

Coalition of Federal Ombudsman Endorsement and Practice Commentary for Administrative Conference of the United States Recommendation 2016-5, “The Use of Ombuds in Federal Agencies”

On December 14, 2016, the Administrative Conference of the United States (ACUS), a federal agency dedicated to improving federal administrative process, adopted Recommendation 2016-5, “The Use of Ombuds in Federal Agencies”. ACUS urged those agencies that already have ombuds or are contemplating creating ombuds offices to align their office standards and practices with those included in Recommendation 2016-5. The Coalition of Federal Ombudsman (COFO) strongly supports this recommendation.

As COFO is the principal interagency forum providing collaboration, advice, and guidance on federal ombuds standards, skills development, program development, and effectiveness, this document elaborates on a subset of the 16 approved recommendations within ACUS Recommendation 2016-5. It focuses on providing additional clarity and specific examples for the practical application of the **three core standards (independence, confidentiality, and impartiality)** and the **three common characteristics (informality, a commitment to fairness, and credible process)** of an ombuds function within the federal sector.

Background

COFO is comprised of both external ombuds mainly interfacing with the public and their respective agencies, and internal organizational ombuds, largely assisting internal inquirers. When COFO held its first meeting in July 1996, there were 11 members. In 2016, the ACUS research team identified over 150 unique federal ombuds programs. Given the significant transformative impact ombuds programs have on federal agencies, combined with new government-sponsored research within our community of practice, we anticipate additional growth in the number of new federal ombuds programs in the upcoming years.

ACUS Recommendation 2016-5 notes “the far broader array of federal ombuds that have been established”¹ since their previous recommendation on ombuds in 1990 and, citing the “more polarized ... milieu in which government operates”², “urge[s] Congress and the President to create, fund, and otherwise support ombuds offices across the government consistent with [this] recommendation”.³ ACUS also urged agencies that already have ombuds or are contemplating creating ombuds offices to align their office standards and practices with those included in the recommendation and that “[e]xisting offices with the ombuds title that do not adhere to the standards should consider modifying their title, where permitted, to avoid any confusion”.⁴

Recommendation 2016-5 is consistent with established standards of ombuds practice as articulated by the two broad-based professional ombuds associations in the United States – the International Ombudsman Association (IOA)⁵ and the United States Ombudsman Association

¹ Retrieved from <https://www.acus.gov/sites/default/files/documents/Recommendation%202016-5.pdf>, page 1

² ACUS, page 2

³ ACUS, page 3

⁴ ACUS, page 6

⁵ Retrieved from

https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf

(USOA)⁶ – as well as the American Bar Association’s (ABA) 2004 “Standards for the Establishment and Operation of Ombuds Offices”⁷ and the standards cited in the Government Accountability Office’s (GAO) 2001 report GAO-01-466, "The Role of the Ombudsmen in Dispute Resolution".⁸

COFO therefore expresses its strong support for ACUS Recommendation 2016-5 and, recognizing that its elements must be applied in practice, issues this document to provide further guidance, detail, and clarity for the establishment and support of ombuds programs in federal agencies.

Three Core Standards of Practice and Three Common Characteristics

Citing the IOA, USOA, and ABA, ACUS Recommendation 2016-5 delineates three core standards of ombuds practice – independence, confidentiality, and impartiality. Additionally, ACUS also cites three characteristics common to all ombuds: informality (including not making decisions binding on an agency), a commitment to fairness, and a credible process for resolving issues.⁹

Following each core standard and common characteristic as defined in ACUS Recommendation 2016-5 is additional guidance from COFO on its practical application in the federal workplace.

Independence (*ACUS language in italics*)

- a. *To promote the effectiveness and independence of ombuds offices, agencies should consider structuring ombuds offices so that they are perceived to have the necessary independence and are separate from other units of the agency. To ensure adequate support from agency leadership, ombuds offices should report to an agency official at the highest level of senior leadership. Ombuds offices should not have duties within the agency that might create a conflict with their responsibilities as a neutral, and their budgets should be publicly disclosed.*
- b. *The agency should ensure that the ombuds has direct access to the agency head and to other senior agency officials, as appropriate. Whether by statute, regulation, or charter, ombuds should expressly be given access to agency information and records pertinent to the ombuds’ responsibilities as permitted by law.*
- c. *Ombuds and the agencies in which they are located should clearly articulate in all communications about the ombuds that the ombuds office is independent and specifically not a conduit for notice to the agency.*

⁶ Retrieved from <http://www.usombudsman.org/site-usoa/wp-content/uploads/USOA-STANDARDS1.pdf>

⁷ Retrieved from <http://apps.americanbar.org/webupload/commupload/AL322500/newsletterpubs/115.pdf>

⁸ Retrieved from <http://www.gao.gov/assets/240/231398.pdf>

⁹ ACUS, page 4

- d. Federal ombuds should not be subject to retaliation, up to and including removal from the ombuds office, based on their looking into and assisting with the resolution of any issues within the ombuds' area of jurisdiction.¹⁰*

