

# **Guide for Ombudsman Institutions**

## *How to conduct investigations*

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## PREFACE

This Guide is to share knowledge about best practices developed by *Ombudsman*<sup>1</sup> institutions around the world. An Ombudsman institution is authorized to receive complaints and questions confidentially about alleged acts, omissions, improprieties, and broader systemic problems within the defined jurisdiction and to address, investigate, or otherwise examine these issues independently and impartially. This core investigative function of *Ombudsman* institutions ranges widely in complexity and subject matter. The Guide provides personnel of *Ombudsman* institutions with accessible guidelines on the rules and approaches for examining complaints and conducting investigations. More specifically, the Guide contains best practices on policies regarding the receipt of complaints, decisions to investigate them or not, how they are investigated and how the results of those investigations are presented to the complainant, the subject of the investigation, the public and the media. At the same time it does not consider the specific types of complaints or complainants, specific subjects, media relation other than concerning investigations, alternative dispute resolution or evaluating the effectiveness and efficiency of an *Ombudsman* institution.

The Guide was produced by the Democratic Governance group at the UNDP Regional Centre for Europe and the Commonwealth of Independent States (CIS) in Bratislava, Slovakia as part of an ongoing programme to support national human rights institutions in the CIS. Specialists at the Regional Centre offer policy advice on governance, poverty and environmental issues in interested countries of the region, and develop and implement regional programmes to contribute to human development. As they do so they gather, analyze, share and apply the lessons learned and knowledge generated. The aim of Regional Centre specialists is to provide clients with the best knowledge

<sup>1</sup> The term *Ombudsman* is the Swedish work for an official appointed to receive and pursue cases of breaches of administrative duty, first established in Sweden in the 18<sup>th</sup> century. To an English speaker this term does not appear to be gender inclusive since it includes the word 'man'. This has led to widespread discussion among experts providing support and advice to *Ombudsman* institutions worldwide. These discussions have tried to identify a better English term that refers to the offices headed by both Ombudswomen and Ombudsmen. This has proven difficult and the debate has not been resolved.

The United Nations Development Programme (UNDP) is an international organization with the important mandate of promoting gender equality. UNDP makes a point of using gender inclusive terminology. Therefore, the UNDP Regional Centre for Europe and the Commonwealth of Independent States has decided to use the Swedish word *Ombudsman* to modify the term institution (i.e. *Ombudsman* institution) to refer to national institutions headed by women and men, and to italicize the word to indicate that it is a foreign word. The head of the *Ombudsman* institution, the officeholder, will be referred to as the Ombudsperson throughout this publication. This is to reflect a gender inclusive understanding of the position. The term Ombudsperson is intended to encompass all other forms of the word, such as Ombuds, Ombudswoman, Ombudsman, human rights commissioner, parliamentary commissioner of administration and others.

and information available. This Guide is one of several knowledge management publications produced by the Regional Centre in 2005 and was prepared at the request of the network of Ombudspersons from the Commonwealth of Independent States. The Regional Centre organizes and facilitates biannual meetings of this Network to share experience and build capacity of *Ombudsman institutions* to carry out their functions effectively, according to internationally accepted standards.

The Guide was prepared under the direction of Mr. Sergei Sirotkin, Policy Advisor on Human Rights at the Regional Centre. The recommendations in the Guide draw on data, knowledge and experience regionally and worldwide accumulated during the past two decades. The draft was reviewed and revised by Ombudspersons from the CIS at a Roundtable organized by the Regional Centre in May 2005. We hope that Ombudspersons in the CIS and other countries find the Guide useful in improving their skills while conducting investigations and responding to complaints by individuals and groups seeking justice.

Please send comments and questions about the Guide to Mr. Sergei Sirotkin at [sergei.sirotkin@undp.org](mailto:sergei.sirotkin@undp.org).



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UNDP staff members in the region also made valuable contributions. The Guide would not have been completed without the support of John Macaulay, Research Assistant, Louise Nylin, Policy Specialist and Charlotta Rodhe, Research Assistant, all staff members at the UNDP Regional Centre for Europe and the CIS. Thanks also go to Peter Serenyi, Editor at the Regional Centre, for proof reading the Guide.

The Guide draws on the policies and procedures and investigation manuals of the Ombudspersons of the State of Alaska, the Australian state of New South Wales, the Commonwealth of Australia, Ireland, the Canadian Provinces of Ontario and British Columbia, New Zealand and the United Kingdom.

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# INTRODUCTION

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## INTRODUCTION

The first Ombudsperson appointed by a parliament was created in the Swedish Constitution of 1809. Lars Mannerheim, appointed in 1810 by the Swedish Parliament to be the first Ombudsperson named under the new Constitution, and his successors had the power to prosecute government officials not doing their job or not following the law. The Swedish Ombudspersons discovered that in some investigations an official's behaviour did not warrant prosecution even though changes were recommended.

The Swedish Ombudsperson began to write reports to explain why prosecuting government officials under these circumstances was not warranted. This was the birth of the modern Ombudsperson's investigative report. Ombudspersons who receive and investigate complaints about human rights violations or maladministration have either explicit or implicit powers to write reports that summarize their investigations and present their recommendations.

## GUIDE CONTENTS AND SUBJECTS NOT INCLUDED

This guide's goal is to present some of the best practices developed internationally for the consideration of *Ombudsman* institutions and intergovernmental organizations such as the United Nations Development Programme (UNDP) that support them and endorse their efforts and goals.

The guide contains information on best practices from *Ombudsman* institution experience on the receipt of complaints, policies and procedures surrounding the receipt of complaints, decisions to investigate them or not, how they are investigated, how the results of those investigations are presented to the complainant, the subject of the investigation, government officials and leaders, parliament, the public and the media. These best practices are presented so Ombudspersons and their staff can consider implementing or adapting them to improve the function and performance of their institutions.

