to his or her own information would not fall under this exemption if otherwise obtainable under the Privacy Act.

The Supreme Court has made clear that the threshold test of whether or not the documents constitute part of a personnel, medical or similar file is to be interpreted broadly.<sup>452</sup> Nonetheless, the information must pertain to a specific individual and must be personal rather than business in nature.<sup>453</sup>

The application of the FOIA exemptions can be very nuanced and discussion of the considerable body of case law on the exemptions exceeds the scope of this study. However, there are two key factors that federal ombuds should bear in mind as they consider office operations. First, as with both the Federal Records Act and the Privacy Act, decisions that are

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<sup>447</sup> See *National Assoc. of Retired Fed. Employees v. Favish*, 541 U.S. 157, 172 (2004) (holding that FOIA "requires the person requesting the information to establish a sufficient reason for the disclosure.").

<sup>448</sup> The Supreme Court has found that "the only relevant public interest in the FOIA balancing analysis . . . [is] the citizens' right to be informed about what their government is up to." *DOD v. FLRA*, 510 U.S. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773).

<sup>449</sup> See, e.g., *Consumers' Checkbook Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs.*, 554 F.3d 1046, 1050 (D.C. Cir. 2009) ("[W]e must determine whether 'disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest.'" (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)).

<sup>450</sup> See *U.S. Dep't of Defense v. FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992) (holding that although alternative means of disclosure "certainly are not a per se defense to a FOIA request," it is appropriate nonetheless to consider "the extent to which there are alternative sources of information available that could serve the public interest in disclosure.")

<sup>451</sup> See *Reporters Comm.*, 489 U.S. at 763-65.

<sup>452</sup> *U.S. Dep't of State v. Washington Post*, 456 U.S. 595 (1982)

<sup>453</sup> *Id.* at 602; *Sims v. CIA*, 642 F.2d 562, 574 (D.C. Cir. 1980) ("Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships.")

made as to what sensitive information is documented and how it is stored may have an impact on the degree to which confidentiality can be protected. Secondly, with regard to Exemption 6, the degree to which a privacy interest may be recognized by the courts may depend on the manner and degree to which an expectation of privacy has been created by the ombuds with regard to the individual whose information may be disclosed.

### **Conclusions and Recommendations for Agency Officials and Ombuds Offices on Ombuds and Records Management**

In the end, the federal ombuds office must consider how best to protect office documentation from inadvertent or compulsory disclosure consistent with whatever confidentiality is offered and with these three statutes, even though these statutes may at times be at odds with each other or appear to put confidentiality in potential peril. Several practical measures should be considered. Ombuds office practices should ensure that no one is privy to ombuds confidential case records who does not need to know their contents and whose access to those documents is not consistent with the nature and scope of the confidentiality commitment of the office. Those engaged in intake and administrative functions for the ombuds office should be properly instructed on and bound by the office's confidentiality commitments. Further, tangible records should be maintained in a secure repository within the ombuds office and electronic records should, if at all possible, be generated and maintained on a separate server. Failing that, ombuds electronic records should be in a secure location on a shared server. At the very least, electronic records should be accessible only via password-protected workstations located in attended offices or through a secure remote access network. All confidential documents should be marked as such.

While the requirements under these three statutes pertaining to management and disclosure of agency records are clear, their application to federal ombuds is not, leaving room for thoughtfulness and creativity in collaboration with legal counsel and agency records officials as office record management practices are established. With regard to the FRA, there are a number of kinds of ombuds records that surely fall within standard categories of agency records and can be managed in accord with other agency records of the same type — office creation, enabling and evaluative documents, budgets, planning and so forth. As COFO suggests, statistical data on office caseloads (absent individual identifying information), and data on systemic issues also should be retained in a system of agency records. However, ombuds offices should work with legal counsel and records management officials to devise prudent policies for confidential case documentation and include in this discussion the question of electronic communications such as emails. For routine cases, ombuds use of only rough private notes that are not shared with others to the extent practical and appropriate should be considered. When and if case files in a system of records are deemed necessary, appropriate thought should be given to how such files are labeled or identified, and especially the duration of retention that will both comply with the requirements of the FRA and minimize the potential for inadvertent or compulsory disclosure of confidential documents to the fullest extent possible. For those offices currently lacking NARA's imprimatur on a records retention schedule, a detailed background on the office, its purpose and standards and the reasons therefore should be included when approval is sought.

