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K-12 SCHOOL OMBUDS TOOLKIT

[Compiled by the ABA Dispute Resolution Section Ombuds Committee]

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--SAMPLE--

Frequently Asked Questions (K-12 Ombuds Programs)

What is an [Ombuds] Ombudsman?

An Ombuds [or Ombudsman] is an independent, neutral, informal, and confidential resource who assists parents and other members of the District community in surfacing issues and in resolving complaints, conflicts, and other school related issues in the District. The Ombuds will listen to your concern, help you obtain necessary information, and offer impartial guidance on how you may raise or resolve your issue. The Ombuds also helps identify systemic issues for the District without disclosing your confidential communications with the Ombuds.

Why was the program created?

[This will vary depending on the District, but here are two examples.]

The Ombuds program was created as a proactive measure to provide an additional resource to assist all constituents of the District by providing a place to informally discuss issues or disputes with an impartial and independent party.

The Ombuds program was created in response to what the School Board determined were problematic issues faced by parents, teachers, and other members of the community in an effort to provide an informal and alternative avenue to discuss or resolve concerns without having to go through the traditional channels of school administration with which some constituents may have lost trust. It was determined that this would be a particularly good resource for people who were not certain how to proceed or where to go to try to obtain information or resolve their issue.

Who can use the Ombuds program?

- Parents
- Students
- Residents of the District
- Teachers and other Staff

What does the Ombuds do?

- Provides confidential, neutral, independent, and informal assistance to constituents
- Listens to concerns and provides guidance, information, and individual coaching
- Serves as a resource by providing information, helping locate the appropriate person who can assist with an issue, clarifying processes, and seeking options for resolution
- Explains District policies and procedures and how they relate to an individual situation
- Helps identify a range of resolution options, including formal and/or informal channels
- Increases social capital by enhancing communication and mitigating conflict
- Helps bridge communication between visitors and others in the organization
- Identifies trends and makes recommendations for organizational improvement and policy or practice changes to prevent recurring issues
- Assists in achieving outcomes consistent with fairness and established policies
- Facilitates communication through a variety of techniques, including shuttle diplomacy

What the Ombuds does NOT do?

- Act as a place to receive notice of formal complaints against the District
- Act as an advocate for any individual or cause
- Breach confidentiality by revealing anything that could disclose the identity of a visitor
- Maintain permanent records of confidential communications
- Conduct formal or in-depth investigations
- Make management decisions for the District or school administration
- Create, change or set aside established policies
- Replace existing formal channels of communication or reporting
- Testify or otherwise participate in grievances or other formal processes
- Offer legal advice
- Answer questions about visitors with whom the Ombuds may have spoken or disclose an individual visitor's name or specific issue with anyone outside of the Ombuds Office, unless in the course of their confidential communications, the visitor gives the Ombuds consent and the Ombuds agrees to do so
- Determine guilt/innocence, right/wrong, etc.

Is visiting the Ombuds Office voluntary or required?

Visiting the Ombuds Office is completely voluntary. It is not a required step in any other complaint or dispute resolution process.

Is there a charge for going to the Ombuds?

There is no charge to contact or meet with an Ombuds or otherwise utilize the services of the Ombuds Office.

How is going to the Ombuds different from using other District channels or resources?

- The Ombuds is a voluntary and informal process.
- It is not part of any formal process for investigation and resolution of claims.
- The Ombuds is not authorized to receive notice of claims against the District, but the Ombuds can assist visitors in identifying formal channels for raising or giving notice of claims.
- The Ombuds will not serve as anyone's advocate, lawyer, or counselor.
- The Ombuds is committed to a fair process for raising issues and resolving conflicts.
- The Ombuds Office and its published materials will provide information about formal processes if a visitor wants to put the District on formal notice of a claim or resolve claims through a formal process.

Does speaking with the Ombuds put the District on notice of claims?

The Ombuds program was created to be a confidential, informal, independent, and impartial resource for visitors to discuss issues or seek guidance or information, but it is not authorized to receive notice of claims against the District. If you want to place the District on notice of your claim, you must use one of the formal channels identified in District policies or in the Ombuds Office's brochure or other program information.

Are communications with the Ombuds confidential?

[Check the applicable law of your jurisdiction in connection with the following statements.]

Confidentiality is essential to the effective functioning of the Ombuds Office. Ombuds assert that communications with the Ombuds are privileged with the privilege being held by the Ombuds Office. In addition, because the Ombuds program was created to be a purely voluntary, confidential, informal, impartial, and independent resource for District constituents, visitors to the Ombuds Office will be understood to have agreed to abide by the principles on which the Office was established and made available to them, including not calling the Ombuds to testify in formal or legal proceedings with respect to confidential communications.

Are there exceptions to confidentiality?

[Confirm with the laws of your jurisdiction and the policies of the District creating the Ombuds program.]

Ombuds are required by law and the Standards of Practice under which they operate (**provide link to the relevant Code of Ethics and Standards of Practice**) to make a disclosure when the Ombuds determines that disclosure is necessary to prevent an imminent threat of serious harm to an individual. Ombuds are also generally required by law to report what they determine is suspected child abuse. Ombuds will endeavor to protect the confidentiality of communications with visitors but state or federal laws may, in some cases, mandate disclosure or limit the ability of Ombuds to keep certain discussions confidential.

Who does the Ombuds report to and what type of reports are made to the District?

While the Ombuds Office was created to be an independent, impartial, and confidential resource, the Ombuds reports for administrative purposes to the District Superintendent. In doing so, however, the Ombuds does not disclose the identity of visitors to the Ombuds Office or the substance of confidential communications unless required by law to do so. In addition, the Ombuds will regularly report trends and systemic issues to both the Superintendent and the School Board, without disclosing confidential communications or the identity of visitors.

Does the Ombuds maintain permanent records on behalf of the District?

[Check the applicable law of your jurisdiction in connection with the following statements, including your state's public records laws.]

Because the Ombuds Office is an independent and informal resource, Ombuds do not maintain permanent records of confidential communications on behalf of the District. Ombuds take very limited notes, which are used solely as a memory aid for the Ombuds and not disclosed to anyone outside the Ombuds Office. To the extent permitted by state and federal law, these notes are not kept once a matter is concluded. The only permanent records maintained by the Ombuds relate to non-confidential documents about the general operations of the Office and statistical summaries and reports.

Can the Ombuds work with union member employees?

[Check with legal counsel for the District and any relevant collective bargaining agreements to confirm the answer suggested below.]

The Ombuds cannot and will not participate in collective bargaining discussions or activities, but in many cases the Ombuds can work with employees who are members of a union with a collective bargaining agreement with the District. For matters within the scope of the collective bargaining agreement, the Ombuds will refer union members to their respective union resources. For matters outside the scope of the collective bargaining agreement, the Ombuds may be able to work with individual employees to answer questions and help resolve issues. The Ombuds is also a resource for unions to help support their members.

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

February 9, 2004

RESOLVED, That the American Bar Association endorses the revised Standards for the Establishment and Operation of Ombuds Offices dated February, 2004.

STANDARDS¹ FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES

REVISED FEBRUARY, 2004

PREAMBLE

Ombuds² receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations.

Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombuds offices, but with enormous variation in their duties and structures. Ombuds offices so established may be placed in several categories: A Legislative Ombuds is a part of the legislative branch of government and addresses issues raised by the general public or internally, usually concerning the actions or policies of government entities, individuals or contractors with respect to holding agencies accountable to the public. An Executive Ombuds may be located in either the public or private sector and receives complaints concerning actions and failures to act of the entity, its officials, employees and contractors; an Executive Ombuds may either work to hold the entity or one of its programs accountable or work with entity officials to improve the performance of a program. An Organizational Ombuds may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. An Advocate Ombuds may be located in either the public or private sector and like the others evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. These

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1. The ABA adopted a resolution in August, 2001, that supported “the greater use of ‘ombuds’ to receive, review, and resolve complaints involving public and private entities” and endorsed Standards for the Establishment and Operation of Ombuds Offices. These standards modify those Standards in four regards. First, they clarify the issue of notice in Paragraph F; secondly, they modify the limitations on the ombud’s authority; third, they provide for a new category of executive ombuds that is described in Paragraph H; and, fourth, they modify the definition of legislative ombuds and the standards applicable to them to make them conform to the new category of executive ombuds. The 2001 Standards, in turn, expanded on a 1969 ABA resolution to address independence, impartiality, and confidentiality as essential characteristics of ombuds who serve internal constituents, ombuds in the private sector, and ombuds who also serve as advocates for designated populations.
 2. The term ombuds in this report is intended to encompass all other forms of the word, such as ombudsperson, ombuds officer, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage others from using other terms.

standards were developed to provide advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

The essential characteristics of an ombuds are:

- independence
- impartiality in conducting inquiries and investigations, and
- confidentiality.

ESTABLISHMENT AND OPERATIONS

- A. An entity undertaking to establish an ombuds should do so pursuant to a legislative enactment or a publicly available written policy (the “charter”) which clearly sets forth the role and jurisdiction of the ombuds and which authorizes the ombuds to:
- (1) receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the ombuds’s jurisdiction as defined in the charter establishing the office
 - (2) exercise discretion to accept or decline to act on a complaint or question
 - (3) act on the ombuds’s own initiative to address issues within the ombuds’s prescribed jurisdiction
 - (4) operate by fair and timely procedures to aid in the just resolution of a complaint or problem
 - (5) gather relevant information and require the full cooperation of the program over which the ombuds has jurisdiction
 - (6) resolve issues at the most appropriate level of the entity
 - (7) function by such means as:
 - (a) conducting an inquiry
 - (b) investigating and reporting findings
 - (c) developing, evaluating, and discussing options available to affected individuals
 - (d) facilitating, negotiating, and mediating

- (e) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them
 - (f) identifying complaint patterns and trends
 - (g) educating
 - (h) issuing periodic reports, and
 - (i) advocating on behalf of affected individuals or groups when specifically authorized by the charter
- (8) initiate litigation to enforce or protect the authority of the office as defined by the charter, as otherwise provided by these standards, or as required by law.

QUALIFICATIONS

- B. An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombuds with relevant education and the periodic updating of the ombuds's qualifications.

INDEPENDENCE, IMPARTIALITY, AND CONFIDENTIALITY

- C. To ensure the effective operation of an ombuds, an entity should authorize the ombuds to operate consistently with the following essential characteristics. Entities that have established ombuds offices that lack appropriate safeguards to maintain these characteristics should take prompt steps to remedy any such deficiency.

- (1) Independence. The ombuds is and appears to be free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry.

In assessing whether an ombuds is independent in structure, function, and appearance, the following factors are important: whether anyone subject to the ombuds's jurisdiction or anyone directly responsible for a person under the ombuds's jurisdiction (a) can control or limit the ombuds's performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of the office.

- (2) Impartiality in Conducting Inquiries and Investigations. The ombuds conducts inquiries and investigations in an impartial manner, free from initial bias and conflicts of interest. Impartiality does not preclude the ombuds from developing an interest in securing changes that are deemed necessary as a result of the process, nor from otherwise being an advocate on behalf of a designated constituency. The ombuds may

become an advocate within the entity for change where the process demonstrates a need for it.

- (3) Confidentiality. 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. Records pertaining to a complaint, inquiry, or investigation are confidential and not subject to disclosure outside the ombuds's office. An ombuds does not reveal the identity of a complainant without that person's express consent. An ombuds may, however, at the ombuds's discretion disclose non-confidential information and may disclose confidential information so long as doing so does not reveal its source. An ombuds should discuss any exceptions to the ombuds's maintaining confidentiality with the source of the information.³

LIMITATIONS ON THE OMBUDS'S AUTHORITY

- D. An ombuds should not, nor should an entity expect or authorize an ombuds to:
- (1) make, change or set aside a law, policy, or administrative decision
 - (2) make binding decisions or determine rights
 - (3) directly compel an entity or any person to implement the ombuds's recommendations
 - (4) conduct an investigation that substitutes for administrative or judicial proceedings
 - (5) accept jurisdiction over an issue that is currently pending in a legal forum unless all parties and the presiding officer in that action explicitly consent
 - (6) address any issue arising under a collective bargaining agreement or which falls within the purview of any federal, state, or local labor or employment law, rule, or regulation, unless there is no collective bargaining representative and the employer specifically authorizes the ombuds to do so,⁴ or
 - (7) act in a manner inconsistent with the grant of and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

3. A legislative ombuds should not be required to discuss confidentiality with government officials and employees when applying this paragraph to the extent that an applicable statute makes clear that such an individual may not withhold information from the ombuds and that such a person has no reasonable expectation of confidentiality with respect to anything that person provides to the ombuds.

4. Under these Standards, the employer may authorize an ombuds to address issues of labor or employment law only if the entity has expressly provided the ombuds with the confidentiality specified in Paragraph C(3). An ombuds program as envisioned by these Standards supplements and does not substitute for other procedures and remedies necessary to meet the duty of employers to protect the legal rights of both employers and employees.

REMOVAL FROM OFFICE

- E. The charter that establishes the office of the ombuds should also provide for the discipline or removal of the ombuds from office for good cause by means of a fair procedure.

NOTICE

- F. An ombuds is intended to supplement, not replace, formal procedures.⁵ Therefore:
- (1) An ombuds should provide the following information in a general and publicly available manner and inform people who contact the ombuds for help or advice that –
 - (a) the ombuds will not voluntarily disclose to anyone outside the ombuds office, including the entity in which the ombuds acts, any information the person provides in confidence or the person's identity unless necessary to address an imminent risk of serious harm or with the person's express consent
 - (b) important rights may be affected by when formal action is initiated and by and when the entity is informed of the allegedly inappropriate or wrongful behavior or conduct
 - (c) communications to the ombuds may not constitute notice to the entity unless the ombuds communicates with representatives of the entity as described in Paragraph 2
 - (d) working with the ombuds may address the problem or concern effectively, but may not protect the rights of either the person contacting the office or the entity in which the ombuds operates⁶
 - (e) the ombuds is not, and is not a substitute for, anyone's lawyer, representative or counselor, and
 - (f) the person may wish to consult a lawyer or other appropriate resource with respect to those rights.
 - (2) If the ombuds communicates⁷ with representatives of the entity concerning an allegation of a violation, then —

5. An ombuds program as envisioned by these Standards supplements and does not substitute for the need of an entity to establish formal procedures that may be necessary to *protect legal rights and to address allegedly inappropriate or wrongful behavior or conduct.*

6. The notice requirements of Paragraph F do not supercede or change the advocacy responsibilities of an Advocate Ombuds.

7. Under these standards, any such communication is subject to Paragraph C(3).

- (a) a communication that reveals the facts of
 - (i) a specific allegation and the identity of the complainant or
 - (ii) allegations by multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful

should be regarded as providing notice to the entity of the alleged violation and the complainants should be advised that the ombuds communicated their allegations to the entity; but otherwise,
 - (b) whether or not the communication constitutes notice to the entity is a question that should be determined by the facts of the communication.
- (3) If an ombuds functions in accordance with Paragraph C, “Independence, Impartiality, and Confidentiality,” of these standards, then —
- (a) 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 of alleged violations, and
 - (b) communications made to the ombuds should not be imputed to anyone else, including the entity in which the ombuds acts unless the ombuds communicates with representatives of the entity in which case Paragraph 2 applies.

LEGISLATIVE OMBUDS

- G. A legislative ombuds is established by the legislature as part of the legislative branch who receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, public employee, or contractor. In addition to and in clarification of the standards contained in Paragraphs A-F, a legislative ombuds should:
- (1) be appointed by the legislative body or by the executive with confirmation by the legislative body⁸
 - (2) be authorized to work to hold agencies within the jurisdiction of the office accountable to the public and to assist in legislative oversight of those agencies

8. This restates the 1969 ABA Resolution, which remains ABA policy, that a legislative ombuds should be “appoint[ed] by the legislative body or . . . by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority, such as two thirds.”

- (3) be authorized to conduct independent and impartial investigations into matters within the prescribed jurisdiction of the office
- (4) have the power to issue subpoenas for testimony and evidence with respect to investigating allegations within the jurisdiction of the office
- (5) be authorized to issue public reports, and
- (6) be authorized to advocate for change both within the entity and publicly.