Programmatic independence ensures that the ombuds has no conflict of interest. The ombuds should not report to the agency's business offices, so it is unlikely that he/she will be influenced by the statements or actions of the senior managers of those offices. Thus, it would not be appropriate for an ombuds who is called upon to provide options for the resolution of employment related matters to report to the agency's head of human resources, administration, equal opportunity, civil rights, civil liberties, privacy, counsel, or inspector general, nor should an ombuds assisting in the resolution of the concerns of external stakeholders report to any of the operating units or be within any of the business lines/program offices of an agency.¹¹

In all circumstances, federal ombuds should report to the highest person possible, such as the departmental secretary or agency director/administrator. The ombuds should have unfettered and direct access to all officials, including the agency head, and interacts at all levels without regard to the chain of command.

The federal ombuds should:

- Have access to all agency records, people, and information needed to perform duties¹²
- Have sole discretion to pursue any issue within his/her purview¹³
- Be protected from retaliation and made free from real and perceived interference from performing his/her duties. In assessing whether an ombuds is independent in structure, function, and appearance, the following factors are important: whether anyone who may be affected by actions of the ombuds office (a) can control or limit the ombuds' performance of assigned duties, or (b) can eliminate the office, remove the ombuds, or reduce the budget or resources of the office for retaliatory purposes.¹⁴
- Be free from other positions or duties that compromise independence¹⁵
- Be independent from control, limitation, or penalty by a person who may be the subject of a complaint or inquiry.¹⁶
- Have access to legal counsel which is free of conflicts of interest.¹⁷

¹⁰ ACUS, pages 7-8

¹¹ These lists are not exhaustive. Ombuds should not report to an operating unit or business line of an agency.

¹² ACUS, pages 7-8

¹³ IOA, page 1; USOA, pages 4 & 10; ABA, page 2

¹⁴ ACUS, pages 7-8

¹⁵ ACUS, page 7

¹⁶ IOA, page 1; USOA, pages 2 & 4; ABA, page 3

¹⁷ ACUS, page 10. "To protect the independence and confidentiality of federal ombuds, agencies should ensure, consistent with available resources, that ombuds have access to legal counsel for matters within the purview of the ombuds, whether provided within the agency with appropriate safeguards for confidentiality, by direct hiring of attorneys by the ombuds office, or under an arrangement enabling the sharing across agencies of counsel for this purpose. Such counsel should be free of conflicts of interest"

Confidentiality (*ACUS language in italics*)

- a. *Consistent with the generally accepted interpretation of ADRA § 574, as applied to alternative dispute resolution offices, agencies should understand and support that the Act's requirements for confidentiality attach to communications that occur at intake and continue until the issue has been resolved or is otherwise no longer being handled by the ombuds, whether or not the constituent ever engages in mediation facilitated by the ombuds office. Restrictions on disclosure of such communications, however, should not cease with issue resolution or other indicia of closure within the ombuds office.*
- b. *Agencies (or other authorizers) should articulate the scope and limits of the confidentiality offered by ombuds offices in their enabling documents (whether statute, regulation, charter or other memoranda), as well as on the agency website, in brochures, and in any other descriptions or public communications about the office utilized by the office or the agency.*
- c. *Agency leadership and management should not ask for information falling within the scope of confidentiality offered by the ombuds office.*
- d. *If information is requested from an ombuds during discovery in litigation, or in the context of an internal administrative proceeding in connection with a grievance or complaint, then the ombuds should seek to protect confidentiality to the fullest extent possible under the provisions of ADRA § 574, unless otherwise provided by law. Agencies should vigorously defend the confidentiality offered by ombuds offices.¹⁸*

Confidentiality is central to ombuds practice, allowing the ombuds to create a safe space to raise issues and concerns without fear of reprisal or retribution. Therefore, without express permission of the inquirer and at the discretion of the ombuds, the federal ombuds shall not disclose, inside or outside the agency, any inquirer names or information provided in confidence except to address a threat of imminent physical harm or as otherwise required by law.¹⁹ The ombuds maintains information (e.g., notes, phone messages, appointment calendars) in a physically secure location and manner²⁰, protected from inspection by others, including management, and has a consistent, standard practice for the destruction of such information. Practitioners should also establish a records schedule approved by the National Archives and Records Administration consistent with these standards.²¹

COFO concurs with Recommendation 2016-5 that ombuds discussion and inquiries constitute dispute resolution proceedings as defined in the Administrative Dispute Resolution Act of 1996 (ADRA) and that ombuds themselves are neutrals as defined by ADRA. ACUS states that “the 1996 addition of the words ‘use of ombuds’ to the definition of ‘means of alternative dispute

¹⁸ ACUS, pages 8-9

¹⁹ As with Freedom of Information Act requests or information

²⁰ ACUS, page 11, “To reinforce confidentiality and the perception of independence, to the fullest extent possible and consistent with agency resources, the agency should ensure that the physical ombuds office and telephonic and online communications systems and documentation enable discreet meetings and conversations”

²¹ ACUS, page 11, “Federal ombuds offices should work with agency records officials to ensure appropriate confidentiality protections for the records created in the course of the office’s work and to ensure that ombuds records are included in appropriate records schedules”

resolution' in ADRA clarifies that, when the ombuds office is assisting in the resolution of issues that are raised to it under its mandate, it is covered by the Act's provisions."²² Therefore, COFO's position is that the ombuds should not voluntarily disclose or be required to disclose through discovery or compulsory process any oral or written communications prepared for an ombuds inquiry except as provided for by ADRA.