Finally, while ADRA's confidentiality provision, § 574 does not exempt dispute resolution communications from the requirements of either the FRA or the Privacy Act, it does contain an exemption from disclosure under FOIA. This is significant for "the use of ombuds" falling under the aegis of ADRA. For those ombuds functions falling outside of ADRA § 574 but still deemed

confidential, ombuds should consider the exemptions contained in FOIA itself should confidentiality be at stake. In particular, many ombuds responding to our survey have indicated that they have had a role in changes to agency policies and some ombuds engage in system reviews. These may fall within FOIA Exemption 5. For some ombuds, Exemption 6 for “personnel and medical files *and similar files*” may also be applicable in the event office records are requested under FOIA.

### **VIII. Legal Analysis — Conclusions and Recommendations to the Administrative Conference of the United States**

While the issues discussed in this legal analysis are relevant to most federal offices bearing the ombuds title, the following recommendations to the Administrative Conference (ACUS) pertain primarily to those ombuds offices that adhere in large part to one of the three generally recognized sets of ombuds professional standards.

**1. Practicing to Standards:** Those legislative and agency officials who would create offices that assist designated constituents to raise and resolve issues should only attach the “ombuds” title to the office if the office adheres to the three core principles of confidentiality, independence and impartiality/neutrality as represented in at least one the three sets of professional standards (the IOA, ABA and USOA). Existing offices that do not reflect these principles should be modified to adhere to them, or renamed.

While federal ombuds — internals, externals, advocates — can and should serve many kinds of constituents and use many different techniques and processes, there are compelling reasons why there should be recognized core principles even as the government embraces other variations. Elsewhere in this study we have discussed the nature of ombuds professional ethical



standards, why they, in particular these three core standards, are critical to ombuds effectiveness and why they have come to be viewed as the *sin qua non* of ombuds practice. The evident lack of a clear definition of federal ombuds based on core principles makes a common set of expectations for federal ombuds more difficult to achieve and these principles, for those federal offices that have adopted them, more difficult to defend.<sup>454</sup>

Of equal importance, failure to establish and operate an ombuds office consistent with all three applicable ombuds core standards will undermine the ombud's ability to defend a challenge to any one of them. For example, an ombuds or ombuds office that lacks sufficient indicia of independence, whether by virtue of where it is placed or how it is operated or collateral responsibilities assigned to the ombuds, will be hard-pressed to argue that it is neutral to a wary constituent. Nor will it be in a good position to protect confidentiality should it be challenged by litigants, labor unions, Inspectors General or even upper management. Likewise, should the ombud's agency undermine or even chip away at confidentiality, it will be difficult for the ombuds to make the case for independence and neutrality and this, in turn, will undermine the ombud's credibility with constituents, tribunals, agency officials and others.

Finally, from a legal perspective, while ADRA has since 1996 included "use of ombuds" in its definition of the means of alternative dispute resolution, as we have discussed its embrace of those with the ombuds title and their various practices is still not definitively resolved. A common understanding, at least, of the meaning of the ombuds title would render interpretation of this addition to the Act far less daunting.

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<sup>454</sup> Moreover, the inconsistent and unpredictable definitions and standards for ombuds in the federal sector may well confuse the general perception of what an ombuds is and undermine attempts to build and secure the profession nationwide in both the public and private sectors.