The guide does not cover investigations by the Ombudsperson into specific types of complaints or complainants, specific subjects, media relations other than concerning investigations, alternative dispute resolution in detail, how to construct or use a computerized complaint registration system that tracks information about complaints and investigations, prevention of human rights violations or maladministration, or evaluating the effectiveness and efficiency of an *Ombudsman* institution's office. Those and other topics will be the subjects of additional guides if the Community of Practice (CoP) decides that they should be written.

The guide is a Knowledge Management product intended to be organic—revised and expanded as the CoP determines is appropriate and necessary.

## LEGAL BASIS FOR AN INVESTIGATION BY THE *OMBUDSMAN* INSTITUTION

The legal basis for an Ombudsperson to conduct inquiries and investigations of complaints is in the country's constitution and/or law creating the institution. Without specific authority, the *Ombudsman* institution could not conduct an investigation of a complaint received within the office's competence. The *Ombudsman* institution is a Rule of Law institution. Ombudspersons must be the first to follow the laws creating their offices and providing the powers they can use to receive and investigate complaints.

Each Ombudsperson and staff who conduct investigations should carefully read, analyze, understand and use appropriately the powers and authorities provided in the office's legal basis. To do otherwise would open the *Ombudsman* institution to the kind of criticism it makes of other authorities about not following the law.

## ADAPTATION FOR LOCAL PRACTICE

Each *Ombudsman* and National Human Rights Institution (NHRI) has its own legal basis in the country's constitution and the law creating the institution as well as in the regulations, and policies and procedures adopted for each institution. If there is a conflict between the guide and national legislation, follow national legislation. If provisions in national legislation do not agree with international standards, seek amendments to the legislation to bring it into agreement with international standards.

Individual institutions may have different ways to accomplish the same goals described here as best practices that have been developed in other countries.

No one set of practices fits every local situation. The basic concept of an independent, impartial institution that receives and investigates complaints about alleged violations of human rights or maladministration is implemented using different methods in different countries. What is important is that the *Ombudsman* institution be and be seen to be independent and impartial, capable of conducting fair and unbiased investigations credible to both complainants and the authorities under the institution's competence.

## REGULATIONS, POLICIES AND PROCEDURES

In whatever manner an *Ombudsman* institution is structured under law, an important goal is to create one or more documents prescribing how the office

functions in its various aspects. While it is difficult to create a manual early in an office's history, it is important to begin and to draft and adopt regulations that amplify and complement the law creating the *Ombudsman* institution. The regulations should be further amplified in policies and procedures the Ombudsperson can change instantly that prescribe how the office operates.

Documents and manuals are important for the efficient, effective and consistent operation of an *Ombudsman* institution. Practices should be documented in written policies and procedures. This is vitally important for investigations. Written policies and procedures help insure that staff conduct investigations in manners approved in advance by the Ombudsperson that are consistent from one investigation to another.

# 1. INVESTIGATIONS CONDUCTED BY THE *OMBUDSMAN* INSTITUTION VERSUS CRIMINAL INVESTIGATIONS

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## 1. INVESTIGATIONS CONDUCTED BY THE *OMBUDSMAN* INSTITUTION VERSUS CRIMINAL INVESTIGATIONS

An investigation is the Ombudsperson's process of examining a complaint. The Ombudsperson determines the facts, the laws or other legal bases governing the facts, analyzes the facts in light of the laws, makes a finding on the allegations of the complainant and makes recommendations to restore rights or prevent them from being violated in the future.

The Ombudsperson and staff systematically gather and analyze facts to understand and determine the merits of a complaint and, in turn, to consult either to settle a complaint or to make recommendations to resolve the complaint.

In English, the word 'investigation' can be used to describe everything from a very informal inquiry to a very formal criminal investigation that could result in a prosecution. In Russian, the word 'investigation' often connotes a criminal prosecution, an activity conducted only by procurators. Thus it is very important to distinguish between investigations conducted by the Ombudsperson and those conducted by a procurator.

Investigations conducted by the Ombudsperson are **not** criminal investigations. Their goal is not to determine whether to initiate a criminal prosecution. An *Ombudsman* institution investigation is administrative, an inquiry that determines facts, finds the law governing the situation, makes a finding on the complaint and presents recommendations designed to resolve or redress the specific problem or to prevent it from happening again.

An Ombudsperson's credibility and the regard in which the public holds the institution depend to a large degree on the credibility and results of investigations the office conducts. Credibility of both the Ombudsperson and the office's investigations depend on sufficient powers to enable the *Ombudsman* institution to determine the facts even if those who possess them are not willing to cooperate with the *Ombudsman* institution.

An investigation begins with a complaint. If it is within the *Ombudsman* institution's competence as prescribed by the office's legal basis, the Ombudsperson can determine whether it should be investigated. The investigation ends once the Ombudsperson and staff are satisfied that the inquiry has yielded all relevant facts. Normally, a member of the *Ombudsman* institution's staff receives the complaint, defines what is to be investigated, plans and conducts the investigation under the supervision of the Ombudsperson or other managers, evaluates the complaint, the facts obtained and the applicable laws. The investigator drafts a report that presents a suggested finding to the Ombudsperson along with recommendations if appropriate. The investigator and the managers of the *Ombudsman* institution evaluate an authority's re-

sponses to the Ombudsperson's finding and recommendations and make any appropriate changes to the draft report. The Ombudsperson signs the report and determines whether it will be made public. Eventually the investigation is concluded.

Ombudspersons will criticize authorities that have been found to violate human rights or commit maladministration. The *Ombudsman* institution—the person, the institution and its staff—must be as exact and precise, as scrupulously accurate in all of its work, particularly investigations, as it would expect other authorities to be.



## 2. INVESTIGATIVE PRINCIPLES

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## 2. INVESTIGATIVE PRINCIPLES

### 2.1. Introduction

Investigations begin with complaints or issues the Ombudsperson chooses to examine without a complaint. They may proceed in a variety of ways and end for different reasons. The problem may be resolved and the Ombudsperson chooses to discontinue the investigation. Key witnesses or records may no longer be available. Or the Ombudsperson and staff conduct the investigation, find the facts, make a determination and issue a report.