EXECUTIVE OMBUDS

H. An executive ombuds may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions and failures to act of the entity, its officials, employees, and contractors. An executive ombuds may either work to hold the entity or specific programs accountable or work with officials to improve the performance of a program. In addition to and in clarification of the standards contained in Paragraphs A-F, an executive ombuds:

- (1) should be authorized to conduct investigations and inquiries
- (2) should be authorized to issue reports on the results of the investigations and inquires, and
- (3) if located in government, should not have general jurisdiction over more than one agency, but may have jurisdiction over a subject matter that involves multiple agencies.

ORGANIZATIONAL OMBUDS

I. An organizational ombuds facilitates fair and equitable resolutions of concerns that arise within the entity. In addition to and in clarification of the standards contained in Paragraphs A-F, an organizational ombuds should:

- (1) be authorized to undertake inquiries and function by informal processes as specified by the charter
- (2) be authorized to conduct independent and impartial inquiries into matters within the prescribed jurisdiction of the office
- (3) be authorized to issue reports, and
- (4) be authorized to advocate for change within the entity.

ADVOCATE OMBUDS

- J. An advocate ombuds serves as an advocate on behalf of a population that is designated in the charter. In addition to and in clarification of the standards described in Paragraphs A-F, an advocate ombuds should:
- (1) have a basic understanding of the nature and role of advocacy
 - (2) provide information, advice, and assistance to members of the constituency
 - (3) evaluate the complainant's claim objectively and advocate for change or relief when the facts support the claim
 - (4) be authorized to represent the interests of the designated population with respect to policies implemented or adopted by the establishing entity, government agencies, or other organizations as defined by the charter
 - (5) be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant, and
 - (6) the notice requirements of Paragraph F do not supersede or change the advocacy responsibilities of an Advocate Ombuds.

REPORT

The American Bar Association (ABA) adopted a resolution in 1969 recommending that state and local governments consider establishing ombudsmen who would be authorized to inquire into administrative action and to make public criticism. That policy also recommended that the statute or ordinance creating the ombudsmen contain twelve essential points. The ABA then adopted a resolution in 1971 recommending that the Federal government experiment with the establishment of ombudsmen for certain geographical areas, specific agencies, or for limited phases of Federal activities. In 2001, ABA the adopted a resolution supporting the greater use of “ombuds⁹” to receive, review, and resolve complaints involving public and private entities. That policy also endorsed Standards for the Establishment and Operations of Ombuds Offices (Standards). The 2001 Resolution and Standards broadened the ABA’s existing policy to address ombuds who are appointed within government, academia, and the private sector, and who respond to complaints from individuals from within and outside the entity. The 2001 Resolution and the Standards also clarified that independence, impartiality in conducting inquiries and investigations, and confidentiality are essential characteristics of all ombuds. Ombuds must operate consistently with these essential characteristics to discharge the duties of the office effectively.

This Resolution recognizes that entities that create ombuds offices should adhere to the Standards for the Establishment and Operations of Ombuds Offices, dated February, 2004. The fundamental underlying premise of this resolution is that all ombuds must operate with certain basic authorities and essential characteristics. The effort here is to provide practical advice and guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. These Standards modify the Standards for the Establishment and Operation of Ombuds Offices that were adopted by the ABA in August, 2001, in four regards. First, they clarify the issue of notice in Paragraph F; secondly, they modify the limitations on the ombud’s authority in Paragraph D; third, they provide for a new category of executive ombuds that is described in Paragraph H; and, fourth, they modify the definition of legislative ombuds and the standards applicable to them to make them conform to the new category of executive ombuds.

INTRODUCTION

Over the past three decades, and particularly recently, an extraordinary growth in the number and type of ombuds has taken place. Congress has established several ombuds in various programs. In addition to specific legislation concerning ombuds, the Administrative Dispute Resolution Act authorizes Federal agencies to use “ombuds.” As a protector of individual rights against the excesses of public and private bureaucracies, an ombuds receives complaints and questions from individuals concerning the functioning of an entity, works for the resolution of particular issues, and where necessary, makes recommendations for the improvement of the general administration of the entity. As an independent, impartial, and confidential complaint handler, an ombuds serves as an alternative means of dispute resolution – a means by which issues may be raised, considered, and resolved.

Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities have established ombuds offices, but with enormous

9. The term ombuds in this report is intended to encompass all other forms of the word such as ombudsperson, ombuds officers, and ombudsman, a Swedish word meaning agent or representative. The use of ombuds here is not intended to discourage others from using other terms.

variation in their duties and structures. Ombuds offices so established may be placed in several categories. A Legislative Ombuds is established by the legislature as part of the legislative branch and addresses issues raised by the general public or internally, usually concerning the actions or policies of a government agency, official, public employee, or contractor. An Executive Ombuds may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions or failures to act of the entity, its officials, employees, or contractors; an Executive Ombuds may either work to hold the entity or specific programs accountable or work with officials to improve the performance of a program. An Organizational Ombuds may be located in either the public or private sector and ordinarily addresses problems presented by members, employees, or contractors of an entity concerning its actions or policies. An Advocate Ombuds may be located in either the public or private sector, and like the others evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved.

As a result of the various types of offices and the proliferation of different processes by which the offices operate, individuals who come to the ombuds' office for assistance may not know what to expect, and the offices may be established in ways that compromise their effectiveness. The ABA endorsed Standards that were developed to provide advice and guidance on the structure and operation of ombuds offices to the end that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. The ABA action was based on the collaborative efforts of the Sections of Administrative Law and Regulatory Practice and of Dispute Resolution who worked together and appointed a steering committee consisting of representatives from the Coalition of Federal Ombudsmen, the National Association of State Ombudsman Programs, the International Ombudsman Institute (IOI subsequently withdrew), The Ombudsman Association, the United States Ombudsman Association,¹⁰ and the University and College Ombuds Association, as well as other experts in the field. The committee consulted with numerous ombuds from Federal, state, and local agencies, academic institutions, companies, and non-profit organizations. Further, it solicited, received, and considered comments from the international community of ombuds. Within the ABA, the Commission on Law and Aging, based on its experience with advocate ombuds, was instrumental in distinguishing among the types of ombuds. The Section of Business Law collaborated extensively with the committee to further the understanding and appreciation of the role of the ombuds in the business environment. Consultations with the Section of Labor and Employment Law resulted in refining the limitations on the ombuds' jurisdiction.

The Standards for the Establishment and Operation of Ombuds Offices dated August 2001 have been widely distributed and utilized by Federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities. For example, Congress is currently considering legislation to reauthorize an ombuds at the U.S. Environmental Protection Agency and has relied upon the ABA's Standards in defining the position.

To ensure that ombuds can protect individual rights against the excesses of public and private bureaucracies, now, again, the Sections of Administrative Law and Regulatory Practice, Business Law, Dispute Resolution, and Individual Rights and Responsibilities have worked together and with

10. The United States Ombudsman Association did not endorse the Standards that were adopted in 2001 and was not involved in the subsequent revisions to the Standards.

the ombuds community and other ABA entities to develop a resolution to support amendments to the Standards for the Establishment and Operations of Ombuds Offices.

STANDARDS

Section A. Establishment and Operations

An ombuds is a person who is authorized to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader, systemic problems within the ombuds's defined jurisdiction and to address, investigate, or otherwise examine these issues independently and impartially.

Importantly, the ombuds' jurisdiction – who complains and who or what are complained about – needs to be defined in advance, setting out the scope of the duties and authority. The ombuds's jurisdiction must be defined in an official act that establishes the office, which is appropriately called the “charter” in the Standards. The charter may be a legislative enactment or a publicly available written policy. The jurisdiction may be limited to a defined constituency or population. For example, a state ombuds may receive complaints or questions from any person, while a university student ombuds may receive complaints or questions only from students at that university, and a long-term care ombuds has jurisdiction only to resolve complaints initiated by or on behalf of residents receiving long-term care.

The ombuds determines whether to accept or to act on a particular complaint or question. The ombuds also has the discretion to initiate action without receiving a complaint or question. An ombuds may determine that the complaint is without merit. Or, an ombuds may receive a complaint or question on a specific topic and conduct an inquiry on a broader or different scope.

Appropriate subjects for an ombuds to review include allegations of unfairness, maladministration, abuse of power, abuse of discretion, discourteous behavior or incivility, inappropriate application of law or policy, inefficiency, decision unsupported by fact, and illegal or inappropriate behavior. It is essential that the ombuds operate by fair procedures to aid in the just resolution of the matter. Ombuds need access to all information relevant to a complaint or a question so that the review is fair and credible, and the charter should authorize access to all relevant information and require the full cooperation of the program over which the ombuds has jurisdiction. The entity must be responsible for protecting those seeking assistance from or providing information to the ombuds from personal, professional, or economic retaliation, loss of privacy, or loss of relationships.

An ombuds may make a formal or informal report of results and recommendations stemming from a review or investigation. If such a report is issued, the ombuds should generally consult with an individual or group prior to issuing a report critical of that individual or group, and include their comments with the report. Moreover, the ombuds should communicate the outcome, conclusion or resolution of a complaint or an inquiry to the complainant and may also communicate with other concerned entities or individuals.

In addition, to ensure the office's accountability, an ombuds should issue and publish periodic reports summarizing the ombuds's findings and activities. This may include statistical information about the number of contacts with the ombuds, subjects that the ombuds addressed evaluation by complainants, etc. These reports may be done annually, biannually, or more frequently.

In receiving complaints or questions and examining problems, the ombuds may use a variety of dispute resolution and other techniques. These processes include: conducting an inquiry; investigating and reporting findings; developing, evaluating, and discussing the options which may be available for remedies or redress; facilitating, negotiating, and mediating; making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have authority to act on them; identifying complaint patterns and trends; and educating.

As necessary, the ombuds may advocate on behalf of affected individuals or groups when authorized by the charter and the situation warrants that action. An ombuds may initiate litigation to enforce or protect the authority of the office. For example, if an ombuds issues a subpoena and the subpoena is ignored, the ombuds should be able to initiate litigation to compel a response. In addition, an ombuds may initiate litigation as otherwise provided by these standards or as required by law. For example, an advocate ombuds should be authorized to initiate action in an administrative, judicial, or legislative forum when the facts warrant.

An ombuds uses the powers of reason and persuasion to help resolve matters. The goal of the ombuds's efforts is to provide a path to fairness and justice. Therefore, the ombuds' quest is to seek the fair and just resolution of the matter.

Section B. Qualifications

An ombuds should be a person of recognized knowledge, judgment, objectivity, and integrity. The establishing entity should provide the ombuds with relevant education and the periodic updating of the ombuds's qualifications.

Section C. The Essential Characteristics

The original 1969 resolution contained twelve essentials for the ombuds described in it. These have been distilled and expanded in the Standards. The core qualities are independence, impartiality in conducting inquiries and investigations, and confidentiality. Without them, an ombuds cannot discharge the duties of the office effectively. The Standards therefore provide that an entity should authorize an ombuds it establishes to operate consistently with these essential characteristics to ensure the effective operation of the duties of the office. The Standards also recognize, however, that some entities may have already established offices that lack appropriate safeguards to comply fully with the characteristics. The Standards then provide that such entities should take prompt steps to remedy any such deficiency.

1. Independence in structure, function, and appearance

To be credible and effective, the office of the ombuds is independent in its structure, function, and appearance. Independence means that the ombuds is free from interference in the legitimate performance of duties and independent from control, limitation, or a penalty imposed for retaliatory purposes by an official of the appointing entity or by a person who may be the subject of a complaint or inquiry. In assessing whether an ombuds is independent, the following factors are important: whether anyone subject to the ombuds's jurisdiction or anyone directly responsible for a person under the ombuds's jurisdiction (a) can control or limit the ombuds's performance of duties, or (b)

can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the office's budget or resources.

Historically, ombuds were created in parliamentary systems and were established in the constitution or by statute, appointed by the legislative body, and had a guarantee of independence from the control of any other officer, except for responsibility to the legislative body. This structure remains a model for ensuring independence for Legislative Ombuds, and a number of states have followed it. In more recent times, however, Executive Ombuds have been created by public officials without legislation, by regulation or decree, and by private entities. Ensuring the independence of the ombuds is equally important in these instances, but will require other measures.¹¹

Great care has to be exercised in establishing the ombuds structure to ensure that the independence described in the resolution is, in fact, achieved. Choosing which of these approaches are appropriate will depend on the environment. The instrument used to establish independence should be the strongest available and should guarantee the independence of the ombuds from control by any other person.

The twelve essential characteristics of the 1969 ABA Resolution continue to serve as the model for an ombuds reporting to the legislative branch of government who is authorized to investigate administrative action, help provide legislative oversight, and offer criticism of agencies from an external perspective. While there are a number of potential avenues of achieving independence, experience on the state and local level has demonstrated rather consistently that unless there is a structural independence for these ombuds akin to the 1969 ABA Resolution that independence will not be accomplished and the office will not be able to function as envisioned in this resolution and the accompanying standards.

Structuring independence for ombuds who serve inside organizations require similar care. These elements should be in the charter. The ombuds position should be explicitly defined and established as a matter of organizational policy, authorized at the highest levels of the organization; the ombuds should have access to the chief executive officer, senior officers and the oversight body or board of directors of the organization; the ombuds should also have access to all information

11. In the United States since the late 1960s, a number of other ways have been developed to ensure independence. Examples of approaches that contribute to an ombuds's independence include: establishment of the office through a formal act of a legislature or official governing body of an organization; establishment outside the entity over which the ombuds has jurisdiction; a direct reporting relationship to a legislative body, the official governing body of an organization or the chief executive; designation as a neutral who is unaligned and objective; a broadly defined jurisdiction not limited to one part of the entity or one subject matter; appointment or removal of the ombuds free of influence from potential subjects of a complaint or inquiry; a set term of office; no reporting relationship to someone with assigned duties that conflict with the ombuds's role; no assignment of duties other than that of the ombuds function; specifically allocated budget and sufficient resources to perform the function; freedom to appoint, direct, and remove staff; sufficient stature in the organization to be taken seriously by senior officials; placement in an organization at the highest possible level and at least above the heads of units likely to generate the most complaints; discretion to initiate and pursue complaints and inquiries; access to and resources for independent legal advice and counsel; prohibition of disciplinary actions against the ombuds for performing the duties of the office; removal only for cause; provision of an employment contract that the ombuds will receive a significant severance provision if terminated without good cause.

within the organization, except as restricted by law; and the ombuds should have access to resources for independent legal advice and counsel.

The Standards recognize that at this time there are ombuds who have not achieved this goal. The Standards urge and anticipate that these variations will be eliminated over time.

2. Impartiality in conducting inquiries and investigations

The ombuds' structural independence is the foundation upon which the ombuds' impartiality is built. If the ombuds is independent from line management and does not have administrative or other obligations or functions, the ombuds can act in an impartial manner.

Acting in an impartial manner, as a threshold matter, means that the ombuds is free from initial bias and conflicts of interest in conducting inquiries and investigations. Acting in an impartial manner also requires that the ombuds be authorized to gather facts from relevant sources and apply relevant policies, guidelines, and laws, considering the rights and interests of all affected parties within the jurisdiction, to identify appropriate actions to address or resolve the issue.

The ombuds conducts inquiries and investigations in an impartial manner. An ombuds may determine that a complaint is without merit and close the inquiry or investigation without further action. If the ombuds finds that the complaint has merit, the ombuds makes recommendations to the entity and/or seeks resolution for a fair outcome. Impartiality does not, however, preclude the ombuds from developing an interest in securing the changes that are deemed necessary where the process demonstrates a need for change nor from otherwise being an advocate on behalf of a designated constituency. The ombuds therefore has the authority to become an advocate for change where the results of the inquiry or investigation demonstrate the need for such change. For example, when an ombuds identifies a systemic problem, it would be appropriate for the ombuds to advocate for changes to correct the problem. An advocate ombuds may initiate action and therefore serve as an advocate on behalf of a designated population with respect to a broad range of issues and on specific matters when the individual or group is found to be aggrieved. But, when determining the facts, the ombuds must act impartially.

3. Confidentiality

Confidentiality is an essential characteristic of ombuds that permits the process to work effectively. Confidentiality promotes disclosure from reluctant complainants, elicits candid discussions by all parties, and provides an increased level of protection against retaliation to or by any party. Confidentiality is a further factor that distinguishes ombuds from others who receive and consider complaints such as elected officials, human resource personnel, government officials, and ethics officers.

