

# **A GUIDE FOR FEDERAL EMPLOYEE OMBUDS**

**A SUPPLEMENT TO AND ANNOTATION OF THE  
STANDARDS FOR THE ESTABLISHMENT  
AND OPERATIONS OF OMBUDS OFFICES  
ISSUED BY THE  
AMERICAN BAR ASSOCIATION**

**Coalition of Federal Ombudsmen (CFO)  
and  
Federal Interagency ADR Working Group Steering Committee**

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## FOREWORD

*This Guide, developed by the Coalition of Federal Ombudsmen (CFO) and the Federal Interagency Alternative Dispute Resolution Working Group (IADRWG) Steering Committee, builds upon the [Standards For The Establishment And Operation Of Ombuds Offices](#) issued February 2004 by the American Bar Association (ABA) and is intended only for use by federal employee Ombuds in connection with their functions for the federal government.*

*Federal agencies establishing an Ombuds function, whether by mandate or administrative action, should use the ABA Standards, which are set forth below in their entirety. However, there are specific areas, unique to federal Ombuds practice, that require additional practical guidance. For these areas – in particular, confidentiality, including the provision of notice, reporting and record keeping – the CFO and IADRWG Steering Committee have developed Federal Guidance Notes, which follow each of the pertinent ABA Standards and are set out in italics.*

***NOTE:*** *This Guide applies solely to the internal management and operations of the federal executive branch. It is not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. Questions regarding interpretations of this Guide should be brought to the Office of the General Counsel or Legal Counsel in each department or agency. In addition, federal employee Ombuds must look to their Ombuds charters and to agency rules, regulations, directives and policies for guidance specific to their agencies.*

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# **STANDARDS<sup>1</sup> FOR THE ESTABLISHMENT AND OPERATION OF OMBUDS OFFICES**

**REVISED FEBRUARY, 2004**

## **PREAMBLE**

Ombuds<sup>2</sup> 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 public accountability. An Executive Ombuds may be located in either the public or private sector and receives complaints concerning actions and omissions of the entity, its officials, employees and contractors; an Executive Ombuds may work either 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.

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<sup>1</sup> The ABA proposed a resolution of February 2004 that supports “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 for 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 2004 Standards, in turn, expand 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.

<sup>2</sup> 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.

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 standards put forth here were developed to provide advice and guidance on the structure and operation of federal Ombuds offices so that Ombuds may fulfill their functions better and so that individuals who avail themselves of 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 a federal Ombuds are:

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

Subsequent Update to ABA Standards:

On November 1, 2004, new sentencing guidelines were issued by the United States Sentencing Commission, [2004 Federal Sentencing Guidelines](#). These guidelines were updated in compliance with the Sarbanes-Oxley (SOX) Act. These guidelines were issued after the issuance of the ABA standards but specifically relate to the existence and establishment of an Ombuds office.

Amendment 673 of the guidelines states that determination of fines for any publicly traded organization found guilty should be based on the seriousness of the offense and the culpability of the organization. The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility. One of the primary aspects of an effective compliance and ethics program is to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation." While the word Ombuds was not used, the "anonymity and confidentiality without fear of retaliation" language suggests the presence of an Ombuds and some federal regulatory entities have noted the need for and encouraged the use of Ombuds. Since many of the SOX requirements are being required in Federal operations, this may be a future area of consideration when developing an Ombuds office.

## **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' 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' own initiative to address issues within the Ombuds' 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 means such 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.

***Federal Guidance Notes:*** Although federal Ombuds offices generally are established under statutes, regulations and a variety of directives and memoranda, rather than formal charter documents, for purposes of this Supplement, we will refer to these sources of Ombuds authority as “charters.” Ombuds charters should set forth the scope of the Ombuds’ responsibilities and related matters dealing with how the Ombuds is to function within the federal organization.

Many federal Ombuds are chartered specifically to deal with employment concerns. Consistent with collective bargaining obligations and agreements, Ombuds’ charters also may authorize Ombuds to participate in the resolution of bargaining-unit employee disputes. In this regard, the collective bargaining agreements should address the Ombuds role in employment dispute resolution. See the Federal Guidance Note below following the ABA’s Standard regarding “Limitations on the Ombuds’ Authority.” With respect to the above Standard, where an Ombuds serves in some capacity as a dispute resolution neutral, the Ombuds should consult two other documents prepared and being issued concurrently with this Guide by the Interagency ADR Working Group Steering Committee, namely “A Guide for Federal Employee Mediators” and “Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators”. Federal Ombuds should be aware that there are statutory provisions and there also may be regulatory provisions or internal agency guidance that may impact on the Ombuds’ functions in dealing with bargaining-unit employees, in particular those under the Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71. Ombuds should seek the advice of a knowledgeable federal labor relations specialist to assure compliance with all such requirements.

For those federal agencies whose Ombuds charters authorize initiation of litigation (per Standard A (8) above), the Ombuds should be mindful of their obligations regarding the maintenance of confidentiality whenever they prosecute such litigation.

## **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’ 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 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 who may be affected by actions of the Ombuds office (a) can control or limit the Ombuds' performance of assigned duties, or (b) can (1) eliminate the office, (2) remove the Ombuds, or (3) reduce the budget or resources of the office for retaliatory purposes.

- (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' office. An Ombuds does not reveal the identity of a complainant without that person's express consent. An Ombuds may, however, at the Ombuds' 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' maintaining confidentiality with the source of the information<sup>3</sup>.

***Federal Guidance Notes:** The independence of an Ombuds Office is a fundamental prerequisite to its effective operations. To ensure this independence, the federal Ombuds should, if possible, have direct access to the highest agency official or his designee. The maintenance of confidentiality likewise is of*

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<sup>3</sup> 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.