The process for moving from a complaint or Ombudsperson-initiated investigation to a concluded investigation with a written report may not be described in the office's legal basis in detail sufficient enough to provide Ombudspersons and their staff the principles to follow in conducting the investigation. Whatever process an Ombudsperson follows, full investigations as described in this guide should be undertaken only after an express decision by an investigator, a supervisor and preferably the Ombudsperson. Investigations take much time and can consume resources rapidly. If there is a way to resolve a problem and restore rights that does not require an investigation that method is generally preferred.

The following principles have been derived from examining laws creating more than 130 *Ombudsman* institutions around the world, reading investigative reports from many *Ombudsman* institutions, experience in conducting investigations and discussions with Ombudspersons and their staff.

These principles describe how Ombudspersons and staff have found it best to investigate complaints. They originate in a number of places:

1. The legal instrument that creates the *Ombudsman* institution.
2. Furtherance of the characteristics of independence, impartiality and integrity.
3. Experience from having conducted investigations and determined what works best to yield investigations that are respected by complainants, authorities, government, parliament and the public at large.

If an *Ombudsman* institution's legal basis does not permit following the principles, the Ombudsperson should follow the law creating the institution. If the law prevents investigations from being conducted in good ways, if appropriate the Ombudsperson should seek to have the law amended to improve the investigative process. When one or more principles cannot be followed because they contradict the *Ombudsman* institution's legal basis, think about why that

principle has been suggested here and whether being able to follow it would improve the quality of investigations conducted by the *Ombudsman* institution. If it would improve investigative work, plan how to approach Parliament to seek amendments that permit or require the principle to be followed.

## 2.2. The principles

Giving explanations is a large part of an Ombudsperson's work. From helping complainants understand how government functions through explaining what an investigation determined and what people's human rights are to help prevent them from being violated, Ombudspersons devote much energy to explanations.

In nearly all *Ombudsman* institutions around the world, investigations are inquiries, not adversarial processes. The Ombudsperson is responsible for all investigations, even in those offices where the Ombudsperson may delegate some, many or all of the powers to conduct investigations. Based on powers provided in law, the Ombudsperson determines how each investigation will be conducted.

The *Ombudsman* institution protects the rights of all parties in a complaint and assures that natural justice, due process or procedural fairness is observed. The *Ombudsman* institution does not represent the complainant, authority, government or parliament. The *Ombudsman* institution represents good government and observance of human rights.

Investigations are conducted in private. Staff are required to observe secrecy and confidentiality. Information is normally only disclosed for purposes of the investigation or to establish grounds for the Ombudsperson's determination and recommendations. (Some Ombudspersons return documents or copies to the person or authority that provided them.)

The Ombudsperson or staff conduct an impartial and independent investigation of actions over which the office's legal basis gives the *Ombudsman* institution jurisdiction. The Ombudsperson has no interest in the results of investigations other than that they are fair, impartial, independent and correct. The Ombudsperson responds to actions found to be violations of human or other rights over which the *Ombudsman* institution has competence. Generally, if an authority's action was not a violation of human rights or other rights, the Ombudsperson has no basis on which to make recommendations.

Once the Ombudsperson receives a complaint and decides to investigate it, the authority is notified of the proposed investigation and given an opportunity to comment.

Subject to the office's legal basis, the Ombudsperson determines whether any person may be represented or advised by legal counsel and what role that counsel may play other than advising the person before the Ombudsperson.

The Ombudsperson in most countries normally may compel individuals to appear and give testimony or produce information the Ombudsperson determines is relevant to the investigation. Individuals compelled to appear, testify and/or produce information usually have the same rights as witnesses in the country's courts.

The Ombudsperson and investigative staff should attempt to conduct investigations in ways that are reasonable and fair. Decisions should be made about what is needed to prove or disprove what the complainant alleges took place. The investigator should plan how to do that in an efficient and effective manner that does not waste time or resources with little hope of yielding better results or preventing human rights violations in the future.

The Ombudsperson and investigative staff should not make up their minds about the outcome of an investigation before concluding it. They should not assume that violations of human rights or other rights will be found to have occurred just because they have been alleged or found in the past. Staff should not express opinions, personal or otherwise, about complaints, complainants, authorities, civil servants or government officials. To do so may compromise the *Ombudsman* institution's impartiality prior to conducting an investigation or considering future complaints. Internal debate among staff and the Ombudsperson is welcome and essential to a vigorous consideration of issues before the Ombudsperson makes a finding or takes a position after conducting an investigation. The Ombudsperson benefits from hearing a broad range of opinion from staff and others when that is appropriate. Broadly discussed issues result in better recommendations and actions by the *Ombudsman* institution.

The *Ombudsman* institution issues a report after each completed investigation. It summarizes the complaint, the facts the investigation found, the law governing the situation, an analysis of the facts in light of the law, a finding on what the complaint alleged, and any recommendations the Ombudsperson proposes the authority implement to remedy the situation or to prevent it from happening again. The *Ombudsman* institution may not issue binding orders to authorities unless the law specifically provides that power. During investigations, the *Ombudsman* institution does not do the state's job or substitute for state power but rather assesses its use and determines whether that power is being exercised in ways that violate human rights.

The *Ombudsman* institution gives any person, official or authority that will be criticized the opportunity to read a preliminary report on the investigation and respond in any manner the person, official or authority sees fit. The *Ombudsman* institution incorporates written responses or summaries of them and any other responses in the final report.

Final reports are presented to the complainant, the authority that was the subject of the complaint, any individuals who acted on the matter complained about along with their supervisors and any other person or authority the Ombudsperson determines should receive the report.

Courts may not review the acts of the *Ombudsman* institution in investigations as in other matters. Communications or publications of the *Ombudsman* institution are absolutely privileged and cannot form the basis for suits charging defamation, libel or slander.