Confidentiality extends to all communications with the ombuds and to all notes and records maintained by the ombuds in the performance of assigned duties. It begins when a communication is initiated with the ombuds to schedule an appointment or make a complaint or inquiry. Confidentiality may apply to the source of the communications and to the content of the communications. Individuals may not want the ombuds to disclose their identity but may want the ombuds to act on the information presented. Therefore, an ombuds does not reveal the identity of a complainant without that person's consent. The ombuds may, however, disclose confidential

information so long as doing so does not compromise the identity of the person who supplied it. It should be emphasized that the decision whether or not to disclose this information belongs to the ombuds, and it would not be appropriate for anyone to demand that the ombuds disclose such information, except as required by statute. To the extent that an ombuds may not maintain confidentiality, the ombuds should discuss those exceptions with individuals who communicate with the office.

The authorizing entity should allow the ombuds to provide confidentiality of the identity of persons who communicate with the ombuds and of information provided in confidence. The authorizing entity should not seek information relating to the identity of complainants nor seek access to the ombuds's notes and records.

Providing for confidentiality and protection from subpoena in a statute is particularly important because, where statutes have not provided confidentiality, state courts have not consistently recognized an ombuds privilege nor granted protective orders to preserve the confidentiality of communication made to ombuds. One Federal district court, *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987), recognized a limited privilege under Federal law for an ombuds with a state statutory privilege. The only Federal circuit court to have addressed the issue, *Carman v. McDonnell Douglas Corp.*, 114 F. 3d 790 (8th Cir. 1997), failed to recognize an ombuds privilege.

Short of explicit statutory authority, ombuds offices should adopt written policies that provide the fullest confidentiality within the law, and the entities that establish ombuds offices should expressly provide the ombuds with fullest confidentiality specified in the standards. These policies should be publicly available, broadly disseminated, and widely publicized. Several existing model ombuds acts and policies of ombuds organizations address confidentiality.

An ombuds will rarely, if ever, be privy to something that no one else knows. Therefore, providing confidentiality protection to the ombuds allows the ombuds to perform assigned duties while at the same time, society continues to have access to the underlying facts. As evidenced by the statutes and policies that have been developed, there may be instances in which other, competing societal interests dictate that the ombuds must disclose some information. If an individual speaks about intending harm to himself or herself or others, an entity may require an ombuds to disclose this information. Moreover, an ombuds may be compelled by protective service laws or professional reporting requirements to report suspected abuse.

Section D. Limitations on the ombuds' authority

An ombuds works outside of line management structures and has no direct power to compel any decision. The office is established by the charter with the stature to engender trust and to help resolve complaints at the most appropriate level of the entity. To ensure the ombuds's independence, impartiality, and confidentiality, it is necessary to establish certain limitations on the ombuds's authority.

An ombuds should not, nor should an entity expect or authorize an ombuds to make, change, or set aside a law, policy or administrative/managerial decision, nor to directly compel an entity or any person to make those changes. While an ombuds may expedite and facilitate the resolution of a complaint and recommend individual and systemic changes, an ombuds cannot compel an entity to implement the recommendations.

It is essential that an ombuds operate by fair procedures which means that the actions taken will likely vary with the nature of the concern, and that care must be taken to protect the rights of those who may be affected by the actions of an ombuds. Furthermore, since due process rights could well be implicated, it would not be appropriate for the ombuds's review to serve as the final determination for any disciplinary activity or civil action, nor as a determination of a violation of law or policy. An ombuds's inquiry or investigation does not substitute for an administrative or judicial proceeding. In an administrative or judicial proceeding, the deciding official should not consider the ombuds's review or recommendations to be controlling. Rather, the deciding official must conduct a de novo examination of the matter.

Moreover, it would not be appropriate for the ombuds to act as an appellate forum when a complainant is dissatisfied with the results in a formal adjudicatory or administrative proceeding. Thus, an ombuds should not take up a specific issue that is pending in a legal forum without the concurrence of the parties and the presiding officer. It may, however, be fully appropriate for an ombuds to inquire into matters that are related to a controversy that is in litigation so long as they are not the subject of the suit.

Further, an ombuds should not address, nor should an entity expect or authorize an ombuds to address, any issue that is the subject of a collective bargaining agreement or that arises under labor or employment law. Even where an employee is not covered by a collective bargaining agreement, the involvement of an ombuds in matters that fall within the purview of labor or employment laws raises sensitive issues that may implicate the rights and liabilities of the parties under those laws, such as the issue of notice mentioned in Section F of the Standards. Accordingly, the Standards contemplate that an employer, in establishing an ombuds office, should consider its overall policies for maintaining compliance with those laws, and determine in that light whether to authorize the ombuds to address those matters. The entity should do so only if the ombuds office meets the three essential characteristics of Independence, Impartiality, and Confidentiality. This recommendation is in no way intended to suggest, however, that a policy of authorizing an ombuds to address labor or employment-related matters should be a suspect or disfavored practice. Involvement in such matters is a role typically performed by Organizational Ombuds, and the growing reliance on ombuds at institutions across the country is largely attributable to the broad satisfaction with ombuds' fulfillment of that role on the part of both management and the affected employees. Thus, the language in the Standards indicating that an employer should specifically authorize an ombuds to address labor or employment related matters does not require any detailed or ponderous recitals. Rather, it should be read as simply a particularized application of the generalized expectation in Section A of the Standards that the jurisdiction of an ombuds office should be identified in its charter.

Finally, an ombuds should not act in a manner inconsistent with the grant and limitations on the jurisdiction of the office when discharging the duties of the office of ombuds.

Section E. Removal from office

Entities which establish ombuds offices need to ensure their accountability. Therefore, the charter that establishes the office of ombuds should also provide for the discipline or removal of the ombuds for good cause by means of a fair procedure.

Section F. Notice

When meeting with an ombuds, people discuss allegations of unfairness, maladministration, abuse of power, and other sensitive subjects. They may fear personal, professional, or economic retaliation, loss of privacy, and loss of relationships. Faced with sexual or racial harassment, for example, many will quit, get sick, or suffer in silence. People often need help in developing ways to report or act so that these matters will be considered and resolved. Because an ombuds is intended to supplement, not replace, formal procedures, the Standards recognize that the person contacting the ombuds for assistance needs to understand the difference between working with an ombuds and seeking formal redress. It may be that the ombuds informs people coming to the ombuds office of the issues identified in the Standards; it may be that the ombuds office has a brochure or web page that explains the functioning of the office, working with the ombuds office, and the items listed in Section F(1); or, it may be that the entity itself includes similar information in a manual, other information provided to affected people, or as part of the charter for the ombuds office. But the standards recognize that responsibility needs to be allocated in a way that ensures the communication will actually be made in the relevant circumstances, so it places it at the point of contact with the individual: the ombuds office.

Communications must be protected if people are to be willing to visit and speak candidly with the ombuds. As noted above, some ombuds have confidentiality protected by law. Under these Standards, entities that establish an ombuds should authorize the ombuds to operate with confidentiality and independence, and an ombuds should inform anyone who contacts the ombuds offices, that the ombuds will not voluntarily disclose to anyone outside the ombuds office, including the entity in which the ombuds operates, any information the person provides in confidence or the person's identity, unless necessary to address the imminent risk of serious harm or with the person's express consent. The standards recognize, however, that in some limited circumstances an ombuds may be compelled by a court to divulge confidential information.

The standards are designed to make sure that a person coming to the ombuds will be aware that legal rights might well be at stake and that the person may have to take action beyond working with the ombuds to protect those rights. This is to ensure that the person approaching the ombuds office to redress some particular problem 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 may not constitute notice to the entity unless the ombuds contacts the entity.

Further, the ombuds should describe to visitors that working with the ombuds is an informal process that may well address the person's concern effectively, but doing so may not protect that person's legal right or indeed, those of the entity for whom the ombuds functions. Moreover, the ombuds needs to make clear that the ombuds is not serving as anyone's lawyer, representative or counselor — not for the complainant nor for the entity. Thus, the ombuds is not the person's lawyer or labor representative nor a human resources or social work counselor. So that the person is not lulled into putting off checking what legal rights may be affected, the Standards provide that the ombuds should inform the person that he or she may wish to consult a lawyer or other appropriate resource with respect to preserving and protecting those rights. The standards do not contemplate the ombuds providing any sort of legal advice as to what the legal rights and procedures are, only that they may exist and that the person coming to the office may wish to consult with a lawyer or other resource to determine them.

If an ombuds functions in accordance with these Standards by operating with confidentiality and independence, the details of what is told to the ombuds will not be told to anyone in the entity itself, and hence 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. Further, the Standards provide that the ombuds should not be deemed an agent of any person or entity, other than the Office of the Ombuds, for purposes of receiving notice of alleged violations. Rather, the ombuds would be deemed independent of the entity itself for these purposes. Thus, it would not be appropriate for the ombuds to accept notice on the entity's behalf with respect to any alleged grievance.

When an ombuds works to address an issue, he or she may need to work with those in the entity. An ombuds may therefore communicate with representatives of an entity which, under the standards, the ombuds has the discretion but not the requirement to do. Any such communication would be subject to the confidentiality provisions of Paragraph C(3). If the communication reveals the facts of a specific allegation and the identity of the complainant, then the entity should be regarded as having notice of the alleged violation. Similarly, if the ombuds communicates allegations of multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful then here too the entity should be regarded as having notice of the alleged violation since the multiple complainants makes up for the lack of specific identity. In these cases, the complainants should be informed that the ombuds has communicated their allegations to the entity so they may decide whether or not to take formal action. In both instances, the information provided would need to be sufficiently detailed that the entity could conduct its own investigation with respect to the allegations. Furthermore, the ombuds may provide enough information — even though confidentiality is maintained — that the entity in fact is on notice that a potential offense has occurred. The Standards provide, therefore, that when an ombuds communicates with representatives of the entity concerning an allegation by an individual, whether or not that communication constitutes “notice” to the entity is a question that should be determined by the facts of the communication.

Thus, the Standards draw a clear distinction between communications to an ombuds when the ombuds makes no further communication to the entity and those situations where the ombuds communicates with agents of the entity. In the former case, the Standards would provide that it is not appropriate to impute the communication to the entity in the form of notice since it has no way of learning what was communicated. But in the second instance, whether or not the entity has notice depends on the facts relayed and the applicable law.

Section G. Legislative Ombuds

A Legislative Ombuds is established by the legislature as part of the legislative branch and receives complaints from the general public or internally and addresses actions and failures to act of a government agency, official, public employee, or contractor. For Federal, state, and local governments that want to create a Legislative ombuds who would be authorized to address, investigate or inquire into administrative action and to criticize agencies, officials, and public

employees, the ABA's 1969 policy continue to serve as a model.¹² A Legislative Ombuds should be appointed by the legislative body or by the executive with confirmation by the legislative body.¹³ A Legislative Ombuds should be authorized to work to hold agencies within the jurisdiction of the office accountable to the public and to assist in legislative oversight of those agencies. A Legislative Ombuds may conduct inquiries or investigations and suggest modifications in policies or procedures. To ensure access to all pertinent facts, a Legislative Ombuds should be granted subpoena power for testimony and evidence relevant to an investigation. In addition, a Legislative Ombuds should be authorized to issue public reports and to advocate for change both within the entity and publicly.

Section H. Executive Ombuds

An Executive Ombuds may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions and failures to act of the entity, its officials, employees, and contractors. An Executive Ombuds may either work to hold the entity or specific programs accountable or work with officials to improve the performance of a program. In addition, an Executive Ombuds should be authorized to conduct investigations and inquiries. An Executive Ombuds should also be authorized to require the full cooperation of the program over which the ombuds has jurisdiction, including, where appropriate, subpoena power. It may not be appropriate, however, to authorize subpoena power where an Executive Ombuds has been established to receive complaints from regulated entities with regard to an agency's regulatory or enforcement activities. An Executive Ombuds should be authorized to issue reports on the results of the investigations and inquiries. Finally, if located in government, an Executive Ombuds should not have general jurisdiction over more than one agency, but may have jurisdiction over a subject matter that involves multiple agencies. For example, an Executive Ombuds may oversee a variety of governmental agencies having jurisdiction over child welfare, crime victims, or mental health issues.

Section I. Organizational Ombuds

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12. The twelve essential characteristics that were identified in the original ABA resolution continue to have vitality and remain ABA policy. They are: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority of the legislative body, such as two thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restrictions of civil service and classifications acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; and, (12) immunity of the ombudsman and his staff from civil liability on account of official action.
 - 13 This restates the 1969 ABA Resolution, which remains ABA policy, that a legislative ombuds should be "appoint[ed] by the legislative body or . . . by the executive with confirmation by the designated proportion of the legislative body, preferably more than a majority, such as two thirds."

An Organizational Ombuds ordinarily addresses problems presented by members, employees or contractors of an entity concerning its actions or policies. An Organizational Ombuds may undertake inquiries and advocate for modifications in policies or procedures.

Section J. Advocate Ombuds

The Advocate Ombuds may be located in either the public or private sectors, and like the Legislative and Organizational Ombuds, also evaluates claims objectively. However, unlike other ombuds, the Advocate Ombuds is authorized or required to advocate on behalf of individuals or groups found to be aggrieved. Because of the unique role, the Advocate Ombuds must have a basic understanding of the nature and role of advocacy. In addition, the Advocate Ombuds should provide information, advice, and assistance to members of the population identified in the law or publicly available written policy. Further, the Advocate Ombuds represents the interests of a designated population with respect to policies implemented or adopted by the establishing entity and government agencies. The notice requirements of Paragraph F do not supersede or change the advocacy responsibilities of an Advocate Ombuds.

CONCLUSION

Government, academia, and the private sector are answering demands for fairness and responsiveness by establishing ombuds. Ombuds receive complaints and questions concerning the administration of the establishing entity. However, the basic authorities of these persons called ombuds and the independence, impartiality, and confidentiality with which they operate vary markedly. An ombuds works for the resolution of a particular issue, and where necessary, makes recommendations for the improvement of the general administration of the entity. To be credible and effective, the office of the ombuds must be independent in structure, form, and appearance. The ombuds's structural independence is the foundation upon which the ombuds's impartiality is built. The ombuds must conduct investigations and inquiries in an impartial manner, free from initial bias and conflicts of interest. Confidentiality is a widely accepted characteristic of ombuds, which helps ombuds perform the functions of the office. Without these Standards, individuals may be reluctant to seek the ombuds's assistance because of fear of personal, professional, or economic retaliation, loss of privacy, and loss of relationships. This Resolution and the Standards for the Establishment and Operation of Ombuds Offices are appropriate now to ensure that ombuds can protect individual rights against the excesses of public and private bureaucracies. Practical and political considerations may require variations from these Standards, but it is urged that such variations be eliminated over time.

Respectfully submitted,

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INTERNATIONAL
OMBUDSMAN
ASSOCIATION

IOA CODE OF ETHICS

PREAMBLE

The IOA is dedicated to excellence in the practice of Ombudsman work. The IOA Code of Ethics provides a common set of professional ethical principles to which members adhere in their organizational Ombudsman practice.

Based on the traditions and values of Ombudsman practice, the Code of Ethics reflects a commitment to promote ethical conduct in the performance of the Ombudsman role and to maintain the integrity of the Ombudsman profession.

The Ombudsman shall be truthful and act with integrity, shall foster respect for all members of the organization he or she serves, and shall promote procedural fairness in the content and administration of those organizations' practices, processes, and policies.

ETHICAL PRINCIPLES

INDEPENDENCE

The Ombudsman is independent in structure, function, and appearance to the highest degree possible within the organization.

NEUTRALITY AND IMPARTIALITY

The Ombudsman, as a designated neutral, remains unaligned and impartial. The Ombudsman does not engage in any situation which could create a conflict of interest.

CONFIDENTIALITY

The Ombudsman holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm.

INFORMALITY

The Ombudsman, as an informal resource, does not participate in any formal adjudicative or administrative procedure related to concerns brought to his/her attention.



INTERNATIONAL OMBUDSMAN ASSOCIATION

IOA STANDARDS OF PRACTICE

PREAMBLE

The IOA Standards of Practice are based upon and derived from the ethical principles stated in the IOA Code of Ethics.

Each Ombudsman office should have an organizational Charter or Terms of Reference, approved by senior management, articulating the principles of the Ombudsman function in that organization and their consistency with the IOA Standards of Practice.

STANDARDS OF PRACTICE

INDEPENDENCE

- 1.1 The Ombudsman Office and the Ombudsman are independent from other organizational entities.
- 1.2 The Ombudsman holds no other position within the organization which might compromise independence.
- 1.3 The Ombudsman exercises sole discretion over whether or how to act regarding an individual's concern, a trend or concerns of multiple individuals over time. The Ombudsman may also initiate action on a concern identified through the Ombudsman's direct observation.
- 1.4 The Ombudsman has access to all information and all individuals in the organization, as permitted by law.
- 1.5 The Ombudsman has authority to select Ombudsman Office staff and manage Ombudsman Office budget and operations.