Impartiality (*ACUS language in italics*)

*Ombuds should conduct inquiries and investigations in an impartial manner, free from conflicts of interest. After impartial review, ombuds may appropriately advocate with regard to process. An ombuds established with advocacy responsibilities may also advocate for specific outcomes.*²³

The federal ombuds is a designated neutral who is free from bias, conflicts of interest, and conflicts of position. They do not advocate for the positions or preferred outcomes of employees, management, external stakeholders, or their agency. Rather, they build collaborative relationships with all these parties to facilitate dialogue about fair policies and practices and help identify resolution options as a neutral. The ombuds should have no personal interest or stake in, and incur no gain or loss from, the outcome of an issue. They remain objective in the conduct of business. They should be physically located outside of senior and administrative structures to ensure, and preserve the perception of, neutrality and independence. The ombuds neither serves in additional roles nor performs collateral responsibilities within the agency since that would compromise the ombuds' impartiality.

Three Common Characteristics (*ACUS language in italics*)

Informality

*(1) Ombuds do not make decisions binding on the agency or provide formal rights-based processes for redress*²⁴

The federal ombuds should not have structural alignment or functional responsibility with any formal investigative, adjudicative, managerial, or oversight element. It is imperative to create structures and responsibilities that do not create actual or perceived conflicts of interest for the ombuds. The ombuds does not speak on behalf of or receive notice on behalf of the agency. Similarly, the ombuds does not put the agency on notice.

Ombuds use a flexible approach with regard to concerns brought to their offices. Options are tailored to individual circumstances. Multiple alternative dispute resolution techniques are utilized.

The ombuds does not serve as a voting member on a search committee for agency hires (other than for ombuds staff); handle appeals of management actions; keep case records on behalf of the agency; or make, change, enforce or set aside a law, policy, rule or management decision.

²² ACUS, page 4

²³ ACUS, page 9

²⁴ ACUS, page 4

Ombuds supplement, but do not replace, the agency's existing formal channels. Use of ombuds offices is voluntary, and is not a required step in any grievance process or agency policy. It does not replace, supplant, or take the place of or otherwise delay timeframes or deadlines associated with formal complaint handling programs or included in law, regulation, or agency policy.

Fairness

(2) They have a commitment to fairness²⁵

The federal ombuds advocates for process and procedural fairness in a dispute or conflict rather than any particular position. Furthermore, the ombuds should advocate for wider-scale systemic fairness both throughout their agency and as the public engages with the agency.

Ombuds, as an informal resource, facilitate resolution of concerns and look into procedural irregularities and/or broader systemic problems when appropriate. They identify trends, issues and concerns about policies and procedures (including potential future issues and concerns) and provide options for responsibly addressing them.

Credible Process

(3) They provide credible processes for receiving, reviewing, and assisting in the resolution of issues²⁶

Agencies should not interfere with the conduct of ombuds inquiries nor ask for information falling within the scope of ombuds confidentiality. Federal agencies should provide ombuds access to those individuals and information it may reasonably need to address an individual's concern

Federal ombuds offices should be led by personnel with sufficient stature, including an appropriately high positional grade and professional experience, to assist and advise on issues and concerns at the highest levels of an agency.²⁷ Additionally, ombuds offices should strive to achieve a diversity of skills and backgrounds in order to credibly handle all matters presented to them.²⁸ Agencies should provide training to ombuds with regard to standards and practice, whether offered by one of the ombuds professional organizations or working groups, or from within the government.²⁹

Federal agencies should ensure that employees seeking assistance from the office will be free from retaliation or reprisal for requesting or using the services of an ombuds office and should, where applicable, codify this in the ombuds office's establishing documents. Furthermore, "federal ombuds should not be subject to retaliation, up to and including removal from the ombuds office, based on their looking into and assisting with the resolution of any issues within the ombuds' area of jurisdiction".³⁰

²⁵ ACUS, page 4

²⁶ ACUS, page 4

²⁷ ACUS, page 9

²⁸ ACUS, page 9

²⁹ ACUS, page 10

³⁰ ACUS, page 8

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For additional information about the use of ombuds in federal agencies or to find contact information for COFO members or the COFO executive committee, please see the COFO website at <http://federalombuds.ed.gov/federalombuds/index.html>..

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