## 3. TYPES OF INVESTIGATIONS

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### 3. TYPES OF INVESTIGATIONS

Investigations may focus on:

1. Issues brought to the Ombudsperson by one or more complainants,
2. Concerns that the Ombudsperson chooses for own-motion investigations without a complaint, or
3. Problems systemic in nature even though they come to the Ombudsperson as a single complaint

#### 3.1. Individual Complaint

Investigations may focus on the separate and unique aspects of the circumstances giving rise to an individual complaint. Many investigated complaints affect only the person who has complained. Investigations of individual complaints may also focus on understanding the broader context of one or more complaints. All investigations may take a holistic or systemic approach whether their focus is broad or narrow.

#### 3.2. Own Motion

Most Ombudspersons have the power to investigate matters under their jurisdiction and competence without requiring a complaint. An own-motion investigation, one undertaken on the Ombudsperson's own motion, must be about issues and authorities that would be within the *Ombudsman* institution's competence if they were brought by a complainant.

Own motion or Ombudsperson-initiated investigations are useful when:

- the persons affected are unable to make a complaint themselves, either because of disabilities or their age;
- the person affected who could bring a complaint would be in danger for doing so; or
- the matter is an important issue and no complainants are likely to bring the matter to the Ombudsperson.

Some Ombudspersons choose to limit severely the initiation of own-motion complaints believing that the most important issues will eventually be presented by one or more complaints. Another factor for limiting own-motion complaints is that they may be seen as an attempt by the Ombudsperson to seek publicity. In other societies, the Ombudsperson is expected to initiate in-

vestigations based on newspaper articles that call attention to problems and concerns that could be investigated if presented by a complainant.

### 3.3. Systemic

Some problems presented to the *Ombudsman* institution relate more to how a system functions rather than its application to a single individual. In these situations, several, many or all persons subject to the system are affected when it violates human rights, malfunctions or is maladministered. Investigations of single instances may resolve individual complaints while the system continues to cause problems.

The goal of handling complaints is to resolve them where possible to achieve a remedy for the complainant and/or a restoration of rights that have been violated. The *Ombudsman* institution seeks to improve public administration where defective administration has been identified or rights have been violated. During an investigation, the *Ombudsman* institution should identify broken systems that violated rights. Ombudspersons often review individual complaints to find patterns of systemic problems.

Where an authority violates human rights, the *Ombudsman* institution will be more effective and assist more people by looking at the system as a whole. Systemic investigations may begin with a single complaint, a group of complaints or be initiated by the Ombudsperson. They may be about large or small matters. At times, a change in the law, regulation, policy or procedure is needed to prevent additional rights violations. Systemic investigations normally focus on matters that are not simple mistakes or failures to follow the existing law, regulation, policy or procedure.

Own-motion investigations often focus on systemic issues, particularly if resolution of a specific problem would be delayed by examining it as a systemic investigation.

Systemic issues may be simple and individual or complex and require significant resources to investigate. Systemic issues should be screened to determine priority and whether they should be pursued. Factors to set priorities for systemic investigations include how serious and urgent the issue is, how many people are affected, whether the *Ombudsman* institution has defined the issue or authority as a priority, whether the matter could or would be investigated by another authority.



# 4. THE OMBUDSPERSON'S JURISDICTION, ROLE AND RESPONSIBILITY

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## 4. THE OMBUDSPERSON'S JURISDICTION, ROLE AND RESPONSIBILITY

The Ombudsperson's jurisdiction is set out in the office's legal basis. In the countries of Eastern Europe and the Commonwealth of Independent States, Ombudspersons most often have jurisdiction over complaints alleging violation of human rights. The definition of a human rights violation can be sufficiently broad to encompass many if not most complaints about the acts of government authorities.

The acts of the *Ombudsman* institution as an independent and impartial third party to examine and, where appropriate, to investigate complaints. The Ombudsperson decides which complaints to investigate, how to investigate them and what recommendations to make to the authorities against which the complaints have been made. Most Ombudspersons try to find resolutions to problems and ways to restore rights rather than conduct the full investigation process described below. That process takes time and resources that could better be devoted to solving problems. There are occasions, however, when solutions may not be possible or may not be possible without a full investigation that determines what actually took place and has recommendations based on fact-finding. In serious, difficult and complex cases, the investigative process described below will help determine what happened and what to recommend. This type of full investigation process should be considered and used only when necessary, particularly in offices that do not have sufficient resources.

In handling and investigating complaints, most offices use some form of these steps:

- A. *Receiving and focussing the complaint:* Communicating with the complainant(s) to determine what is being alleged and which person or authority is the subject of the complaint.
- B. *Determining whether the Ombudsman institution has authority/power/jurisdiction to investigate:* Examining the *Ombudsman* institution's legal basis to determine whether the complaint is within the Ombudsperson's power to consider and investigate.
- C. *Deciding whether to investigate:* After a preliminary examination of the complaint, determining whether it can be resolved without an investigation and if not whether it will be investigated.
- D. *Investigating through fact-finding:* Using the *Ombudsman* institution's powers to interview persons with information about the events that are the subject of the complaint, and obtaining records about the events to determine the facts surrounding the complaint.

- E. *Testing the facts*: Examining the facts to resolve conflicts and determine which are most important to making a finding on the complaint.
- F. *Analyzing the facts*: Finding laws or other legal instruments that govern the facts and then analyzing the facts in light of the laws.
- G. *Consulting with the subject of the investigation in an attempt to settle the complaint*: Interviewing the subject to determine whether it is possible to settle the complaint or to restore rights that have been violated. Resolving complaints where and when possible.
- H. *Preliminary report to the authority/institution*: Writing a report that summarizes the investigation—the facts found, the law that governs them, analysis of the facts in light of the law, the Ombudsman institution's finding on the complaint and recommendations. A preliminary report is sent to any person or authority that is being criticized for any comments or responses.
- I. *Final report with findings and recommendations*: Any responses are included or summarized, any changes made as a result of the responses are indicated and the findings and recommendations are made final. Confidential material is removed before the report is issued to anyone not entitled to read the confidential material.
- J. *Keeping the complainant appropriately informed*: The complainant is appropriately informed of the investigation's progress throughout the process.