NEUTRALITY AND IMPARTIALITY

- 2.1 The Ombudsman is neutral, impartial, and unaligned.
- 2.2 The Ombudsman strives for impartiality, fairness and objectivity in the treatment of people and the consideration of issues. The Ombudsman advocates for fair and equitably administered processes and does not advocate on behalf of any individual within the organization.
- 2.3 The Ombudsman is a designated neutral reporting to the highest possible level of the organization and operating independent of ordinary line and staff structures. The Ombudsman should not report to nor be structurally affiliated with any compliance function of the organization.
- 2.4 The Ombudsman serves in no additional role within the organization which would compromise the Ombudsman's neutrality. The Ombudsman should not be aligned with any formal or informal associations within the organization in a way that might create actual or perceived conflicts of interest for the Ombudsman. The Ombudsman should have no personal interest or stake in, and incur no gain or loss from, the outcome of an issue.
- 2.5 The Ombudsman has a responsibility to consider the legitimate concerns and interests of all individuals affected by the matter under consideration.
- 2.6 The Ombudsman helps develop a range of responsible options to resolve problems and facilitate discussion to identify the best options.

CONFIDENTIALITY

- 3.1 The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following: The Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual's express permission, given in the course of informal discussions with the Ombudsman; the Ombudsman takes specific action related to an individual's issue only with the individual's express permission and only to the extent permitted, and even then at the sole discretion of the Ombudsman, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombudsman Office. The only exception to this privilege of confidentiality is where there appears to be 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.
- 3.2 Communications between the Ombudsman and others (made while the Ombudsman is serving in that capacity) are considered privileged. The privilege belongs to the Ombudsman and the Ombudsman Office, rather than to any party to an issue. Others cannot waive this privilege.
- 3.3 The Ombudsman does not testify in any formal process inside the organization and resists testifying in any formal process outside of the organization regarding a visitor's contact with the Ombudsman or confidential information communicated to the Ombudsman, even if given permission or requested to do so. The Ombudsman may, however, provide general, non-confidential information about the Ombudsman Office or the Ombudsman profession.
- 3.4 If the Ombudsman pursues an issue systemically (e.g., provides feedback on trends, issues, policies and practices) the Ombudsman does so in a way that safeguards the identity of individuals.
- 3.5 The Ombudsman keeps no records containing identifying information on behalf of the organization.
- 3.6 The Ombudsman maintains information (e.g., notes, phone messages, appointment calendars) in a secure location and manner, protected from inspection by others (including management), and has a consistent and standard practice for the destruction of such information.
- 3.7 The Ombudsman prepares any data and/or reports in a manner that protects confidentiality.
- 3.8 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 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. However, the ombudsman may refer individuals to the appropriate place where formal notice can be made.

INFORMALITY AND OTHER STANDARDS

- 4.1 The Ombudsman functions on an informal basis by such means as: listening, providing and receiving information, identifying and reframing issues, developing a range of responsible options, and – with permission and at Ombudsman discretion – engaging in informal third-party intervention. When possible, the Ombudsman helps people develop new ways to solve problems themselves.
- 4.2 The Ombudsman as an informal and off-the-record resource pursues resolution of concerns and looks into procedural irregularities and/or broader systemic problems when appropriate.
- 4.3 The Ombudsman does not make binding decisions, mandate policies, or formally adjudicate issues for the organization.
- 4.4 The Ombudsman supplements, but does not replace, any formal channels. Use of the Ombudsman Office is voluntary, and is not a required step in any grievance process or organizational policy.
- 4.5 The Ombudsman does not participate in any formal investigative or adjudicative procedures. Formal investigations should be conducted by others. When a formal investigation is requested, the Ombudsman refers individuals to the appropriate offices or individual.
- 4.6 The Ombudsman identifies trends, issues and concerns about policies and procedures, including potential future issues and concerns, without breaching confidentiality or anonymity, and provides recommendations for responsibly addressing them.
- 4.7 The Ombudsman acts in accordance with the IOA Code of Ethics and Standards of Practice, keeps professionally current by pursuing continuing education, and provides opportunities for staff to pursue professional training.
- 4.8 The Ombudsman endeavors to be worthy of the trust placed in the Ombudsman Office.

Frequently Asked Questions

1. What is an Organizational Ombudsman?

An Organizational Ombudsman is an individual who serves as a designated neutral within a specific organization and provides conflict resolution and problem-solving services to members of the organization (internal ombudsman) and/or for clients or customers of the organization (external ombudsman). There are Organizational Ombudsmen in all sectors (corporate, academic, governmental, non-governmental, and non-profit). Some may serve both internal and external constituencies.

An Organizational Ombudsman provides confidential, informal, independent and impartial assistance to individuals through dispute resolution and problem-solving methods such as conflict coaching, mediation, facilitation, and shuttle diplomacy. The Organizational Ombudsman responds to concerns and disputes brought forward by visitors to the office and may report trends, systemic problems, and organizational issues to high-level leaders and executives in a confidential manner. He or she does not advocate for individuals, groups or entities, but rather for the principles of fairness and equity. The Organizational Ombudsman does not play a role in formal processes, investigate problems brought to the office's attention, or represent any side in a dispute.

2. Why the word "Ombudsman"?

The word "Ombudsman" is Scandinavian and means "representative" or "proxy." The term is gender-neutral in origin and is used by the International Ombudsman Association (IOA) to communicate to the widest possible community. Variations of the term exist (i.e. ombuds, ombudsperson) and are common among those practicing in the ombudsman field.

3. Are there other kinds of Ombudsmen?

Yes.

Classical Ombudsmen

These Ombudsmen receive and investigate complaints and concerns regarding governmental policies and processes. The authority and mandate of Classical Ombudsmen are typically provided by statutory language. These Ombudsmen may be elected by constituents or appointed by a legislature or organization to monitor citizens' treatment under the law. Classical Ombudsmen generally have authority to conduct investigations and make recommendations for appropriate redress or policy change.

Advocate Ombudsmen

An Advocate Ombudsman may be located in either the public or private sector. He or she evaluates claims objectively but is authorized or required to advocate on behalf of individuals or groups found to be aggrieved. Advocate Ombudsmen are often found in organizations such as long-term care facilities or agencies, and organizations that work with juvenile offenders.

Hybrid Ombudsmen

Hybrid Ombudsmen are usually established by policy or terms of reference by both private and public sector organizations. They primarily use informal methods to resolve complaints but also have the power to investigate and the authority to publish annual and special reports.

Executive Ombudsmen

An Executive Ombudsman may be located in either the public or private sector and receives complaints concerning actions and failures to act of the organization, its officials, employees and contractors. An Executive Ombudsman may either work to hold the organization or one of its programs accountable or work with the organization's officials to improve the performance of a program.

Legislative Ombudsmen

A Legislative Ombudsman is a part of the legislative branch of a government entity and addresses issues raised by the general public or internally, usually concerning the actions or policies of government entities, individuals or contractors with respect to holding agencies accountable to the public.

Media Ombudsmen

The Media, or News, Ombudsman is familiar to many people. The News Ombudsman's primary objective is to promote transparency within his or her news organization. This Ombudsman can receive and investigate complaints about news reporting on behalf of members of the public and then recommend the most suitable course of action to resolve issues raised in the complaints. The News Ombudsman is an independent officer acting in the best interests of news consumers. He or she explains the roles and obligations of journalism to the public and acts as a mediator between the expectations of the public and the responsibilities of journalists. (For more information, see <http://newsombudsmen.org/> [<http://newsombudsmen.org/>].)

4. What is "IOA"?

IOA is the International Ombudsman Association. IOA's mission is to "support and advance the global Organizational Ombudsman profession and ensure that practitioners work to the highest professional standards." For more information, please go to www.ombudsassociation.org. There are currently more than 500 members in the IOA.

IOA has established a set of ethical principles for Organizational Ombudsman practice. These ethical principles are:

- Independence
- Impartiality
- Confidentiality
- Informality

IOA has also established Standards of Practice, which are based on the ethical principles. For more information on the IOA Code of Ethics or Standards of Practice, please go to: <http://www.ombudsassociation.org/standards> [<http://www.ombudsassociation.org/standards>] [[/About-Us/IOA-Standards-of-Practice-IOA-Best-Practices.aspx](http://www.ombudsassociation.org/standards)].

5. How does an Ombudsman differ from an Employee Relations/Human Resource professional?

Employee Relations and Human Resource (ER/HR) professionals assist managers and employees of the organization in establishing, following and applying Human Resource-related policies and procedures. They may conduct formal investigations, make or modify policies, and accept formal notice of a claim on behalf of the organization. As a result, the ER/HR professional cannot always extend complete confidentiality to individuals who come forward with issues. The ER/HR professional's role is not completely neutral because they are part of the management structure and they must directly represent and protect the interests of the organization.

An Ombudsman's function is to provide informal assistance in surfacing and resolving issues. While they can recommend that an organization consider establishing or revising policy, the Ombudsman plays no formal role in enforcing or deciding to implement policy. The Ombudsman does not conduct formal investigations. However, they do assist in identifying or creating options for resolution, including referrals to formal channels with investigatory powers. Because they are not part of the management structure of the organization, an Ombudsman does not accept notice for the organization and can extend near absolute confidentiality (except in the instance of imminent threat of serious harm, as jointly defined by the organization and the Ombudsman, at the discretion of the Ombudsman). The Ombudsman acts as a neutral party and does not advocate for the individual, groups or the organization. The only advocacy role is for fairness and equity.

The roles of the Ombudsman and the ER/HR professional are not competing roles, they are complementary. When the two functions work together in an effective partnership, they can yield tremendous benefit to an organization by maintaining an environment that encourages the use of multiple options to surface and resolve issues and to improve systemic policies and procedures.

6. How does an Organizational Ombudsman differ from a lawyer?

The Organizational Ombudsman's role is quite different from that of a lawyer, who is associated with more formal processes and the legal system. An Organizational Ombudsman maintains neutrality and impartiality when working with visitors, while a lawyer must advocate for his or her client and generally uses adversarial approaches to resolve issues. Though some Organizational Ombudsmen may have legal training and experience with issues of the law, Ombudsmen do not provide legal advice.

7. Is an Ombudsman the same as a mediator?

No. An Ombudsman works to manage conflict within an organization, whereas Mediation is a specific process used for conflict resolution. Many Ombudsmen are trained as mediators and often use mediation skills and techniques as one of many approaches to problem solving and conflict management. Some Ombudsmen write written agreements after parties have reached an agreement. However, in accordance with IOA Code of Ethics, the Organizational Ombudsman engages informally with visitors and will not retain written records for confidentiality reasons. If a written agreement is reached, others in the organization, such as the HR department, will retain that document in a file.

8. How can an Organizational Ombudsman contribute to an organization?

An Organizational Ombudsman can:

1. "Humanize" an organization by providing constituents with safe and informal opportunities to be heard; assistance in identifying options for managing or resolving concerns; facilitation of communication between or among conflicting parties; conflict resolution skills training; and upward feedback to management about trends in conflicts, hot-button issues or other matters of import to organizational leaders (see Question 9 for more).
2. Help organizations reduce costs related to conflict by resolving disputes informally and helping to avoid the waste of resources, time and energy of parties in formal grievance processes and litigation.
3. Help keep top management abreast of new and changing trends within the organizational community. (See Question 9 for more).
4. Help executives and managers avoid spending excessive time attempting to resolve conflicts.
5. Refer individuals toward appropriate formal processes and resources within the organization.

9. Why should the leader(s) of an organization listen to an Ombudsman?

The Ombudsman is interested in being helpful to the leader, in the same way that the Ombudsman is helpful to others within the organization. An Ombudsman's orientation is toward "fair process" so he or she is likely to be sensitive to the interests and concerns of a wide range of people. An Ombudsman is likely to have a different perspective than most others to whom organizational leaders listen. He or she is likely to be familiar with multiple points of view regarding any given situation and be able to appropriately articulate the concerns of those whose voices often go unheard. The Ombudsman can also:

- Brief the leader on issues or 'hotspots' of which he or she ought to be aware, and the possible implications of those issues.
- Share what has been done so far to address the issues, taking care to maintain confidentiality.
- Identify serious potential problems that may be unforeseen or downplayed by management or employees.
- Create an opportunity for the executive to talk about things they might not be able to talk to others about.

10. Is the Organizational Ombudsman field growing?

The modern Organizational Ombudsman role began to take shape in the 1960s and 1970s. In the decades that have followed, Organizational Ombudsman offices have been established within hundreds of organizations worldwide and in every sector of society. There are various reasons for that growth, including federal legislation in the United States promoting alternative dispute resolution; legal settlements in the private sector that required the creation of ombudsman offices; and a growing recognition of the need for alternative channels for communication within organizations.

11. Would an Organizational Ombudsman work with a union to help resolve issues?

The extent to which an Ombudsman would work with a union depends in large part upon the nature of the issue. Most Ombudsmen refrain from significant involvement in issues that are specifically covered by a union contract and for which a specific, formal resolution process is mandated by the contract. However, an Ombudsman can often be a very useful informal resource for union leadership or union employees for issues that are not governed by the contract.

12. What is a charter or Terms of Reference?

The charter or Terms of Reference of an Organizational Ombudsman office is the document that generally defines the role of the Ombudsman and scope of his or her duties.

13. How does someone become an Organizational Ombudsman?

There is currently no established path to becoming an Organizational Ombudsman. A specific career background or formal academic degree is less important than one's demonstration of skills, including non-judgmental listening; the ability to communicate successfully with a diverse range of people; courage to speak up; discretion; creativity in

developing options; and problem solving and analytical ability. That is why, within the ranks of IOA, you will find Ombudsmen from all disciplines, ranging from the sciences to academia, management, human resources, law, engineering, accounting, consulting, and everything in between.

Many new Organizational Ombudsmen assume their roles after holding other jobs within their organizations. Often, they are tapped to become the Ombudsman because they have established a widely known reputation for integrity, confidentiality, and knowledge of organizational processes across functions. Their specialized experience within their organizations can make them even more effective as Ombudsmen because they have a deeper understanding and awareness of the specific issues that affect people and organizations in these fields.

Ombudsmen also may be hired from outside the organization after having served as an Ombudsman in other organizations.

Occasionally, when an organization does not or cannot appoint an Ombudsman from within, they may turn to Ombudsmen who work independently and contract their services. These Ombudsmen have typically established their professional credibility through prior experience in organizations, success with clients, and formal conflict resolution training.

Formal training can be invaluable in preparing an individual for an Ombudsman role. The IOA offers a series of professional training courses that include skills training as well as practical instruction in establishing and maintaining an Organizational Ombudsman office. Formal training in mediation and/or other conflict resolution processes, such as facilitation and conflict coaching, is also very valuable. For more information on IOA training opportunities, please see: <http://www.ombudsassociation.org/conferences-professional-development> [/Conferences-Professional-Development.aspx]

14. Do individuals need a license to be an Ombudsman?

There is no licensure requirement at this time. The Organizational Ombudsman field is still relatively new in the U.S. so people are selected for the position from a variety of educational and professional backgrounds (see Question 12). In 2009, the International Ombudsman Association launched a certification credential called the Certified Organizational Ombudsman Practitioner (see <http://www.ombudsassociation.org/boc/> [/Certification.aspx] for more information). However, certification is currently not required to serve as an Ombudsman.

15. How do I become a member of IOA?

For more information on IOA and how to become a member visit:
<http://www.ombudsassociation.org/membership/join-ia> [/Join-IOA.aspx]

16. How can I get involved in IOA?

There are a number of ways in which you can get involved in the International Ombudsman Association. The organization sponsors a number of excellent training sessions and meetings each year in addition to an annual conference. For more information on these professional development events, please visit:
<http://www.ombudsassociation.org/conferences-professional-development> [/Conferences-Professional-Development.aspx]

The work of IOA is largely completed by a number of busy and effective committees made up of volunteers. For a complete listing of the IOA committees and their functions, please visit: [The Standing Committees Page](#) [/About-Us/IOA-Leadership-and-Organization/Standing-Committees.aspx]

Additional resources:

Mary Rowe, MIT. Selected Ombudsman publications: <http://web.mit.edu/ombud/publications/index.html>
[<http://web.mit.edu/ombud/publications/index.html>]

United States General Accounting Office, 2001. "The Role of Ombudsmen in Dispute Resolution."
<http://www.gao.gov/new.items/d01466.pdf> [<http://www.gao.gov/new.items/d01466.pdf>]

Gadlin, H., and Levine, S., 2007. "Stranger in a Strange World: The Ombudsman in the Federal Government." [/IOA_Main/media/SiteFiles/OmbudsInFederalGovt-ACResolution.pdf] *ACResolution*, Association for Conflict Resolution.