Articulating and maintaining standards for ombuds would not inhibit legislative or executive efforts to create “complaint handling” offices that provide a combination of, for example, some of the following services to internal or external constituents: inquiry, dispute resolution, facilitation, coaching, communication, outreach, and training. However, if the architects of such offices want to claim the name and obtain the particular benefits of ombuds practice, those creating such offices must fully commit to the standards that have been shown to make those benefits possible. This means at a minimum placing the ombuds office where it might be, and be perceived to be independent, and permitting it to operate as independently as is possible consistent with law and accountability. Similarly, it means that ombuds confidentiality and impartiality under the standards must be broadly communicated, respected and supported from the top down.

Some agency leadership, particularly those in the public eye who are accountable for what transpires within their area of responsibility, may be uncomfortable with the notion of a largely independent office within the agency offering confidentiality in one of the forms recognized by ombuds standards. Accordingly, one best practice that characterizes some of the most effective ombuds offices is their ongoing efforts to forge strong relationships characterized by mutual understanding with agency leadership and management, legal offices, Inspector General offices, officials responsible for FOIA requests, records management and, if relevant, EEO, employee and labor relations. Such efforts build the trust necessary to inspire confidence in the confidentiality, independence and impartiality that are the lifeblood of ombuds effectiveness.

## **2. Legal Protection for Ombuds Confidentiality**

**A. New Ombuds Legislation:** Suggestions have been made from time to time, including in our survey responses, that legislation should be enacted to provide a template for creation of federal ombuds offices.<sup>455</sup> Such legislation would be a drafting challenge inasmuch as fashioning definitions and standards must take into account at least the several principal classifications of current federal ombuds and three sets of recognized standards. The advantages would be twofold — uniform structural and ethical standards for ombuds within each principal classification, and protection of these standards from erosion and incursion by agency leadership or other entities whether under color of law or not.

**B. Modification of ADRA:** Should proposing new legislation be deemed inadvisable at this time, ombuds practicing to standard, and indeed the ADR community at large, would benefit from certain targeted amendments to ADRA. These would add needed clarity and remove much of the ambiguity as to who the Act covers and the scope of that coverage. These changes might include:

- **§ 571. Definitions**
  - (8) “issue in controversy” — broaden this definition to *expressly* include internal conflicts of the kind handled by workplace mediators, conflict management coaches and internal ombuds and to include issues for which the neutral directly engages with only one party in the course of providing assistance in resolution. The latter would also require modification of § 571(6) to the effect that both parties need not actively participate in a “dispute resolution proceeding.”

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<sup>455</sup> See, e.g., 2009 Taxpayer Advocate Service Study of Ombuds Offices, at 114–116 (focusing primarily on the need for legislation for external ombudsmen).

- (9) “neutral” — to align with current thinking, clarify that this term denotes any individual acceptable to the parties who functions specifically to aid the parties in resolving an issue in controversy. This would align the definition in § 571 with the descriptive language in § 573(a).
- (10) “party” — clarify that this includes both named parties and any person or entity significantly affected by a potential resolution of the issue in controversy *and* specify additionally that when a federal neutral aids parties to resolve an issue in controversy the government is always, *de facto*, a party. In either case, the Congress or the agency has determined that the cost of establishing ADR programs is outweighed by the benefits to the government precisely because the government is significantly affected directly or indirectly by the conflicts these programs are designed to address. (This amendment to include the government as a party might not be necessary should the amendments recommended above for §§ 571(6) and (8) be enacted.)
- **§ 574. Confidentiality** — Note that if this provision is modified to more definitively embrace federal sector ombuds, allowance should be made for those ombuds offices: 1) that practice according to USOA standards which provide for confidentiality only at the discretion of the ombuds which is at variance with confidentiality as defined in the current § 574 and/or 2) that were created by statutes specifying the scope of confidentiality applicable to that office.
  - § 574(3) — the exception for communications “required by statute to be made public” should be modified to comport with its presently generally understood

meaning as applying to communications required *by statute* to be made public *or* reported to agency officials or other authorities.