These steps may be followed in this order or where appropriate in a different order. For example, the complainant may be informed at regular intervals of the investigation's progress, not just at the end when it is concluded.



# 5. RECEIVING, UNDERSTANDING AND RECORDING A COMPLAINT

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## 5. RECEIVING, UNDERSTANDING AND RECORDING A COMPLAINT

Section 1 on Complaint Reception of the UNDP Guide for *Ombudsman* Institutions: How to handle complaints describes best practices in receiving and recording complaints. Readers are urged to read that section of the earlier guide. That information will not be repeated here.

From the perspective of a complaint that will be investigated, initial reception of the complaint is important because it is the first opportunity for the intake officer to help define the issues, concerns and alleged violations of human rights that the complainant wishes the Ombudsperson to resolve or investigate. Many of the complainant's expectations are set when a complaint is received.

Additionally, the complainant's attitude towards the office and its reception of the complaint are set from the first interactions. Complainants often come to the *Ombudsman* institution because no one in government has taken the time to explain why action was taken or not, even when the action is legal and respects the individual's human rights. Complainants may be frustrated both by the actions of government and the attitude of government officials or civil servants who may be rushed, dismissive, refer complainants to other offices that also do not help, etc. Complainants may have received incorrect or wrong information from a person who shows no interest in helping. Complainants want to be treated as fellow human beings with dignity and respect, a reception that all *Ombudsman* institution staff should provide.

It is not always possible during complaint reception to determine which complaints will be investigated. Where a matter is clearly within the *Ombudsman* institution's competence and might become an investigation, staff seeing the complainant in person or talking by phone should obtain as much information as possible during that contact.

Complainants often have difficulty focusing on the basic cause for their complaint. Many complainants bring many complaints at one time. Intake officers should help them identify the causes for their concerns and the issues they wish reviewed, particularly when no appeal or alternative way to resolve their complaint exists. Asking what is the most important issue may help them focus. Asking what outcome they seek may help determine whether an investigation conducted by the *Ombudsman* institution could produce it.

During the initial contact, intake officers should seek what might be called 'sufficient cause'. To be investigated, a complaint should contain sufficient allegations of facts that can be determined. Guesses, hunches, suspicions are not sufficient for conducting investigations. They are difficult and perhaps impossible to investigate while respecting the rights of the person against whom

the complaint is lodged. Depending on what jurisdiction the law creating the *Ombudsman* institution defines, a complaint must allege a violation of human rights or maladministration. Intake officers should look for allegations of fact that can be determined which, if found true, would result in the complaint being upheld.

5 Intake officers should ask a complainant to relate chronologically, specifically and systematically the nature of the problem. That helps determine the complainant's understanding of the grievance, the relief the complainant seeks and why the complainant believes that relief is required or appropriate. Any evidence the complainant can provide or describe helps determine whether to investigate the complaint. The intake officer should seek all the information the complainant can provide about witnesses or other sources of information that would support what the complainant is alleging. Intake officers also help investigators by asking what remedy the complainant seeks. If that remedy is not possible, would other options solve the problem?

Complaints received in writing may not have all of these details or they may not be presented clearly and coherently. The intake officer or investigator may need to ask the complainant to contact the office and provide additional information.



# 6. COMPLAINANT EXPECTATIONS

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## 6. COMPLAINANT EXPECTATIONS

Complainants approach the *Ombudsman* institution because they have problems they believe they cannot resolve themselves. No one has resolved their complaint or satisfactorily explained their situation to them. They are often frustrated, angry and have been passed off from one authority to another, from one civil servant to the next. They may not be very nice people. They can be demanding, imposing, insulting, aggressive, obnoxious, and hateful—qualities most societies do not respect. Without condoning their behaviours, they often act as they do because of how they have been mistreated.

Try to understand the world from their perspective. An Ombudsperson who does that has a better point from which to relate and communicate with them successfully.

The earliest contacts between an *Ombudsman* institution and complainants set expectations for what follows. How the intake officer explains the *Ombudsman* institution's role, process and work to new complainants, for example, tells them what to expect. They should understand the range of remedies the *Ombudsman* institution can recommend and that the Ombudsperson can only make recommendations and not order authorities to implement the recommendations.

The intake officer should help complainants understand what they can do themselves. Offices try to act only for those who cannot act for themselves or who have exhausted their remedies.

Ombudspersons find it better not to promise much and to deliver more. Complaints can not be judged only from the information the complainant provides. Complainants should know at the end of an intake that their concerns have been heard and will be examined. They should expect that someone will contact them to report on the status of their complaint. They should have some idea of when that will happen so they can contact the office if it does not communicate with them.

Be frank with complainants about the amount of time it takes to review or investigate a complaint. Try not to promise results by specific dates. Staff receiving complaints should not promise exact dates by which a complaint will be considered, examined or investigated. Circumstances change and such promises normally result in disappointed or upset complainants. Complainants should not leave the intake process believing that their complaint will be fully investigated, that an investigation will happen quickly and always result in restoration of violated rights. These expectations may not be met.

What complainants think about the office and how well it performs depends on what expectations are set early and how well they are met. Complainants should think the office has given them the best service possible. Nothing re-

quires the *Ombudsman* institution to make them happy with the results—especially if the only way they will be happy is if the *Ombudsman* institution finds what they want even if the facts don't support such a finding.

The Ombudsperson and staff should treat complainants as they would like to be treated. A little bit of kindness, thoughtfulness and respect goes a long way especially with difficult complainants.