GOVERNMENTAL OMBUDSMAN STANDARDS

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United States Ombudsman Association
Governmental Ombudsman Standards
October 2003

Drafted by the Standards Committee of the
United States Ombudsman Association:

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Approved October 14, 2003 by the
United States Ombudsman Association's Board of Directors

For more information on the United States Ombudsman Association,
please visit www.usombudsman.org

PREFATORY NOTE

At the 2001 annual United States Ombudsman Association (USOA) conference, the creation of standards for the establishment and functioning of an Ombudsman office emerged as a top priority for the membership. USOA representatives had worked on a steering committee of the American Bar Association (ABA) to create what the ABA adopted in August 2001 as Standards for the Establishment and Operation of Ombuds Offices. The 2001 ABA standards modify and expand on the ABA's 1969 Resolution (as amended in 1971) regarding the essential characteristics of an Ombudsman. However, the USOA did not support the ABA standards in their entirety. The USOA then decided to establish its own standards for Governmental Ombudsman offices.

In early 2002, the USOA Board of Directors created a three-member Standards Committee made-up of a long-time "classical" Ombudsman (Angrick), an executive Ombudsman (Adcock), and a municipal Ombudsman located in the city auditor's office (Chiao). The committee was charged with developing standards which could be used as a means to educate and provide advice or guidance to legislators, state officials and the public about the roles and core principles of Governmental Ombudsman offices.

After initial conference calls and a review of relevant materials including "Essential Characteristics of a Classical Ombudsman" by Dean M. Gottehrer and Michael Hostina, the USOA's Model Ombudsman Act, and the General Accounting Office's Government Auditing Standards "Yellow Book," the committee convened in July 2002 in Des Moines, Iowa for two days. The committee balanced the goal of providing a standard measure of what a Governmental Ombudsman should be with practical ideas that would be useful to individuals in offices that are not general jurisdiction in scope or established in the legislative branch.

The result was a first draft of the Standards, submitted to the USOA Board in August and to the USOA membership in October 2002 at the association's annual conference. Participants at the conference and other members made helpful suggestions that were incorporated into a second draft. We also received a comment that Ombudsman offices in government agencies that address solely internal matters along the lines of an Organizational Ombuds model were not included under what we labeled a "Governmental Ombudsman." Footnote 2 was added to the final draft to address this concern.

The second draft of the Standards was presented to the USOA Board and membership at the 2003 annual conference. After incorporating minor changes to the draft presented at the conference, the USOA Board approved the Standards in the present form. We expect that this document may be used as a starting point for other projects, such as a "best practices" manual or a handbook for establishing a Governmental Ombudsman office. We hope that these Standards will be useful to individuals and organizational entities interested in how a Governmental Ombudsman can serve the public and improve administrative efficiency and fairness.

United States Ombudsman Association Governmental Ombudsman Standards

I. PREAMBLE

The title "Ombudsman" has gained popularity in both the public and private sectors to describe various types of problem-solvers.¹ The United States Ombudsman Association (USOA) promotes a model that defines a Governmental Ombudsman (hereinafter Ombudsman) as:

an independent, impartial public official with authority and responsibility to receive, investigate or informally address complaints about government actions, and, when appropriate, make findings and recommendations, and publish reports.²

The standards in this document, which has been produced by the USOA, lay out basic principles, guidelines, and best practices for Ombudsman offices. Existing Ombudsman offices can evaluate how they conform to these guidelines with the goal of working towards the best practices described below. Government policy makers may use them to establish new Ombudsman offices. The general public can use this document to understand more fully the role of the Ombudsman.

These standards are divided into the following four categories: Independence, Impartiality, Confidentiality, and Credible Review Process.

A. Independence

The Ombudsman's office, in structure, function and appearance, should be free from outside control or influence. This standard enables the Ombudsman to function as an impartial and critical entity that reports findings and makes recommendations based solely on a review of facts and law, in the light of reason and fairness.

B. Impartiality

The Ombudsman should receive and review each complaint in an objective and fair manner, free from bias, and treat all parties without favor or prejudice. This standard instills confidence in the public and agencies that complaints will receive a fair review, and encourages all parties to accept the Ombudsman's findings and recommendations.

¹ Ombudsman is a gender-neutral term, used throughout the world by women and men who hold the office. However, some prefer the terms Ombuds or Ombudsperson.

² There are a number of Ombudsman offices, primarily in federal agencies and public universities, that address solely internal matters along the lines of an "Organizational Ombuds" model, and although governmental, may not see themselves as being included in this definition.

C. Confidentiality

The Ombudsman should have the privilege and discretion to keep confidential or release any information related to a complaint or investigation. This standard balances the need to protect sensitive information so that a complainant can come forward, and witnesses and subjects can speak openly, with the need to disclose information as a part of an investigation or public report.

D. Credible Review Process

The Ombudsman should perform his or her responsibilities in a manner that engenders respect and confidence and be accessible to all potential complainants. This standard is necessary for the work of the Ombudsman to have value and to be accepted by all parties to a complaint.

II. STANDARDS

A. Independence

Independence is a core defining principle of an effective and credible Ombudsman. The Ombudsman should be independent to the greatest degree practicable. Authoritativeness and permanency are two criteria by which to measure this standard.

The following are indicators of independence, the absence of any one of which may create functional problems:

1. The Ombudsman's authority should be established by law.
 - a) Establishment of the Ombudsman in an organic legal document such as a constitution or a charter provides the ultimate stature and protection. Creation by legislation through statute or ordinance gives the ombudsman a sturdy, enduring existence.
 - b) A legislative resolution would indicate a lesser degree of authority and permanence.
 - c) Creation by administrative fiat such as an executive order, administrative rule, or formal policy contains potential temporal limitations subject to changes in the mandating authority's term or whim.
 - d) When established to the greatest degree practicable, the existence, authority, and power of the Ombudsman are less apt to be challenged, compromised, or diminished.
2. The Ombudsman should be appointed by an entity not subject to the Ombudsman's jurisdiction and which does not have operational or administrative authority over the program(s) or agency(ies) that are subject to the Ombudsman's jurisdiction.
 - a) Appointment by a legislative body is the preferred means to ensure independence.
 - b) An Ombudsman who is appointed by an executive should seek operational and administrative independence from the entity over which the Ombudsman has jurisdiction.
 - c) The less independent Ombudsman will be suspect as unable to conduct a thorough and critical investigation by various clients from the outset; and vulnerable to retaliation or lasting animosity if aggressive inquiry is, indeed, carried out.

3. Prior to expiration of term, the Ombudsman may be removed from office for cause only.
 - a) Appointment of the Ombudsman for a defined term of office helps to insure the Ombudsman's ability to conduct investigations and make reports without external pressure, internal hesitancy, or timidity.
 - b) A fixed-term with the potential for reappointment allows an appointing authority to reappoint an effective Ombudsman and replace an ineffective Ombudsman.
 - c) Removal from office in retribution for carrying out an unpopular investigation or making a candid and critical report is often a real or indirect threat to the Ombudsman's independence. Accordingly, both the appointment and removal of the Ombudsman should be defined, transparent, and for cause. These indicators reduce the Ombudsman's vulnerability to retaliatory or political retribution.
4. The Ombudsman should be afforded sufficient compensation, status, budget, resources, and staff.
 - a) Affording the Ombudsman sufficient compensation, status, budget, resources, and staff gives indication that the office has meaning and importance.
 - b) Best practices may link the Ombudsman's compensation to that of other high level public positions such as senior judges.
 - c) Ideally, the Ombudsman's budget and resources should be sufficient to perform the duties prescribed by the establishing authority. Best practice would limit any reduction in resources to only general reductions and limitations when the legislative branch or chief executive self impose across-the-board limitations on themselves.
 - d) When the Ombudsman is not afforded appropriate status and compensation, the position may only attract and be filled by less experienced individuals who may not be as effective in carrying out the Ombudsman's duties. When the Ombudsman's budget, resources, and staff are insufficient to allow the office to meet its responsibilities, the office cannot operate in accordance with best practice.
5. The Ombudsman should retain sole authority to select, direct, and discharge staff.
 - a) Having the sole authority to select, direct, and discharge staff enhances the Ombudsman's independence. Restrictions or expectations placed upon staff hiring, assignment, evaluation, discipline, and termination could interfere with the Ombudsman's ability to conduct thorough, impartial, and critical investigations.
 - b) While it is preferable that the Ombudsman enjoy the general legislative prerogative of "employment at will", it is essential the Ombudsman not be required to hire the favorite of another governmental official, ignore performance shortcomings of a partisan protected staff member, or share supervisory responsibility with someone outside the office.
 - c) Some Ombudsman offices allow for employees to belong to unions or protect them under civil service or merit employment provisions, but even these protections could inhibit the Ombudsman's performance and duties if they inappropriately interfere with what an Ombudsman investigates and the findings and conclusions the Ombudsman makes.
 - d) The Ombudsman should have access to independent legal advice, either in-house or on a contract basis. It would compromise the Ombudsman's independence to be forced to rely on the attorneys representing the governmental entity in the event of a legal controversy.

- e) The Ombudsman should be empowered to contract with outside experts, such as physicians, when useful or necessary to conduct a thorough investigation.
6. The Ombudsman should have discretion to accept or reject matters for investigation, including the ability to initiate on the Ombudsman's own motion, subject only to the legally defined limits of jurisdiction.
 - a) Legislated policy parameters can give guidance to the Ombudsman in applying this discretion.
 - b) However, the specific indicators should be general and flexible in nature so that the Ombudsman has freedom to select, prioritize, and emphasize the complaints accepted and investigations undertaken.
 7. The Ombudsman should have discretion to prescribe how complaints are to be made, received, and acted upon, including the scope and manner of investigations.
 - a) Independence is enhanced when the Ombudsman has discretion to prescribe how complaints are to be made, received, and acted upon, including the scope and manner of investigations.
 - b) The Ombudsman should not have to receive complaints through an intermediary.
 8. The Ombudsman should have discretion to determine which conclusions and recommendations are reached, and freedom to determine what to publish.
 - a) Inhibiting the Ombudsman by requiring a structured review procedure before speaking weakens the credibility and integrity of the office in both fact and appearance.
 - b) The Ombudsman should not be required to submit proposed findings, conclusions, recommendations, and reports to an editorial or review entity, including the appointing authority, which would weaken the force of them. Requiring the Ombudsman to inform a subject agency or official being criticized of his or her findings or expecting the Ombudsman to consult with the subject of a recommendation for comments on accuracy before public release is not the kind of practice being cautioned against. Those are fair and equitable process issues that when properly followed do not detract from the performance of the Ombudsman.
 - c) The Ombudsman's office should be physically and organizationally separated from those entities subject to an Ombudsman's jurisdiction.
 - d) Space should not be shared because to do so compromises the confidentiality of complainants and witnesses coming into the office. It also diminishes the protection afforded to the Ombudsman's files, and may reduce the confidence complainants, witnesses, and other stakeholders have in the ability of the Ombudsman to fulfill the duties and responsibilities of the office.
 - e) Similarly, the Ombudsman's communications and record keeping should be separate from and independent of those services under the Ombudsman's jurisdiction. When absolute independence cannot be achieved, sufficient separation, insulation, or firewalls should be sought and fundamental elements such as locking file cabinets, password protected email systems, keyed doors to enclosed offices, internally controlled surveillance systems, and confidentiality agreements with service providers, vendors and consultants should be ensured.

9. The Ombudsman should be immune from discovery and prosecution for claims arising out of the lawful performance of duty.
 - a) This principle, its indicators and best practices are based upon the concept that the Ombudsman represents an alternative to the formal administrative and legal procedures for resolving complaints. It is coupled with the limiting expectation that the Ombudsman should not be able to overturn or modify an action of a subject agency or officer.
 - b) Indicators of best practice include statutory based protections and immunities recognized in court and the legal community.
 - c) To a much lesser extent, administrative policy and practice may attempt to approximate this ideal protection.
 - d) Without this principle and effective indicators of best practice, the Ombudsman cannot effectively and responsibly offer and maintain the core principle of confidentiality.
10. The findings and recommendations of the Ombudsman are not appealable to any other authority.
 - a) If the Ombudsman's findings and recommendations can be appealed to another authority, then the Ombudsman's role is reduced to just another step in a series of administrative procedures.
 - b) This ideal principle sets the Ombudsman apart from routine administrative process and supports the Ombudsman's role as an impartial critic and opinion giver.
 - c) Because the Ombudsman ideally does not affect substantive rights and should not be able to impose binding decisions, the Ombudsman's findings and recommendations should stand alone and not be subject to modification or alteration upon appeal to some other body or authority.
 - d) The best practice is for this protection to be stated in the establishing document, ideally constitution, charter, or legislation.
 - e) Lesser indicators would find the protection in policy or commonly accepted practice.

B. Impartiality

Impartiality is at the heart of the Ombudsman concept. Both the complainant and the agency are able to place confidence in the Ombudsman knowing that the Ombudsman has no vested interest in the outcome of a complaint investigation. If the Ombudsman is not perceived to be impartial by the complainant, the complainant will not seek the Ombudsman's assistance. If the Ombudsman is not perceived to be impartial by the agency, the agency will be resistant to the investigation and unlikely to accept the Ombudsman's criticism and recommendations. It is not sufficient for the Ombudsman to avoid actual conflict of interest but also to avoid the appearance of such a conflict to instill the utmost confidence. Members of staff acting under delegated power should also be subject to the same high standards.

The following are indicators of impartiality, the absence of any one of which may create problems of credibility and effectiveness:

1. The Ombudsman refrains from partisan and political activities, and employment and business relationships and transactions that may create a conflict of interest, or may create the appearance of a conflict of interest.

- a) The Ombudsman as citizen may, of course, exercise his or her right to vote in partisan elections. However, because the Ombudsman works within a political environment, it is essential not to be perceived as favoring one political person or group over another. This limits the ability of the Ombudsman to speak publicly in favor of or against any candidate for elective or appointive office, make or solicit contributions to political candidates or parties, put partisan signs on vehicles or in yards, or other similar political activities.
 - b) It is equally important that the Ombudsman not enter into any business or employment relationship that might, rightly or wrongly, cause others to question the Ombudsman's ability to be impartial and fair.
2. The Ombudsman holds no other public office that has the potential of creating a conflict of interest or the appearance of a conflict of interest.
- a) It may be possible for the Ombudsman to hold a non-partisan public office. But, great care must be taken to assure that there is no potential for a conflict of interest.
 - b) The Ombudsman must not seek or accept a public office over which the Ombudsman has jurisdiction, or an office that may have a contractual or other relationship with an agency or agencies over which the Ombudsman has jurisdiction.
3. The Ombudsman absents himself or herself from involvement in complaints where a conflict of interest or the appearance of a conflict of interest may exist.
- a) If the Ombudsman does receive a complaint with which there is a potential for a conflict of interest or the appearance of a conflict of interest, the Ombudsman must remove himself or herself completely from that complaint and turn it over to a staff member or other party for appropriate action.
 - b) It must be understood that the Ombudsman will not interfere in any investigation or the production or publication of recommendations.
4. The Ombudsman does not allow personal views regarding the subject matter or the parties involved to affect decisions as to what complaints to accept or how they are investigated.
- a) It would be unrealistic to think that an Ombudsman would never have personal values and opinions that may relate to the subject of a complaint. It is imperative, however, that the Ombudsman be able to set aside his or her personal views and approach the complaint in an impartial, unbiased manner.
 - b) It is important that the Ombudsman be aware of his or her personal views and guard against letting those views influence whether or not a complaint will be accepted and how it will be treated.
5. The Ombudsman is not predisposed as an advocate for the complainant nor an apologist for the government, however the Ombudsman may, based on investigation, support the government's actions or advocate for the recommended changes.
- a) The Ombudsman has no client. The Ombudsman is not the complainant's representative, and is not the protector of the public agency.
 - b) The Ombudsman's primary interest is in assuring that laws, rules, and policies are adhered to, and that the outcome is fair.

- c) While the Ombudsman may advocate changes that benefit a complainant, it is the objective of the Ombudsman to improve government performance.