*paramount importance to the effectiveness of federal Ombuds programs, and Ombuds charters accordingly should expressly affirm the criticality to the Ombuds process of maintaining confidentiality. Moreover, Ombuds should be aware that, where they serve as neutrals, the Administrative Dispute Resolution Act of 1996 (“ADR Act”) specifically prohibits them from disclosing the substance of “dispute resolution communications.” By the same token, all federal employees, including Ombuds, are obligated to report incidents of fraud, waste and abuse in conjunction with the operation of federal programs and to cooperate with duly authorized federal investigative agencies and organizations. The federal Ombuds functions by making recommendations for resolution of systemic problems to those persons who have the authority to act upon them. Also, on occasion, a federal Ombuds might be faced with having to respond to Congressional or agency management inquiries. There will be times when these requirements and obligations may present a conflict. Accordingly, it is essential that federal Ombuds have access to independent or properly insulated legal counsel, in order to obtain competent advice whenever such conflicts arise.*

*In terms of record keeping, federal Ombuds’ records may be subject to regulations administered by the U.S. National Archives & Records Administration, an independent federal agency that determines which records and reports should be maintained in accordance with the Federal Records Act. Federal Ombuds offices should review agency record development and retention procedures and, whenever needed, should consult agency counsel and records officers for guidance as to the creation, maintenance and destruction of records. In addition, Federal Ombuds should become familiar with their obligations for complying with the Freedom of Information Act (FOIA) (including the FOIA exemption provided under the ADR Act, applicable when Ombuds are serving as neutrals) as well as the Privacy Act, and should seek counsel to resolve any questions with regard to those statutes.*

#### **LIMITATIONS ON THE OMBUDS’ 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’ 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<sup>4</sup>, 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 the Ombuds.

***Federal Guidance Notes:*** *The above Standard provides that Ombuds may not “address” issues arising under a collective bargaining agreement, or an issue involving federal, state or local labor or employment law, rule or regulation, but implies that Ombuds may do so where “there is no collective bargaining representative” and where “the employer specifically authorizes the ombuds to do so.” In the latter regard, charters for federal Ombuds frequently provide specific authority for the Ombuds to deal with employment related matters and, indeed, the sole focus of the federal Ombuds in many instances is in the area of employee related issues in controversy. Where the charter creates such authority, the above Standard D(6) does not apply, and does not limit Ombuds’ involvement in federal employment matters. See the Federal Guidance Notes following ‘Establishment and Operations’ and ‘Independence, Impartiality, Confidentiality’ Standards.”*

## **REMOVAL FROM OFFICE**

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

***Federal Guidance Notes:*** *The procedure and grounds for discipline and/or removal of a federal Ombuds is controlled by 5 U.S.C. Chapter 75.*

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<sup>4</sup> 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.

## NOTICE

F. An Ombuds is intended to supplement, not replace, formal procedures<sup>5</sup>. 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 when formal action is initiated and if notice is given to the entity

(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 complainant or the entity in which the Ombuds operates<sup>6</sup>

(e) the Ombuds is not anyone's lawyer, representative, or counselor or a substitute for any of these, and

(f) the complainant may wish to consult a lawyer or other appropriate resource with respect to those rights.

(2) If the Ombuds communicates<sup>7</sup> with representatives of the entity concerning an allegation of a violation, and –

(a) the communication that reveals the facts of

(i) a specific allegation and the identity of the complainant

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<sup>5</sup> An Ombuds program, as envisioned by these Standards, supplements, and does not substitute for, the need of an entity to establish formal procedures to protect legal rights and to address allegedly inappropriate or wrongful behavior or conduct.

<sup>6</sup> The notice requirements of Paragraph F do not supersede or change the advocacy responsibilities of an Advocate Ombuds.

<sup>7</sup> Under these Standards, any such communication is subject to Paragraph C(3).

- (ii) allegations by multiple complainants that may reflect related behavior or conduct that is either inappropriate or wrongful

then the communication 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; 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, as described in Paragraph 2.

***Federal Guidance Notes:** Federal employee communications to a federal Ombuds should not be construed as providing notice to the federal agency or other federal entity, because Ombuds should maintain the confidentiality of those communications and their own independence from others within the entity. See Federal Guidance Notes following the “Independence, Impartiality and Confidentiality” Standard. Where the employee raising an issue with an Ombuds wishes to remain anonymous, the Ombuds, acting as a conduit for the employee and at the employee’s request, should provide notice to the entity, to the extent notice is possible with an anonymous report, and provide notice in such a way that anonymity is maintained. If the employee does not wish to remain anonymous, the Ombuds should direct the employee to the proper office within the entity, in order to provide his/her own notice, and should either furnish the employee with information regarding what time limitations may apply or direct the employee to where such information may be obtained . In other instances, the Ombuds may make recommendations for the resolution of a systemic problem to those persons who have the authority to act upon them.*

## **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 omissions 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 body<sup>8</sup>
- (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
- (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 omissions of the entity, its officials, employees, and contractors. An Executive Ombuds may work either 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 inquiries, 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.

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<sup>8</sup> 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.”

*Federal Guidance Notes: In addition to general federal executive Ombuds, some agencies have been directed by statutes and regulations to create an Ombuds position to perform specific functions. For example, Section 16.505 of the [Federal Acquisition Regulation \(FAR\)](#) requires federal agency heads to create “task-order” and “delivery-order” Ombuds for use in connection with multiple award indefinite quantity/indefinite delivery type acquisitions. There is great variation among federal agencies in the operations of these special purpose Ombuds. Charters for such Ombuds should be precise regarding the Ombuds’ location and scope of authority.*

### **ORGANIZATIONAL OMBUDS**

- I. An Organizational Ombuds facilitates fair and equitable resolution of concerns that arise within an 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.