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# 7. RETRIBUTION

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## 7. JURISDICTION: MAY A MATTER BE INVESTIGATED?

Determining the *Ombudsman* institution's jurisdiction is the first key step in deciding whether a complaint may be investigated. The legal basis sets for the *Ombudsman* institution out what is within the *Ombudsman* institution's jurisdiction.

These factors determine whether a specific complaint is within the *Ombudsman* institution's jurisdiction:

**Who can complain:** The law creating the *Ombudsman* institution either specifies from whom the Ombudsperson can accept complaints or limits who can complain. Generally anyone affected by acts of the authorities under the *Ombudsman* institution's competence may complain. In addition, some laws specifically allow complaints from NGOs, corporations, etc. If the complaint is made on someone's behalf or is about an act affecting people other than the complainant, staff contact the individual(s) affected to be certain they want the matter examined. The law also specifies how to treat anonymous complaints or those from people willing to identify themselves to the Ombudsperson but wishing to keep their identity otherwise confidential.

**What authorities may be the target of complaints:** The law creating the *Ombudsman* institution specifies which authorities may be the targets of complaints and which may not.

**What acts may be complained about:** Alleged violations of human rights normally may be the subject of complaints. Some laws also include maladministration or other specific acts.

Before the Ombudsperson can handle a complaint it must come from a person or body who can complain, concern an authority under the *Ombudsman* institution's competence, and allege an act that may be the subject of a complaint.

In addition, any other jurisdictional provisions of the legal basis for the *Ombudsman* institution must be satisfied. Some laws require that a complaint not be the subject of court proceedings, that rights of appeal have been exhausted, that no more than a specified time may have passed since the complainant became aware of the act, etc.

While determining jurisdiction, it may be necessary to contact the complainant or the authority for additional information to help make the determination.

# 8. PRELIMINARY EXAMINATIONS

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## 8. PRELIMINARY EXAMINATIONS

Once a complaint within the *Ombudsman* institution's jurisdiction has been received, a preliminary examination may take place. Such examinations seek to determine whether the complaint is capable of a remedy that does not require an investigation, whether facts or law might be issues an investigation would clarify, whether there might be a basis for finding the complaint justified or supported if it is investigated, etc.

Because detailed investigations are time consuming and may require significant staff resources, Ombudspersons seek to conduct them where they are most likely to benefit and are clearly indicated. A preliminary examination generally identifies the appropriate way to handle a complaint. Preliminary examinations may be conducted in a letter to the authority, one or more phone calls to the authority or appropriate government officials, examination of records, preliminary discussions with witnesses, etc.

Some *Ombudsman* institutions request a detailed report from the authority as part of the preliminary examination. These contacts seek information beyond that provided by the complainant. They may also yield the authority's views of the complainant's allegations which in turn may allow *Ombudsman* institution staff to discuss whether the act is a violation of human rights and if the authority wishes to re-examine what it has done. If the act violates human rights or any other act the Ombudsperson may investigate, the preliminary examination could result in the authority reconsidering and restoring violated rights without an investigation conducted by the *Ombudsman* institution.

At the end of the preliminary examination, the investigator determines whether the complaint should be closed, discussed at a higher level within the authority or the government, or whether a full investigation should be conducted.

# 9. REASONS TO INVESTIGATE OR NOT

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## 9. REASONS TO INVESTIGATE OR NOT

### 9.1. General

General reasons to investigate include understanding the source of a grievance and working towards a systemic understanding of a set of human rights issues. General reasons not to investigate include a lack of jurisdiction, other more appropriate remedies are available, or an investigation would be of no benefit to the complainant or the authority.

### 9.2. Specific

Specific reasons to investigate include: philosophic or mandated reasons to investigate; fulfil the *Ombudsman* institution's purpose; remedy human rights wrongs; change poor or unfair law, policy or practice; improve authority service; serve the public; or support lawful acts by authorities.

Some laws mandate circumstances under which an Ombudsperson may not investigate. Those instances define the *Ombudsman* institution's jurisdiction. Other laws give the Ombudsperson discretion to choose whether to investigate under other circumstances. When the Ombudsperson or staff exercise discretion, it is important to consider the specific facts of the individual complaint.

*Ombudsman* institution laws often list specific reasons an Ombudsperson may choose not to investigate or stop investigating. They include reasons such as:

- the complainant knew or ought to have known of the alleged violation more than a year before contacting the *Ombudsman* institution;
- the complainant does not have sufficient personal interest;
- the person aggrieved has not pursued an available and adequate remedy;
- the complaint is frivolous, vexatious, trivial or not made in good faith; further investigation is not necessary; or
- an investigation would not benefit the complainant or aggrieved person.

In these instances, the Ombudsperson and staff need to be very familiar with the office's legal basis. All decisions to investigate or not should be based on analysis of the specifics of the complaint and the legal provisions governing what is within the *Ombudsman* institution's jurisdiction.

# 10. ALLEGATION – THE ISSUE TO BE INVESTIGATED

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## 10. ALLEGATION—THE ISSUE TO BE INVESTIGATED

One outcome of receiving a complaint is an allegation. The intake officer writes the allegation—what the complainant believes happened. It normally contains a specific fundamental freedom, right or liberty alleged to have been violated on which the complaint is reviewed. Ideally an allegation should refer to a Constitutional provision, law, or international treaty or convention signed by the country alleged to have been violated.

The allegation is a good summary or restatement of the problem from the complainant's perspective. It contains a thoughtful, concise statement of each assertion the complainant made during an intake interview or in a written complaint. It sets the focus of what will be examined, suggests the manner in which to conduct the investigation and is stated in a way that allows the Ombudsperson to make a clear finding about what the complainant alleges.

*Ombudsman* institution policy should spell out when an allegation is fixed. In some offices, the allegation can be written and rewritten until such time, for example, as notice is given to the authority that an investigation will take place. Since the allegation is a statement of the boundaries of the investigation, it should be written with much thought about what exactly will be investigated and what violation of rights the complainant is asserting.