C. Confidentiality

Confidentiality is an Ombudsman's tool. It may be offered, at the Ombudsman's discretion, to complainants, agency employees, and witnesses when such an offer is necessary to elicit needed information or to protect the source of needed information. The Ombudsman must take care, however, that more is not offered than can be delivered. Each Ombudsman must carefully review the legislation establishing his or her office to determine what, if any, confidentiality protections are afforded. These may vary greatly from jurisdiction to jurisdiction. An Ombudsman located in the legislative branch may have more protections than one located in the executive branch. An Ombudsman established by law may have more protections than one established by executive order. An Ombudsman created by state law or local ordinance also needs to determine if the protections the Ombudsman has within his or her political jurisdiction would be honored or sustained by federal courts.

The following are indicators of the appropriate use of the Ombudsman's discretion:

1. The Ombudsman should not reveal information when confidentiality has been promised.
 - a) In most situations, it should be the Ombudsman who determines whether or not confidentiality will be offered to a complainant, agency employee, or witness.
 - b) The Ombudsman may choose not to raise the issue, but if the Ombudsman, the complainant, or a party from whom information is being sought raises the issue, the Ombudsman has a responsibility to advise that person as to any limitations to confidentiality that may apply.
 - c) Once confidentiality has been promised, and its known limits explained, the Ombudsman must honor the promise within those limits.
2. The Ombudsman should not release information where confidentiality is required by law, or where unnecessary harm would result.
 - a) During the course of an investigation, the Ombudsman may come into possession of information that federal and/or state law prohibits being made public.
 - b) The Ombudsman must treat information with the same degree of confidentiality as would be legally required of the agency being investigated.
 - c) Further, if the Ombudsman has reason to believe that release of information, though legal, would result in unnecessary harm to one or more persons, the Ombudsman should protect that information and/or its source.
3. The Ombudsman should not be compelled to testify or to release records.
 - a) In the establishment of the Ombudsman's office, the Ombudsman should seek statutory protection from being compelled to testify in a legal or administrative proceeding, or from having to release information gathered during the course of an investigation.
 - b) A promise of confidentiality would be of limited value if the Ombudsman could be required to testify in a proceeding or to release information as a part of a discovery process.

- c) The inability of the Ombudsman to maintain control over the information gathered during an investigation may well have the effect of discouraging cooperation and openness on the part of complainants, agency employees, and/or witnesses.

D. Credible Review Process

The concept of a credible review process encompasses the authority granted to the Ombudsman and the Ombudsman's responsibilities towards the complainant, the subject of a complaint, the appointing entity, and the public. If the process the Ombudsman uses to investigate complaints is flawed, the resulting recommendations are more likely to be ignored.

The following are powers and responsibilities inherent in a credible review process:

1. The Ombudsman should be qualified to analyze issues and matters of law, administration, and policy.
 - a) Describing what qualities are necessary for an Ombudsman is difficult because there are many intangible factors that go into making an Ombudsman a person whose judgment and recommendations will be respected.
 - b) In addition to being independent and impartial, the basic qualification for an Ombudsman is an ability to analyze issues and matters of law, administration, and policy.
 - c) In some positions, expertise, knowledge, or experience in a particular subject matter may be useful. This would be more true for a limited jurisdiction office set up to monitor an area like corrections, for example, than for someone who investigates complaints about a wide array of government activities.
 - d) Where there are reasons for specialized qualifications, they should be detailed in the authorizing law.
 - e) Where the Ombudsman also functions as the manager of others, he or she should also possess adequate managerial skills--the ability to hire and supervise qualified staff.
2. The Ombudsman should have the discretion to act informally to resolve a complaint.
 - a) Conducting investigations is the primary function of an Ombudsman, but not all inquiries and complaints are appropriate for formal investigation.
 - b) Other options include providing information and referrals, expediting individual matters, coaching people to take action on their own behalf, mediating, or providing other assistance.
 - c) The choice of the right approach to use should remain with the Ombudsman.
 - d) The number of cases formally investigated is usually a small proportion of the number of contacts. Not all complaints require full investigation to resolve and most likely, there are not enough resources to investigate every complaint. However, if most members of the public are turned away without any assistance, confidence in the value of bringing a matter to the Ombudsman will be lost.
3. The Ombudsman should have the authority to delegate power to a deputy or acting Ombudsman.
 - a) The powers and duties of the Ombudsman should be delegable during periods when the Ombudsman is unavailable.

- b) The only powers not delegable should be the power to delegate and the reporting responsibilities.
 - c) This authority to delegate and its limits serves to maintain confidence that someone will always be there to fill the role of Ombudsman and that the Ombudsman still remains ultimately responsible for the office and the reports that are issued.
4. The Ombudsman provides for sufficient access for any person to make a complaint known to the Ombudsman directly without a fee.
- a) An Ombudsman is of little value if not visible and readily accessible.
 - b) The Ombudsman is responsible for making public the existence and role of the Ombudsman.
 - c) The Ombudsman must assure that complainants have direct and timely access to the Ombudsman and that there be no barriers, such as fees, that may discourage a complainant from making their complaint known.
 - d) The Ombudsman should make provisions to accept complaints from those with access difficulties, for example those with disabilities or for whom English is not their first language.
5. The Ombudsman's jurisdiction should be clearly defined and the Ombudsman should not act outside of that jurisdiction.
- a) The government agency or agencies whose acts are subject to review by the Ombudsman should be described in the authorizing statute (or other document).
 - b) Limits on the Ombudsman's jurisdiction should be made clear to the public.
 - c) Legislation or regulations to create an Ombudsman to provide services in a more limited area should also clearly define the entities and individuals covered in the Ombudsman's jurisdiction and exceptions that apply in the particular situation.
 - d) An Ombudsman should not have jurisdiction over those officials who have supervisory or funding authority over the Ombudsman.
 - e) Once established, an Ombudsman should not act outside jurisdictional limits.
6. The grounds for Ombudsman review should be stated broadly.
- a) An Ombudsman's review of administrative acts should not be limited narrowly to whether or not the act was legal or consistent with policy.
 - b) The standard list of appropriate subjects of review includes administrative acts which fall into the following categories: contrary to law or regulation, based on mistaken facts or irrelevant considerations, unsupported by an adequate statement of reasons, performed in an inefficient manner, unreasonable, unfair, or otherwise erroneous even though in accordance with law.
 - c) The Ombudsman should be granted authority to review an administrative act from the broadest perspective with the goal of improving government.
 - d) An Ombudsman should be empowered to act in pending matters, as well as after a final action has been taken by an administrative agency, provided the Ombudsman is not asked to act in anticipation of an action on an assumption that it will be wrong.

- e) The Ombudsman should be empowered to investigate complaints from any sources and to initiate an investigation into a matter when there has not been a complaint from the public.
 - f) The Ombudsman should retain discretion over which complaints to accept or deny within the Ombudsman's jurisdiction.
7. The Ombudsman should have sufficient powers to conduct thorough investigations.
- a) Government entities and individual government employees that are the subjects of complaints may be resistant to cooperating in investigations. Therefore, the Ombudsman's authority to investigate must be clearly established.
 - b) Agency staff should be required to cooperate with the Ombudsman during the conduct of an investigation. The power to issue subpoenas and to take sworn testimony makes enforcement of such a requirement possible.
 - c) Supervisors should not interfere with an Ombudsman's ability to talk directly to staff.
 - d) An Ombudsman can allow a union representative to be present during an interview when an employee requests. But information obtained at such an interview should come from the employee directly.
 - e) The authority to examine government premises, documents and files, including electronic records, is crucial to the Ombudsman's role as an investigator.
 - f) The Ombudsman should be authorized to enter agency premises and inspect without notice.
 - g) The Ombudsman should have unlimited access to records and proceedings held by jurisdictional agencies, including records that are considered confidential or not otherwise open to the public.
8. The Ombudsman should have the authority and responsibility to publish findings, recommendations, and reports.
- a) It can be seen as a duty of the Ombudsman to make the public aware of investigation results to promote accountability.
 - b) If the results of an investigation and an Ombudsman's recommendations cannot be publicized, the function of the Ombudsman as a watchdog for the public interest is frustrated.
 - c) Identifying information of complainants and witnesses can be changed to protect confidentiality.
9. The subjects of the Ombudsman's reports should be consulted and afforded the opportunity to respond to the report prior to its being published.
- a) Prior to issuing a public report, the Ombudsman should give the agency and any of its officers or employees about whom the report is critical an opportunity to respond to the findings and recommendations.
 - b) It should be made clear that no one is authorized to release or publicize the Ombudsman's preliminary recommendations that have been shared for this purpose on a confidential draft basis.

- c) Once the Ombudsman has reviewed the agency's response, it is for the Ombudsman to release the final version.
 - d) The Ombudsman is sometimes specifically given the responsibility to publish the agency's response along with the Ombudsman's report.
10. The process for how complaints are to be made, received, and acted upon, including the scope and manner of investigations, should be defined and transparent.
- a) The process by which the Ombudsman accepts and acts upon complaints should be clearly defined for the public and the investigated agencies.
 - b) If there are specific requirements for the form complaints must be in to be accepted, or other intake rules, they should be made clear.
 - c) Guidelines for how the Ombudsman will proceed with investigations or dismiss complaints should be available to interested parties.
 - d) Clearly stated standard procedures let parties know what to expect from an Ombudsman's review and establish benchmarks to evaluate whether the office operates as it is intended.
11. The Ombudsman should state the reason a complaint is not accepted for investigation.
- a) The Ombudsman should provide an explanation to a complainant when a case is not accepted for investigation.
 - b) Examples of the reasons why cases are not accepted can include the following: the case is outside the Ombudsman's jurisdiction, the complainant has other available remedies, the complaint is made in bad faith or is vexatious, the complaint is trivial, the complainant will not provide information necessary to conduct an investigation, the office lacks sufficient resources, or the issue has been previously investigated.
12. The Ombudsman should keep both complainants and subjects apprised of the status of the investigation.
- a) Status updates should include information about whether a case will be accepted for investigation and the progress of the review.
 - b) The Ombudsman should advise the complainant and subject regarding the closing of any complaint and the reasons therefore if the complaint does not result in a published report.
 - c) Since many complaints to an Ombudsman will have to do with communication breakdowns between the government and members of the public, the Ombudsman should adhere to and model good communication.
13. The Ombudsman should complete investigations in a timely manner.
- a) Timely completion of investigations is important to the credibility of an Ombudsman's office.
 - b) Although an Ombudsman's investigation generally occurs after an administrative decision has been made, at the end of a process, the recommendations may lose their value if there is too long a delay.
 - c) Since the Ombudsman seeks to uphold standards of government efficiency, the office should be efficient itself.

14. The Ombudsman should, at least annually, report generally on the activities of the office to the Ombudsman's appointing authority, other policy makers, and the public.
- a) There should be an obligation to inform the appointing authority and the public of the activities of the Ombudsman.
 - b) Most offices issue a report annually that describes the work of the previous year: the number of inquiries, the number of cases resolved informally, cases investigated and investigations pending, recommendations made, and whether or not they were followed.
15. The Ombudsman should, in practice and appearance, uphold the highest standards of public service.
- a) As an advocate for good government, the Ombudsman must exemplify the standards used to measure the government agencies under his or her jurisdiction.
 - b) Complainants will come forward with complaints and suggestions and agencies will follow recommendations when they see that the Ombudsman can be trusted to behave appropriately.





MODEL OMBUDSMAN ACT FOR STATE GOVERNMENTS

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United States Ombudsman Association
Model Ombudsman Act for State Governments
February 1997

Drafted by
Model Ombudsman Act Committee of the
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Approved on February 11, 1997 by the
United States Ombudsman Association's Board of Directors

Editor's Note:

The February 1997 document was reformatted in April 2004.
No substantive changes were made to the language of the original document.

For more information on the United States Ombudsman Association,
please visit www.usombudsman.org

PREFATORY NOTE

In the Fall of 1994, the board of directors of the United States Ombudsman Association authorized the preparation of an updated model ombudsman act appropriate for state government. There had been renewed interest in the ombudsman concept in a number of states and one, Arizona, was on the verge of enacting an ombudsman bill. It was felt that an updated model act would be a useful document for those states interested in establishing an ombudsman office as well as a useful tool to promote the classical ombudsman institution in other states. Ruth Cooperrider, legal counsel in the Iowa ombudsman's office, was asked to chair a committee to draft the model act. She was assisted in this endeavor by Marshall Lux, the Nebraska ombudsman, Mike Hostina, former deputy ombudsman from Alaska, and Yen Lew and Norrie Thompson, the Hawaii ombudsman and first assistant. The accompanying document is the result of our work.

While this model act was designed for use at the state government level, it can also be adapted for local government. Those so interested may contact the USOA for assistance.

In drafting the act, the committee decided to use as our basic reference the American Bar Association model which was completed under the leadership of Bernard Frank in 1974. The ABA model itself was based on earlier models, notably the Gellhorn model and the Harvard model. Thus, we are building on the foundations prepared for us by these worthy predecessors.

The ABA model was (and is) an excellent document, well thought-out, comprehensive in scope and meticulously annotated by Mr. Frank in his law review article presentation. We left it essentially intact, limiting our revisions to the following areas:

1. Updating and clarifying the language and making it gender neutral;
2. Amending those provisions which over the course of more than two decades of practical experience were found to lead to administrative difficulties or were otherwise problematic; and
3. Adding new provisions to accommodate recent changes in technology and public administration.

While the ABA model was our basic reference, we also reviewed the Gellhorn and Harvard models for additional clarification on certain points. The recently enacted Arizona statute was consulted to help us understand current legislative thinking about the ombudsman institution. Being either current or former ombudsman practitioners, we were also able to contribute insights from our experiences with our own respective statutes in Alaska, Hawaii, Iowa and Nebraska. This practical experience gave us an advantage over our predecessors whose frame of reference was more theoretical in nature.

Working drafts of the bill were presented at the October, 1995 USOA annual conference in Plymouth, Minnesota and the First North American Conference of ombudsman organizations held in May, 1996 in St. Louis, Missouri. After each conference, comments on the drafts were solicited from conference delegates and the members of the USOA board. Noted ombudsman scholars were also invited to comment.

We received in return a number of very useful comments and suggestions from all these sources, including scholars such as Gerald C. Caiden, Bernard Frank and Donald C. Rowat. Our thanks to all of them. In particular, we would be remiss if we did not acknowledge Mr. Frank's careful review of our draft and his detailed commentary. Mr. Frank, the chair of the ABA ombudsman committee which had issued the ABA model act in 1974, further stated it was appropriate, timely, and logical for the USOA to review and update the ABA model and issue a new USOA model to supersede the ABA model. We are grateful for his endorsement.

In considering the comments and suggestions we received, we undertook a section-by-section review of the draft model act. While that process took an additional six months, it is our feeling that the model act was significantly strengthened as a result. Obviously not all suggestions were accepted. In many cases, this was because the suggestion was at variance with the approach taken in another part of the act. Or, the suggestion raised an issue that we had already considered and resolved among ourselves. This final draft represents a document that is acceptable to all members of the committee, where individual differences and preferences were subsumed in a spirit of consensus and where suggestions from other individuals were incorporated as deemed appropriate.

While we believe that the model act as here presented is suitable for all states, we recognize that political circumstances in a given state may mean that some variations may be more appropriate. This model act is not cast in stone. Those who may be interested in possible alternatives to any of the provisions of this model act are invited to contact the USOA.

Although this is a model act for state governments, the USOA believes the ombudsman institution is applicable at all levels of government and encourages its wider establishment. The state ombudsman office created by this model act is not intended to preempt the establishment of any new local ombudsman office. Any local ombudsman office - whether at the county, municipal, township or other level - whose enabling document meets the standards of independence, fairness, confidentiality, and integrity of the review process which characterize a classical ombudsman, should have statutory immunity similar to that granted to the state ombudsman under this model act. Such immunity is necessary to enable local ombudsmen to have confidential communications with complainants and witnesses and to make findings without fear of interference or retaliation through legal proceedings. The USOA will assist any state legislature considering the enactment of such local ombudsman immunity.

This model act is intended to provide for the establishment of an ombudsman who is able to operate effectively in the context of contemporary state government in this, the final years of the twentieth century. The USOA recognizes that future revisions may be necessary to keep this document up-to-date in light of ongoing changes in the law, in standards of government and public administration and in technology. The USOA welcomes suggestions for future consideration.