- § 574(j) — consideration should be given to harmonizing the Privacy Act and the Federal Records Act with the confidentiality provisions in § 574 as has already been done with FOIA.
- An additional provision precluding access by Inspectors General to confidential ombuds communications should be considered. Barring that, a provision clarifying the relationship between ombuds and Inspector Generals might be added providing a test for access similar to that for courts found in § 574(a)(3).
- § 574 should also be modified to articulate what is now generally understood, i.e., that confidentiality begins to attach at the time of ADR intake. Further, it should be made clear that ADRA’s confidentiality persists until the dispute resolution process concludes, regardless of the techniques employed or whether or not there is a resolution. If the government determines that offering alternative means of resolving issues is in its interest, it is also in the government’s interest to encourage use of these options by protecting users from their first approach to the office offering the service. If formal settlement is reached, it should be disclosed if required by law.

**C. Interpretation of ADRA:** We further recommend that ACUS add clarity and coherence to the discussion of the relationship of ombuds to ADRA by confirming the view that Congress meant what it said when it added “use of ombuds” to the definition of “means of alternative dispute resolution” in 1996. We have explained earlier in this analysis the logic of

this interpretation and only underscore here the importance to the growing ombuds presence in the federal government of ACUS lending its imprimatur to it.

Whether there is a new ombuds statute, modification of ADRA or none-of-the-above, federal ombuds offices like any other government activity remain accountable for efficiency, effectiveness and probity. Confidentiality is the exception rather than the rule in government and therefore not all ombuds office documents, communications or functions warrant confidentiality protection. For example, when communications take place as part of training programs, systems work and some group work that are not connected to resolving issues in controversy they may not be protected by ADRA under any interpretation. Participants in these processes, however, might, agree to maintain confidentiality and documentation might be protected from disclosure under FOIA if it meets the criteria for the exceptions discussed earlier in this analysis. Further, statistics and many routine administrative documents (including those pertaining to budget and staffing even when ombuds independently manage these administrative prerogatives) should be subject to the typical agency rules of disclosure and accessibility to the extent that they do not reveal confidential case information.

**3. Other defenses if ombuds confidentiality is subject to legal challenge:** Unless and until the application of ADRA to ombuds is sufficiently settled, we recommend that agencies and their ombuds offices consider that they may have to complement arguments based on ADRA with other avenues to protect the confidentiality offered to constituents by their offices if it is subject to legal challenge. These avenues all require that ombuds offices be established according to recognized standards, including independence, neutrality/impartiality, and confidentiality, and that there be a meeting of the minds between the ombuds and agency officials on the extent and limits of each of these attributes.

As a best practice, these standards and any exceptions once agreed upon, should be broadly disseminated with suitable website provisions, posters, brochures and the like and specifically communicated to each visitor at intake. Upon a legal challenge to confidentiality, evidence of this dissemination as well as evidence of specific communication to the visitor and, if possible specific acknowledgement by the visitor should form part of the basis for a request to the tribunal to exercise its discretion to protect ombuds' communications.

Additionally, evidence about the office, its standards and the reasons therefore will be needed to bolster such a claim and to establish that an expectation of confidentiality has been created. To the extent that abiding by the ombuds office's confidentiality standard is presented to the visitor as a condition of his or her voluntary engagement with the office, an argument can also be made that the visitor is then bound by this commitment under a theory akin to implied contract (offer and acceptance) should the visitor try to obtain the ombuds' testimony in a later proceeding.

The same evidence and arguments that would support the judge's exercise of discretion might also go toward presenting a claim of privilege. Although given the precedent it is unlikely that this claim will be entertained, there is still some potential that a robustly litigated case with ample evidence of ombuds practice and policy might carry the day. The thoroughness with which all these defensive arguments are supported and documented is critical because the unique attributes of ombuds are not widely understood.