Writing the allegation is a critical first step in conducting an investigation. It determines the specific issue to be investigated, the facts that need to be determined and the standard to be applied to make a finding. It sets the parameters of the investigation.

# 11. DECIDING WHETHER TO INVESTIGATE, AUTHORIZING INVESTIGATIONS

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## 11. DECIDING WHETHER TO INVESTIGATE, AUTHORIZING INVESTIGATIONS

### 11.1. Resolutions rather than investigations

Complaint handling requires good communication, objective analysis of facts and law and thorough case management. In recent years Ombudspersons have increasingly used Alternative Dispute Resolution (ADR) techniques such as conciliation and mediation to handle complaints. Investigators should assess the feasibility of early resolution of complaints within the *Ombudsman* institution's jurisdiction. The Ombudsperson should delegate where appropriate early resolution to staff specializing in these techniques.

Investigators may speed complaint settlement by using facilitation, negotiation, shuttle diplomacy, and face-to-face meetings between authorities and complainants. These techniques appropriately employed may help resolve matters quickly, achieve better outcomes and increase the likelihood of lasting settlements.

Some *Ombudsman* institutions have also used conciliation or mediation to resolve problems. Conciliation brings the parties together to negotiate the outcome of a complaint with the Ombudsperson or staff taking an active role in determining the outcome. Both parties may be told explicitly that if they cannot resolve the matter, the *Ombudsman* institution will investigate the complaint and the result may be to issue an investigative report that may attract unfavourable publicity. In mediation the parties determine the resolution. The investigator or staff member serving as mediator facilitates the complaint resolution process but does not help determine the outcome.

Before employing these techniques, an investigator should decide if the complaint is within the *Ombudsman* Institution's jurisdiction, the key issues are suited to alternative dispute resolution, the complainant's expectations can be served, the process will likely produce acceptable results or the complaint presents systemic issues best addressed in an investigation.

Early resolution is not appropriate when the authority's position is unlikely to change or when no realistic opportunity to resolve the situation exists. These techniques can be time-consuming and should be closely supervised and limited where appropriate. Prolonged attempts to resolve a complaint may harm a complainant or damage an investigation. These techniques may also be inappropriate in other situations, for example, when a risk of injury or threat of harm is high. Detailed discussions of alternative dispute resolution methods are beyond the scope of this Guide.

Resolutions are preferable to investigations. Where they can be achieved, they normally consume fewer resources of the *Ombudsman* institution and produce more lasting results.

## 11.2. Authorizing an investigation

Identifying the nature of the complaint assists in deciding how to deal with the matter. Not every complaint requires an investigation. Most concerns raised by complaints may be resolved informally or through other processes, such as mediation.

The policies and procedures of the *Ombudsman* institution should prescribe the process to authorize an investigation. It should state who authorizes investigations based on complaints, what is required to consider whether a complaint should be investigated and how the decision will be made. Experience has shown that because investigations involve resource commitments, the process should include management approval.

Investigations are normally initiated based on one of two factors:

1. *Individual complaints.* The intake and investigative staff find issues that warrant investigation. Management supervises individual complaints and watches, among other things, for complaints to investigate. Daily reports from computerized complaint registration systems are most helpful in allowing the Ombudsperson and management to know what complaints are received and how intake and investigative staff act on them.
2. *Management's investigative priorities.* The Ombudsperson sets direction by identifying areas of major concern, often in consultation with top management. Where complaints on these matters are presented, they can be used to investigate these priorities. Where no complaints are presented or are unlikely to be presented, Ombudsperson-initiated or own-motion investigations may be the best way to pursue them.

Most Ombudspersons may start investigations on their own motion without having a complaint. Policy should require the Ombudsperson to approve an own-motion investigation. Investigators should have the discretion to open own-motion files without the Ombudsperson's approval to research an issue before starting an investigation. They should then recommend managers to initiate an own-motion investigation. The Ombudsperson makes the final determination whether to authorize such an investigation.

## 11.3. Deciding whether to investigate

An investigation may be initiated after a preliminary examination of the complaint when it appears likely that an authority has violated the complainant's human rights, adversely affecting the complainant and not rectifying the problem.

Questions such as these help determine whether to authorize an investigation:

- Is an investigation called for?
- Would the investigation be beneficial if the allegation is substantiated?
- Has the complainant acted on the issue?
- Is there an appeal procedure the complainant can be expected to pursue?
- Has the complainant presented sufficient information about serious allegations that can be checked? (Suspicions are not sufficient.)
- Is there sufficient justification to investigate?
- Does the Ombudsperson view the issue as an investigative priority?
- Does the complaint require investigation?
- Does it raise serious issues, such as risks to the life, health or safety of individuals?
- Is there a more appropriate mechanism for dealing with the complaint or an alternative and satisfactory way to restore violated rights?
- How much time has elapsed since the events took place?
- Does the complaint indicate a systemic problem?
- Is a large amount of money, property or other benefits involved?

Complaints sometimes are presented in highly emotional language or with suggestions that they may be malicious, vindictive or result from a desire for revenge. Such complaints should be analyzed free of the complainant's emotional state so the office can determine whether the facts and law might substantiate the complaint.

Sometimes a complaint that might otherwise justify investigation should not or cannot be pursued. For example, when events occurred long ago it might be difficult to find witnesses, memories may have faded and evidence no longer be available. Each investigation must be evaluated and narrowly focused to be sure the *Ombudsman* institution may properly investigate the matter, that sufficient resources are available, and that possible or likely outcomes justify using those resources.

Under most laws creating offices, the Ombudsperson may decide not to investigate a complaint if one or more conditions exist. This discretion can be exercised when a complaint is received or later. *Ombudsman* institution law generally requires the office to provide complainants with reasons when a decision is made not to investigate or further investigate a complaint. It may

be important to take an additional step in providing procedural fairness and offer the complainant the opportunity to respond in advance of exercising the Ombudsperson's discretion not to investigate.