United States Ombudsman Association Model Ombudsman Act for State Governments

An Act to establish the office of Ombudsman in _____.

COMMENT:

Enactment clause would be in an appropriate form for the state.

Section 1. Legislative Purpose

It is the intent of the legislature to establish, in addition to other remedies or rights of appeal of any person under state law, an independent, impartial, state office, readily available to the public, responsible to the legislature, empowered to investigate the acts of state [(Alternate) and local] administrative agencies and to recommend appropriate changes toward the goals of safeguarding the rights of persons and of promoting higher standards of competency, efficiency and justice in the administration of state [(Alternate) and local] laws.

COMMENT:

This section provides a concise description of the characteristics of the office and its goals.

If jurisdiction over political subdivisions of the state is included, the phrase "and local" should be included. It must be determined whether the inclusion of the phrase "and local" will be interpreted as pre-empting state jurisdiction over both state and local agencies and preventing local governmental units from establishing their own Ombudsmen.

Section 2. Short Title

This Act may be cited as "The (name of state) Ombudsman Act."

COMMENT:

The title "Ombudsman" is distinctive from the more usual official titles such as "director" and "commissioner" and has gained recognition in the United States and other countries. The existing state statutes do not all use the title: Hawaii - "Ombudsman"; Nebraska - "Public Counsel"; Iowa - "Citizens' Aide"; Alaska - "Ombudsman"; Arizona - "Ombudsman-Citizens' Aide." But it should be noted the term "Ombudsman" is used in these states by the public, the media, and even by the incumbents, who found other titles could be confused with other offices and concepts.

The term "Ombudsman" should be used only when the legislation provides for an independent official who receives complaints against government agencies and who, after investigation, may, if the complaints are justified, make recommendations to remedy the complaints.

If a term other than "Ombudsman" is selected, appropriate changes must be made throughout this Act.

Section 3. Definitions

As used in this Act,

(a) "Agency" means any department, organization, board, commission, council, bureau, administrative tribunal, facility, institution or other governmental entity of (name of state), [(Alternate) any person who is providing services to individuals under contract with (name of state) and as a term of that contract is subject to the Ombudsman's jurisdiction], and any official, officer, administrative hearing examiner, employee or member of (name of state), whether elected or appointed, acting or purporting to act by reason of connection with (name of state), except:

(1) any judge;

(2) the legislature, its members, its committees and its employees;

(3) the governor and the governor's personal staff;

[(4) (Alternate A) any political subdivision of the state;]

[(4) (Alternate B) mayors, council members, judges, and any other elected officials of any political subdivision and their personal staff;]

(5) any multi-state governmental entity.

(b) "Administrative act" means any action, decision, adjudication, failure to act, omission, rule or regulation, interpretation, recommendation, policy, practice or procedure of any agency.

(c) "Person" means any individual, aggregate of individuals, corporation, partnership, or unincorporated association.

(d) "Record" means all records, documents, books, papers, files, photographs, microfilms, sound recordings, video recordings, magnetic storage media, computer data and all other materials, regardless of physical form or characteristics, created, generated, recorded, received, possessed or controlled by or on behalf of any agency.

COMMENT:

(a) Rather than specifying by name those agencies under the Ombudsman's jurisdiction, the Act permits jurisdiction over all state-related governmental operations and personnel (in pursuance of public function) with certain limited exceptions which should be minimized. An alternative clause has been added to provide that the Ombudsman's jurisdiction would include businesses, corporations, persons, etc., under contract to provide services to individuals on behalf of the state. With the increasing popularity of "privatizing" government services, policy-makers may feel the need to bring these "private" bureaucracies under the Ombudsman's jurisdiction, in order to insure that the public receives the same level of protection afforded when the services are provided directly by state agencies. If this alternative is adopted, then it would also be necessary to add to the state's statutes relating to procurement a provision to require all agencies entering into a contract for the "privatization" of governmental services to include in that contract a clause obligating the private service provider to submit to the Ombudsman's jurisdiction. By making cooperation with the Ombudsman a condition of the contract, the private contractors will understand from the outset their responsibilities to the Ombudsman and will accept that arrangement as a part of the agreement with the state.

(a)(1) The exclusion of judges is based upon the existence of the long established system of appellate review of judicial decisions and upon the existence of other mechanisms for the sanctioning and/or the removal of judges who act unethically or who are incapacitated. The exclusion is narrow and contemplates that the Ombudsman

would have jurisdiction to investigate administrative or ministerial acts by employees of the judicial branch, when those acts are peripheral to the adjudication itself. In many instances, administrative errors affecting a particular adjudication would have to be challenged and resolved through the established judicial process, but even in those cases, the Ombudsman could make recommendations for improving administrative procedures that would have a prospective effect. The Ombudsman would not, of course, have the jurisdiction to question, criticize or review the substantive content of any judicial order, decision or opinion. The exclusion of judges would pertain only to judicial officers of the judicial branch of government and would not exclude administrative tribunals or administrative law "judges" from the Ombudsman's jurisdiction.

(a)(2) The Legislature--an independent policy making body, whose actions are conspicuous and subject to public scrutiny, and whose tenure is subject to periodic popular review--is excluded. Committees and staff members who assist in policy formation are, likewise, excluded. Although there may be legislative employees, agencies, bureaus or divisions that provide direct services to the public, those employees and entities are also excluded from the Ombudsman's jurisdiction, because of concerns that the Ombudsman's close relationship with the legislative branch would compromise the independence of the office in dealing with cases involving those employees, agencies, etc. If it is determined that it is desirable to include these legislative service agencies within the Ombudsman's jurisdiction, then as an alternative the exclusion might read, "(2) the members and committees of the legislature and their immediate staff."

(a)(3) Elected state officials (e.g., Lt. Governor, Treasurer) who deserve exclusion for the same reasons as (a)(2) above, may be added to (a)(3) but they must be distinguished from other elected state officials who should be included and who are less immediately involved in policy-making and are engaged chiefly in administrative matters indistinguishable from those performed by non-elected officials generally. Thus, appropriate officials to be excluded may vary from state to state. Alternatively, this exclusion might read, "(3) elected constitutional officials and their personal staff;".

(a)(4) Alternate A: Where local jurisdiction is not included, (a)(4) should read, "[(4) any political subdivision of the state;]."

(a)(4) Alternate B: If jurisdiction over a political subdivision is included, Alternate B should be used to give an exclusion parallel to that for state officials: "[(4) mayors, council members, judges, and other elected officials of political subdivisions and their personal staff;]." A saving clause for existing municipal Ombudsman offices may be added if necessary and desirable.

(a)(5) The specific exclusion of multi-state entities, such as regional transportation and planning authorities, and implicit exclusion of federal agencies (including the local offices thereof), are based on practical and constitutional limitations on sovereign power of the state over such agencies.

(b) "Administrative Act" is broadly defined and includes decisions by administrative boards or tribunals or administrative law "judges" and rule-making activities.

(c) "Person" is defined broadly.

(d) "Record" is broadly defined to make it clear that the Ombudsman is intended to have access to all recorded information possessed or controlled by agencies, regardless of the form or manner of storage of that information.

Section 4. Creation of Office

The office of Ombudsman is established.

Section 5. Nomination and Appointment

The (insert name of legislative body) shall elect the Ombudsman by a two-thirds vote of the members of each house present and voting.

COMMENT:

The Ombudsman is an appointed officer of the legislative branch of government. This arrangement helps to guarantee the independence of the Ombudsman, who might be reluctant to criticize the actions of agencies that are responsible to the executive, if he or she were an executive appointee. As part of the legislative branch of government, the Ombudsman is not only providing a direct service to citizens, but is also performing a role in legislative oversight of the agencies under the Ombudsman's jurisdiction. Since the Ombudsman may only make recommendations, and may not compel the executive and judicial agencies to take substantive actions, the Ombudsman's role is consistent with the concept of separation of powers.

Section 6. Qualifications

(a) The Ombudsman shall be a person of recognized judgment, objectivity and integrity who is well-equipped to analyze problems of law, administration, and public policy.

(b) No person while serving as Ombudsman:

- (1) shall be actively involved in political party activities or publicly endorse, solicit funds for or make contributions to political parties or candidates for elective office;
- (2) shall be a candidate for or hold any other elective or appointive public office;
- (3) shall engage in any other occupation, business, or profession likely to detract from the full-time performance of his or her duties as Ombudsman or to result in a conflict of interest or an appearance of impropriety or partiality.

COMMENT:

The Ombudsman should be a full-time impartial expert in whom the public can have confidence.

(a) This subsection gives the core characteristics and qualifications for an Ombudsman and hence provides more guidance than a mere listing of restrictions on the official.

(b) Paragraph (b)(1) seeks to preserve the Ombudsman's impartiality and the appearance of impartiality in the political arena. The Ombudsman retains the right to participate in the political process as a voter and to express his or her opinion privately.

Paragraph (b)(2) inhibits an Ombudsman from using the office as a political stepping-stone. To further protect the office from politicization, some states (Arizona, Hawaii, and Nebraska) provide that the Ombudsman shall not have served as a member of the Legislature for one or two years prior to his or her appointment. However, this could prevent the appointment of a highly qualified legislator.

Paragraph (b)(3) seeks to assure that the Ombudsman's work is performed on a full-time basis, and that the Ombudsman remains impartial.

Section 7. Term of Office

The Ombudsman shall serve for a term of _____ years and until his or her successor is appointed and qualified. He or she may be reappointed for additional terms.

COMMENT:

A long term is desirable: to permit the Ombudsman sufficient time to become proficient at his or her duties; to provide a measure of independence from politics; and to provide prestige and security to attract qualified persons to the position. An excessively long term (e.g., 15 years) prevents the desired periodic accountability to the Legislature. The term should not be less than five years. The same points that argue for a long term of office for the Ombudsman also support the concept that the incumbent should be eligible for reappointment at the end of his or her term.

Section 8. Removal and Vacancy

(a) The Legislature by a vote of two-thirds of the members of each house present and voting may remove the Ombudsman from office, but only for mental or physical incapacity to perform the duties of the office, or other grounds sufficient for removal of a judge from state court.

(b) If the position of Ombudsman becomes vacant for any reason, the Deputy Ombudsman shall serve as Acting Ombudsman until an Ombudsman has been appointed for a full term.

COMMENT:

(a) The Ombudsman should be secure in the position, so removal is made difficult and must be for cause. This protects the Ombudsman from groundless attacks or political threats. As an alternative, this subsection might provide that the Ombudsman could be removed from office according to state constitutional provisions for removal of judges or other public officials.

(b) In filling vacancies, full term appointment is preferable to remainder-of-term appointment as it provides the desirable longer term of office.

Section 9. Compensation

The Ombudsman shall receive the same salary and benefits as [(Alternate A) a state judge at the general trial court or higher level.] [(Alternate B) a state department head.] [(Alternate C) a legislative agency head.] The salary of the Ombudsman shall not be diminished during the Ombudsman's term of office, unless by general law applying to all salaried officers of the state.

COMMENT:

The Ombudsman is a high-level official who should receive a salary that reflects the importance, responsibility and prestige of the office. Also, a high salary is warranted if the Ombudsman is prohibited by law from engaging in any other occupation, business, or profession.

Three alternative salary proposals are offered for consideration. The first sets the salary at least equal to that of a general trial court judge. The comparison between the two offices is apt in terms of recognizing the Ombudsman's stature as well as reinforcing the

concept of the Ombudsman's independence and neutrality. The second ties the Ombudsman's salary to that of the state department heads. This also provides appropriate stature to the office and emphasizes the point that the Ombudsman deals with department heads as an equal rather than as a lower level official. The third equates the Ombudsman with other legislative agency heads. This approach may be a more familiar frame of reference to legislators and it would help assure consistency within any existing legislative branch salary system. Practically speaking, any of the three alternatives should result in fairly similar salary amounts.

Section 10. Organization of Office

(a) The Ombudsman shall select, appoint and fix the compensation of a person as Deputy Ombudsman and may select, appoint and fix the compensation of such other officers and employees as the Ombudsman may deem necessary to discharge the Ombudsman's responsibilities under this Act. Compensation shall be fixed within the amount available by appropriation. All officers and employees shall serve at the Ombudsman's pleasure.

(b) The Ombudsman may delegate to staff members any authority, power or duty except this power of delegation and the Ombudsman's duty to make any report under this Act. However, the Ombudsman may authorize the Deputy Ombudsman to act in the Ombudsman's stead in the event of illness, absence, leave or disability, or when, in the Ombudsman's sole discretion, an appearance of impropriety or partiality or a conflict of interest prevents the Ombudsman from discharging his or her duty in a particular matter.

(c) The Ombudsman and his or her staff shall be entitled to participate in any employee benefit or retirement plan available to state employees.

COMMENT:

(a) The sensitive nature of the work and the high degree of delegation to and confidence in staff that will be required dictate that the Ombudsman be free of civil service and political constraints in staff selection and retention. The Ombudsman, however, should refer to civil service salary schedules in setting comparable salaries for staff, and would naturally use state accounting facilities for payment of such [cf., section 11(j)]. The appointment of a Deputy Ombudsman is compulsory while selection of other officials, including an Assistant Ombudsman or Ombudsmen, is optional.

(b) This same desire for flexibility should permit a broad delegation of powers. The Ombudsman, however, remains responsible for the organization of the office and for whatever reports leave the office [section 16] -- unless the Deputy Ombudsman has assumed the Ombudsman's duties under this sub-section or when the office is vacant [section 8(b)]. The Ombudsman has complete discretion with respect to recusal for "cause" in order to avoid procedural smoke screens and because the Ombudsman can be expected to diligently maintain his or her limited authority through appropriate recusal. The Ombudsman has discretion to require, by regulation [section 11(b)] or otherwise, that a delegation be in writing or that staff members take an oath of office.

Section 11. Powers

The Ombudsman's powers and duties include but are not limited to the following:

(a) to investigate, on complaint or on the Ombudsman's own initiative, any administrative act of an agency, without regard to the finality of the administrative act;

- (b) to undertake, participate in or cooperate with persons and agencies in such conferences, inquiries, meetings, or studies which might improve the functioning of agencies or lessen the risks that objectionable administrative acts will occur;
- (c) to make such inquiries and obtain such assistance and information from any agency or person as the Ombudsman shall require for the discharge of the Ombudsman's duties. Agencies shall not restrict the Ombudsman's access to agency personnel;
- (d) notwithstanding any other provision of state law, to have access to and to examine and copy, without payment of a fee, any agency records, including records which are confidential by state law. The Ombudsman shall not disclose confidential records and shall be subject to the same penalties as the legal custodian of the records for any unlawful or unauthorized disclosure;
- (e) to enter and inspect without prior notice the premises of any agency;
- (f) to subpoena any person to appear, to give sworn testimony or to produce documentary or other evidence that is reasonably relevant to the matters under investigation;
- (g) to maintain confidential any matter related to complaints and investigations, including the identities of the complainants and witnesses, except as the Ombudsman deems necessary to discharge the Ombudsman's duties;
- (h) to bring suit in (name of court) to enforce the provisions of this Act;
- (i) to adopt, promulgate, amend and rescind rules and regulations required for the discharge of the Ombudsman's duties, including procedures for receiving and processing complaints, conducting investigations, and reporting findings, conclusions and recommendations. However, the Ombudsman may not levy any fees for the submission or investigation of complaints;
- (j) to prepare and administer a budget for the office of the Ombudsman;

COMMENT:

The general powers and duties of the Ombudsman are enumerated for clarity; however, this section is not an exhaustive listing of all the powers and duties delegated to the Ombudsman. Additional provisions related to staffing, delegation of powers and duties, recommendations, and reports are contained in sections 10, 15, and 16.

(a) The Ombudsman's investigatory power is limited to administrative acts of agencies [section 3(b)]. The Ombudsman may receive and consider complaints from any source. The Ombudsman can initiate an investigation when others are unwilling to come forward with a complaint or when the Ombudsman discovers a matter warranting investigation.

(b) Although most of the Ombudsman's time will be occupied with individual complaints, the Ombudsman can conduct studies of a general nature to improve agency efficiency or service to the public, either independently or jointly with other governmental bodies or non-governmental research enterprises.

(c) The Ombudsman has broad access to any type of information from an agency or person, and an agency may not restrict agency personnel from assisting or providing information to the Ombudsman. There is no requirement to conduct formal evidentiary hearings of an adversary nature, although the Ombudsman can take statements from persons under oath. If testimony is taken, it should be perceived purely as an investigatory proceeding, and the procedure need not comport with what is normally required in a formal adjudication hearing.