**4. Recommended best practices:** There are a number of best practices that agency officials and federal ombuds offices should consider that will put the ombuds office in the best legal posture to defend against threats to office standards, to enhance its credibility with constituents and

agency leadership alike and to maintain the integrity of the office. Many of these are discussed under the various headings in the body of this analysis. We emphasize several here.

**A. Independent Counsel:** With respect to agency counsel, there may be times when the interests of agency counsel and that of the ombuds may not be congruent, for example when a threat to confidentiality emanates from or involves another office within the agency that agency counsel also represents. Likewise, the demand for information may originate in litigation against the agency and counsel may be required to balance a variety of agency interests in deciding during negotiations which of the litigant's demands to accept. Agency counsel may also lack experience or expertise in addressing requests for disclosure of confidential ombuds communications.

For these reasons, and in the interests of reinforcing ombuds independence, every effort should be made to obtain independent counsel for federal ombuds when and as issues arise or when the ombuds wants to manage legal questions proactively. Recognizing that few agencies routinely use outside counsel, thought might be given by ACUS and/or COFO, to engaging the Department of Justice (possibly the Office of Federal Programs or the Office of Dispute Resolution) in identifying a niche in government where a cadre of lawyers might be educated on legal issues pertaining to ombuds and available for advice and/or litigation support should the need arise. Alternatively, COFO might identify those within their ranks who are lawyers and willing to act in, at least, an advisory capacity. The "Shared Neutrals" program administered by the Department of Health and Human Services might serve as model for such formalized sharing of expertise and services among agencies.

**B. Affirmative Duty to Report:** As discussed above, where a *statutory* duty to report information conflicts with confidentiality, the duty to report prevails under ADRA § 574(a)(3)



even if it conflicts with professional standards on confidentiality and whether or not there is an imminent risk of serious harm. The same would be true for many of the reporting obligations found in non-statutory sources that merely echo the statutory duties to disclose criminal or potentially criminal behavior. However, where the duty to report is not contained in a statute, the prohibitions in ADRA *against* disclosure arguably would prevail. In this regard, some regulations and management policies imposing an affirmative duty to report on federal employees are not reflected in statutory requirements.

Given the broad reach of existing government-wide statutes, regulations and policies imposing reporting obligations on federal employees combined with the importance of confidentiality in ombuds practice, it should not be necessary for agencies to add to agency specific obligations and they should not do so. However, although technically not within the exception to confidentiality under ADRA § 574, many government-wide non-statutory obligations to report have substantial weight and importance. Agencies and their ombuds should make every effort to reach an explicit understanding of which non-statutory legal and ethical reporting obligations must be applicable in spite of the standards and exigencies of the office and most importantly the express limitation in ADRA of this exception to statutory obligations. This conversation within the agency should include an understanding that all efforts will be made to encourage the visitor to report the information him or herself through appropriate channels and that, should the visitor decline and the ombuds affirmatively be obligated to report, it will be done by the ombuds in a manner that protects confidentiality to the fullest extent possible. Once an understanding is reached, the ombuds should communicate the parameters of confidentiality to visitors. If this limitation on confidentiality is shared in a timely fashion with constituents and visitors, an argument can be made that the parties have implicitly agreed to “alternative

confidential procedures for disclosure” under ADRA § 574(d)(1)<sup>456</sup> rendering a subsequent consistent disclosure by the ombuds permissible under § 574.

**C. Ombuds and Notice to the Agency:** Most federal ombuds created and practicing to standards specifying independence will not be agents of their employer for purposes of legal notice or authorized conduits of information and accordingly only the specter of implied agency would be a concern. The ombuds’ knowledge of pertinent information might be imputed to the employer should appropriate measures not be taken by agency officials and the ombuds him or herself to clearly confirm the ombuds’ independence and disavow any authority on the ombuds’ part to receive notice or act as a conduit of information. In particular, the agency and the ombuds office should take great care when touting the office as a safe place to raise concerns to also include appropriate caveats concerning notice. It goes almost without saying that in order to make this assertion the ombuds should in fact be independent, unencumbered with management responsibilities outside the ombuds office itself and with the requisite independent decision-making and operational authority.

**D. Ombuds and Federal Sector Labor Law:** Federal sector labor law is relevant both to ombuds who deal with internal issues if some of their constituents are within collective bargaining units and to those ombuds who deal with external issues but may have cause to meet with employees within collective bargaining units. The critical provision is FSLMRS § 7114 requiring that the union be given notice and an opportunity to be present at certain meetings with represented employees. As set forth in great detail earlier in this analysis, the provision is most

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<sup>456</sup> 5 U.S.C. § 574(d)(1). “The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding . . . .”

likely to apply to the ombuds' meetings with employees when the ombuds engages both the represented employee and management in attempting to resolve the issue at hand.

When the interactions of the ombuds with the represented constituent and management on an issue are seen as more formal efforts at resolution these might trigger the union's right to notice and right to be present on behalf of the bargaining unit it represents. Ombuds who might be subject to § 7114 should work with legal counsel to develop office protocols for determining if and when the union has a right to notice.

Relatedly, it should be stressed that best practices at the agency and office level include advising 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, the ombuds office should not engage in behavior that could mislead employees about the respective roles of the ombuds and these other entities. Our understanding from this study is that most ombuds offices are aware of this requirement and careful to make it a routine part of their practice.

**E. Ombuds and Inspectors General:** Absent a legislative solution as suggested earlier in these recommendations, the interrelationship of Inspectors General and federal ombuds confidentiality remains unsettled. This makes it all the more important for OIG's to understand the purposes, functions and ethical standards of ombuds offices in advance of any issues that might arise between the two offices. Certainly ombuds can and should, proactively, work to develop a positive working relationship with the Inspector General's office having jurisdiction over their agency.

Further, if it has not already done so, COFO might consider engaging with the Council of the Inspectors General, if not to reach a mutual agreement on confidentiality at least to develop a

working relationship and to educate the Inspectors General about ombuds. This dialogue might include ways the two positions are complementary and distinct, the importance of ombuds confidentiality to realizing the ombuds' mission and the prohibition applicable to neutrals under ADRA of disclosing dispute resolution communications even if considered to be pursuant to statutory compulsion unless "no other person is reasonably available to disclose the communication." 5 U.S.C. sections 574(a)(4) and (b)(5) which, respectively, set out for neutrals and parties the key substantive considerations for courts when considering compulsory disclosure under ADRA (preventing a manifest injustice, establishing a violation of the law, preventing harm to the public health and safety outweighing the integrity of dispute resolution proceedings in general) also may be a helpful starting point for mutual understanding.

**F. Ombuds and records management:** Finally, with respect to ombuds records management, much of what ombuds write about cases can be considered "rough notes" as long as they are not shared and therefore would not be required to be maintained in a system of records. However, for those case records that are more formal and/or shared, the record schedules recently approved classifying confidential case records as temporary and providing for destruction upon closure of the case should be considered a best practice. Inasmuch as ombuds case records are confidential under ADRA and therefore largely foreclosed from disclosure, whatever might be gained by retaining them beyond closure of the case would be outweighed by the risk of inadvertent or compulsory disclosure as well as by the cost of defending against such compulsion.

For those ombuds functions falling outside of ADRA § 574 and its FOIA exemption but still deemed confidential, ombuds should consider the exemptions contained in FOIA itself if a FOIA request is made. In particular, many ombuds responding to our survey have indicated that

they have had a role in changes to agency policies, and some ombuds engage in system reviews. As discussed in more detail in the preceding analysis, these may fall within FOIA Exemption 5, the so-called deliberative process exemption. For some ombuds, Exemption 6 for “personnel and medical files *and similar files*” may also be applicable in the event office records are requested under FOIA.