(d) The Ombudsman can examine and copy or obtain a copy of any agency record, including records which are confidential under state law, without the payment of any fee. However, the Ombudsman and the Ombudsman's staff are obligated to maintain the confidentiality of any confidential records provided by an agency to the same extent as the legal custodian of the records.

(e) The Ombudsman has the power to inspect any agency without notice, as advance notice might negate the value of such a visit. Information gathered on site visits may provide subjects for investigation on the Ombudsman's own motion.

(f) The Ombudsman can compel any person to provide testimonial, documentary, or other evidence through issuance of a subpoena. Implicitly, the Ombudsman and his or her staff are empowered to administer oaths to such witnesses. Protections and privileges for witnesses, regardless of whether or not they have been subpoenaed, are provided in section 18. If a person refuses to comply with the subpoena, the Ombudsman can seek enforcement under section 11(h).

(g) To facilitate the gathering of information, the Ombudsman has discretion to keep confidential any complaint or investigative information. The Ombudsman may disclose such information as the Ombudsman deems necessary or appropriate in carrying out the Ombudsman's duties.

(h) The Ombudsman may bring suit regarding the exercise of his or her powers, including actions: for a declaratory judgment to obtain jurisdiction [under sections 3(a) and 11(a)]; to enter and inspect agencies [section 11(e)]; to show cause for not appearing after being subpoenaed [section 11(f)]; and to enforce confidentiality provisions [sections 13(d) and 13(e)].

(i) The Ombudsman is given broad regulatory discretion to determine the procedures for carrying out the office's functions. The Ombudsman may through rules or regulations specify the means by which complaints may be submitted (which may include fax or electronic mail) and require for good reason that certain types of complaints be in writing. To insure accessibility (and avoid discrimination against the poor), a fee may not be imposed for the Ombudsman's services.

(j) A provision for budgetary powers may be necessary in some states and useful in others, to insure that the Ombudsman's budget is independent of outside (agency) administration.

Section 12. Investigation of Complaints

(a) The Ombudsman shall conduct a suitable investigation of a complaint that is an appropriate subject for investigation. An appropriate subject for investigation by the Ombudsman includes any administrative act which the Ombudsman believes might be:

- (1) Contrary to law or regulation;
 - (2) Based on mistaken facts or irrelevant considerations;
 - (3) Unsupported by an adequate statement of reasons;
 - (4) Performed in an inefficient manner;
 - (5) Unreasonable, unfair, or otherwise objectionable, even though in accordance with law;
- or

- (6) Otherwise erroneous.
- (b) The Ombudsman in the Ombudsman's discretion may decide not to investigate because:
 - (1) The complainant could reasonably be expected to use another remedy or channel;
 - (2) The complaint is trivial, frivolous, vexatious, or not made in good faith;
 - (3) The complaint has been too long delayed to justify present examination;
 - (4) The complainant is not personally aggrieved by the subject matter of the complaint;
 - (5) Resources are insufficient for adequate investigation; or
 - (6) Other complaints are more worthy of attention.
- (c) The Ombudsman's declining to investigate a complaint shall not bar the Ombudsman from proceeding on his or her own initiative to investigate an administrative act whether or not included in the complaint.

COMMENT:

(a) The Ombudsman has a duty to investigate the complaints described in subsection (a), although he or she may decline to investigate for the reasons given in subsection (b). The enumerated complaints indicate the kinds of administrative acts that generate complaints to the Ombudsman's office. As shown by paragraph (a)(6), which is a catchall, and subsection (c), the statute is intended as a guide to and not a limitation on the complaints which the Ombudsman can investigate.

(b) The Ombudsman may choose to investigate a complaint even though the statute permits him or her to refuse. For instance, under paragraph (b)(1), if the Ombudsman believes that recourse to an administrative or legal remedy would be futile or overly burdensome to the complainant, the Ombudsman may investigate the complaint. Similarly, the Ombudsman may decide to investigate a complaint of public concern even though the complainant was not personally aggrieved.

(c) Complaints which are inappropriate for investigation may nevertheless reveal administrative acts which the Ombudsman may decide to investigate on his or her own initiative [section 11(a)].

Section 13. Rights of Complainant--Communication With Complainant

- (a) After the Ombudsman has decided whether or not to investigate a complaint, the Ombudsman shall suitably inform the complainant.
- (b) The Ombudsman shall, if requested by the complainant, suitably report the status of his or her investigation to the complainant.
- (c) After investigation of a complaint, the Ombudsman shall suitably inform the complainant of his or her conclusion or recommendation and, if appropriate, any action taken or to be taken by the agency involved.
- (d) A letter to the Ombudsman from a person held in custody--including by detention, incarceration and hospitalization--by an agency shall be forwarded immediately, unopened, to the Ombudsman. A letter from the Ombudsman to such person shall be immediately delivered, unopened, to the person. Telephone and personal contacts between the Ombudsman and a person in custody shall not be prohibited or monitored.

COMMENT:

Subsections (a), (b) and (c) give the Ombudsman a general duty to inform the complainant of the status of his complaint. The experience and judgment of the Ombudsman will determine the suitable response to be made.

Section 14. Rights of Agency

Before formally issuing a conclusion or recommendation that is significantly critical or adverse to an agency, the Ombudsman shall have consulted with that agency and permitted the agency reasonable opportunity to reply. If the Ombudsman makes a conclusion or recommendation available to the agency to facilitate a reply, the conclusion or recommendation is confidential and may not be disclosed to the public by the agency unless the Ombudsman releases it.

COMMENT:

This section protects agencies, their officers and employees by requiring consultation and giving them reasonable time to reply to significant criticism before the Ombudsman issues critical findings. The Ombudsman has the discretion to make all or part of his or her findings available to facilitate a reply. Because the Ombudsman may modify findings, which may include removal of confidential information and incorporation of the agency's response [section 15(b)], after reviewing the agency's reply, disclosure of findings not released by the Ombudsman is a violation of law, which may be dealt with under existing records confidentiality provisions.

Notice of the Ombudsman's decision to investigate is not required because such formalities: are inconsistent with the role of the Ombudsman as an alternative to procedure-bound remedies and the limited resources of the office; are largely ceremonial in that the Ombudsman will inevitably contact the agency during an investigation; and are not required by due process given the absence of Ombudsman power to enforce recommendations and the fact that an opportunity to be heard is required before publication.

If an advance notice provision is nonetheless desired, it should provide for: informal or preliminary inquiries without notice, since experience shows that the vast majority of complaints are handled expeditiously and informally; withholding notice when notice would hinder investigation; and flexibility of form to avoid legalistic procedural wrangling, e.g. "If after making preliminary inquiries the Ombudsman decides to investigate, the Ombudsman shall suitably inform the agency involved unless the Ombudsman reasonably believes that advance notice will unduly hinder the investigation or make it ineffectual. The Ombudsman may inform the agency verbally or in writing."

Section 15. Procedure after Investigation

(a) If, after investigation, the Ombudsman is of the opinion that an agency should:

- (1) consider the matter further,
- (2) modify or cancel an act,
- (3) alter a regulation, practice or ruling,
- (4) explain more fully the act in question,
- (5) rectify an omission, or
- (6) take any other action,

the Ombudsman shall state any conclusions, recommendations and reasons therefore to the agency. If the Ombudsman so requests, the agency shall, within the time specified, inform the Ombudsman about the action taken on recommendations or the reasons for not complying with them.

(b) After a reasonable period of time has elapsed, the Ombudsman may issue his or her conclusions or recommendations to the legislature, the governor, a grand jury, the public, or any other appropriate authority. The Ombudsman shall include any brief statement the agency may provide if an opportunity to reply is required by this Act.

(c) If the Ombudsman believes that an action has been dictated by laws whose results are unfair or otherwise objectionable, and could be revised by legislative action, the Ombudsman shall notify the (insert name of legislative body) and the agency of desirable statutory change.

(d) If the Ombudsman believes that any agency official or employee has acted in a manner warranting criminal or disciplinary proceedings, the Ombudsman shall refer the matter to the appropriate authorities without notice to that person.

COMMENT:

(a) Though the Ombudsman will rarely have reason to make a recommendation if there is no error in what the agency has done or neglected to do, the Ombudsman should remain free to suggest improvements in method or policy even when the existing practice may be legally permissible. Thus the Ombudsman may facilitate one agency's learning about and taking advantage of the experience of another. This subsection contemplates no entry of judgment, as it were, but simply the expression of opinion by the Ombudsman. The Ombudsman is not a superior official, in a position of command, and cannot compel a change in an administrative act. The Ombudsman's recommendation may, however, induce an agency to exercise whatever power it may possess to right what the Ombudsman points out as a past mistake.

(b) If the Ombudsman is required to provide an opportunity to reply under section 14 and a reply is forthcoming, the Ombudsman must include it when issuing findings. Rather than permitting the Ombudsman to summarize replies, replies are limited to a "brief" statement which shall be printed unedited; regulations as to what is "brief" might be promulgated under section 11(i).

(c) There may be instances where an agency acted in accordance with existing law, but the law itself produces unjust results. The Ombudsman has the duty to bring these situations to the attention of the legislature and appropriate agency officials; if appropriate, the Ombudsman may comment on or recommend changes in legislation.

(d) The Ombudsman's duty to report wrongdoing pertains to miscreant officials. This subsection makes it clear that the Ombudsman may report allegations of wrongdoing without having to first notify the person involved (who may otherwise flee the state or destroy pertinent evidence if tipped off prematurely). This avoids any ambiguity which may arise if this subsection is read in conjunction with section 14.

If the person has testified before the Ombudsman, such testimony would bear the same privileges as testimony in court [section 18].

Section 16. Reports

The Ombudsman may from time to time and shall annually report on his or her activities to the Governor, to the Legislature, or any of its committees, to the public and, in the Ombudsman's discretion, to agencies.

COMMENT:

The Ombudsman's sole means of correcting flawed practices when agencies refuse to do so is to publish criticism and recommendations.

The annual report, whose release date would be set by the Ombudsman [section 11(i)], is mandatory. Special [section 15(b)] or general interim reports are discretionary with the Ombudsman.

Section 17. Ombudsman's Immunities

(a) The substantive content of any finding, conclusion, recommendation, or report of the Ombudsman or member of the Ombudsman's staff shall not be reviewable in any court.

(b) The Ombudsman and the Ombudsman's staff have the same immunities from civil and criminal liabilities as a judge of this state.

(c) The Ombudsman and the Ombudsman's staff shall not be compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties except as may be necessary to enforce this Act.

COMMENT:

(a) & (b) As a public watchdog, the Ombudsman should be able to state his or her position freely and candidly without fear of pressure or reprisal. The judicial immunities afforded the Ombudsman are intended to protect against harassment when the Ombudsman deals with controversial issues or makes an unpopular decision. While the Ombudsman's findings are presented only after due consideration, no claim of infallibility is made and the Ombudsman's findings, conclusions and recommendations are always subject to criticism by government officials as well as members of the public. Since the Ombudsman has no enforcement power and any findings and recommendations are only advisory in nature, the courts should have no authority to order that an expression of opinion be changed.

(c) Certain dealings that the Ombudsman has with complainants and witnesses may be confidential in nature. This subsection is meant to protect these confidential relationships so as to encourage complainants to avail themselves of the Ombudsman's services and witnesses to cooperate with the Ombudsman, where they may be otherwise reluctant to do so.

Section 18. Witnesses' Privileges

Any person who provides information under this Act may be accompanied and advised by counsel of his or her choice and shall be paid the same fees and travel allowances and accorded the same privileges and immunities as witnesses whose attendance has been required in the (name of court). However, a representative of an agency providing information under this Act during business hours shall not be entitled to receive such fees and allowances.

COMMENT:

Although investigations conducted by the Ombudsman are not contested cases or adjudications of rights or interests, and although nearly all testimony will be private and confidential, witnesses who testify (whether or not by subpoena) are given judicial privileges and immunities. Witness fees and travel allowances are also required for persons who provide information to the Ombudsman under the Act. A provision that a representative of an agency during business hours shall not be entitled to such fees and allowances is included to avoid possible double payment of public servants during working hours.

Section 19. Obstruction

Any person who willfully obstructs or hinders the proper and lawful exercise of the Ombudsman's powers, or willfully misleads or attempts to mislead the Ombudsman in the Ombudsman's inquiries, shall be guilty of a (specify the level of offense).

COMMENT:

It must be determined in each state whether necessity exists for indicating the court in which proceedings are to be brought and upon whose initiative. Since fines for offenses vary from state to state and may be subject to periodic changes, it is preferable to specify the offense rather than a set amount of fine for a violation.

Section 20. Reprisals Prohibited

(a) No person who files a complaint or participates in any investigation or proceeding pursuant to this chapter shall be subject to any penalties, sanctions or restrictions in connection with his or her employment or be denied any right, privilege, or benefit because of such action.

(b) A person who alleges a violation of this part may bring a civil action for appropriate injunctive relief, actual damages, and punitive damages. Punitive damages shall not exceed \$10,000.

COMMENT:

This section provides protection to complainants and witnesses from reprisals at their place of employment or the deprivation of other rights or privileges because of their participation in Ombudsman investigations.

Section 21. Relation to Other Laws

The provisions of this Act are in addition to and do not in any manner limit or affect any other provisions of law under which any remedy or right of appeal is provided for any person, or any procedure is provided for the inquiry into or investigation of any matter. The powers conferred on the Ombudsman may be exercised notwithstanding any provision of law to the effect that any administrative action shall be final or unappealable.

COMMENT:

This section clearly sets forth that the Ombudsman office is a supplemental remedy and is in addition to other remedies or rights of appeal--a principle also covered in section 1 with respect to legislative purpose. This section also establishes the principle that the Ombudsman powers are not inhibited by statutory enactments providing that any administrative action shall be final or unappealable.

Section 22. Appropriation

There is appropriated out of the general revenues of the state the sum of \$_____, or so much thereof as may be necessary for fiscal year _____, to the office of the Ombudsman to carry out the purposes of this Act.

COMMENT:

Before an Ombudsman statute can be implemented, funding needs to be made available to pay for the expense of the office. This section provides the mechanism to do this. This section should be included where required by the fiscal regulations or practice of the state. If inclusion of such section is not necessary, it can be omitted.

Section 23. Effective Date

This Act shall take effect upon its approval.

COMMENT:

This is standard enactment language. The Act actually becomes effective only after appropriation has been made and an Ombudsman has taken office.

Section 24. Severability

The provisions of this Act are declared severable, and if any provision thereof is held to be invalid for any reason, the validity of the remainder of the Act shall not be affected.

COMMENT:

The inclusion of this section is optional. It is not in any of the existing state Ombudsman statutes. The need for a severability clause is unclear, but it may be helpful to assuage any legal concerns that may be raised when the bill is being voted on in the legislature.



REFERENCES

Our proposed model ombudsman act is based primarily on the American Bar Association Model Ombudsman Statute for State Governments. The annotated ABA model, together with Bernard Frank's extensive commentary, may be found in Bernard Frank, "State Ombudsman Legislation in the United States," *University of Miami Law Review* 29, no. 3 (Spring 1975), 379-445. This is an extremely comprehensive source of information about the history of the ombudsman institution in the United States as well as on the principles behind ombudsman legislation.

In turn, the ABA model was based on the model prepared by the late Professor Walter Gellhorn. See Walter Gellhorn, "Annotated Model Ombudsman Statute." In *Ombudsman for American Government?* Edited by Stanley V. Anderson. Englewood Cliffs, NJ: Prentice-Hall, Inc., 1968.

One of the sources that Professor Gellhorn used for his model was the Harvard model prepared by the Harvard Student Legislative Reference Bureau. See "A State Statute to Create the Office of Ombudsman," *Harvard Journal on Legislation* 2, no. 2 (June 1965), 213-238.

We also consulted the current state ombudsman statutes to compare the differences and similarities among them. Interested readers are directed to those sources for further information about possible statutory variations and alternatives. The Alaska ombudsman is authorized under Title 24, Chapter 55 of the Alaska Statutes. In Arizona, Title 41, Chapter 8, Article 5 of the Arizona Revised Statutes Annotated establishes the office of the ombudsman-citizens aide. Chapter 96, Hawaii Revised Statutes, is the ombudsman statute for Hawaii. In Iowa, the ombudsman is known as the citizens' aide pursuant to Chapter 2C, Iowa Code Annotated. Public Counsel is the title used in Nebraska in accordance with Sections 81-8,240 to 81-8,254, Revised Statutes of Nebraska.