This opportunity may be provided in person, on the telephone or in writing. If exercising the Ombudsperson's discretion might be disputed, it may be better to communicate with the complainant in writing and offer to read or hear any additional information or discussion that might lead the Ombudsperson to a different conclusion.

Investigations require time and resources adequate for success. Sometimes the number of investigations currently underway can influence whether it is better to conduct fewer investigations to handle and informally resolve more people's complaints.

#### 11.4. Major investigations

Investigators should watch for investigations that might become major ones. Major investigations involve complex issues, large amounts of evidence or systemic issues that may affect many people. They may also be more complex own-motion investigations or result from managerial decisions to target high priorities. Major investigations may require significant changes to procedure, policy or law to be successful and require significant investigative time and resources of the *Ombudsman* institution. Policy and procedures of the *Ombudsman* institution should detail how such major investigations are approved and by whom.



# 12. WHO SHOULD CONDUCT THE INVESTIGATION?

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## 12. WHO SHOULD CONDUCT THE INVESTIGATION?

An investigation conducted by the *Ombudsman* institution is an inquiry and not an adversarial process. The investigator occupies a central position akin to that of a judge in court. The investigator determines the relevant facts and law and proposes a finding and recommendations to the Ombudsperson. For the investigation to be credible and a credit to the office, the investigator must function in independent and impartial ways. The investigator is not on anyone's side in the matter. Like the Ombudsperson, the investigator should be an advocate for good government and a protector of everyone's human rights—including those accused of having violated the human rights of others.

The reputation of the office and of the Ombudsperson rests on the investigator's integrity and the integrity of the process for inquiring into the issues being investigated. The investigator needs to win everyone's confidence. This is accomplished by being thorough, actively listening and seriously considering the evidence and positions of all.

A good investigator understands the psychology of the people and situations under investigation. The investigator does not accept factual assertions unquestioningly but tests facts in dispute, checking them against what else is known without assuming anything.

The qualities of independence, impartiality and integrity help indicate who should investigate a complaint. In addition, investigators bring individual strengths and weaknesses. The Ombudsperson should carefully design a process to assign investigations to ensure good matches between investigator and complaint. The investigation should benefit from the investigator's strengths and not be compromised by the investigator's weaknesses. In complex investigations, an Ombudsperson may need more than one investigator's skills and will assign additional investigators to add strengths that round out the team and eliminate or mitigate individual weaknesses. The Ombudsperson will also try to balance workloads in assigning investigations.

### 12.1. Investigators of the *Ombudsman* institution and delegations of authority

Most *Ombudsman* institution legislation authorizes the Ombudsperson to delegate some or all of the office's powers to individual staff. Because the Ombudsperson cannot conduct all investigations but often is responsible for all of them, the Ombudsperson delegates some or all of the powers the law gives the Ombudsperson to investigators.

The *Ombudsman* institution's policies and procedures should make clear which powers may be delegated. The Ombudsperson will decide to which in-

investigators what powers will be delegated. Some Ombudspersons who have the power to compel a person to appear and answer questions under oath or produce evidence may be willing to delegate it. Other Ombudspersons reserve that power to themselves. Whatever the policy, it should be clear to all who can do what in an investigation.

## 12.2. Conflicts of interest

The *Ombudsman* institution's policies and procedures should also include a definition of conflicts of interest and how to handle them. Investigators must not have nor be perceived to have any conflicts of interest in investigating complaints. Otherwise the investigation's credibility is threatened. Investigators should be required to declare any possible conflicts to the Ombudsperson. The most effective ways to deal with apparent or real conflicts of interest are to declare them to the parties and ask the party most likely to be adversely affected if the investigator is acceptable and if not to change investigators.

These factors may indicate actual or perceived conflicts of interest:

- Personal or financial relationships with anyone concerned with the investigation;
- Benefits to the investigator, relatives or friends from a specific finding;
- Past experience or bias indicating lack of impartiality; and/or
- Prior involvement in the matters of the complaint.

Aside from personal strengths, investigators who are free from conflicts of interest, real or perceived, should conduct investigations. They should not have had any relationship to the complainant, subject of the complaint, witnesses or the authority. Wherever possible, and it is not always possible, the investigator should have no relationship or prior connection with anyone involved in the complaint or investigation. In small communities, this is not always possible.

When an investigator has a conflict and investigators without conflicts are not available, the Ombudsperson considers who has the least conflicts or which investigator would be most acceptable to the party most likely to be disadvantaged by a conflict.

## 12.3. Whether the authority should be asked to investigate first

The *Ombudsman* institution is not the first instance of appeal. Ombudspersons ask complainants to use appeals procedures with authorities or to pres-

ent their grievances first to the authority to give it an opportunity to resolve the problem or restore violated rights. The *Ombudsman* institution staff may choose not to do that if it is clear, especially from past experience, that the authority will not act on complaints in good faith.

Similarly, Ombudspersons may ask authorities that can be trusted to conduct the first investigation of a complaint. As long as the authority is trusted to conduct an impartial investigation and no risks exist that evidence will disappear or be tampered with, this saves the Ombudsperson work. The Ombudsperson may later examine the authority's investigation to determine if it was impartial and found all the facts.

When an Ombudsperson weighs the risks versus the benefits of asking the authority to conduct the initial investigation, these factors should be considered:

- Is the authority trustworthy to conduct an impartial investigation?
- Does the authority have the power to obtain testimony from relevant witnesses?
- Will the authority have access to relevant information and records?
- Will the authority be requesting testimony, information and records or can it compel them if the individuals refuse to appear or produce the requested information?
- If the Ombudsperson chooses to investigate after the authority's investigation, will records still be available and testimony not have been altered?

If an Ombudsperson decides that the benefits of the authority conducting an initial investigation outweigh any risks and asks the authority to conduct the initial investigation, the authority should be asked to report the results of its investigation to the *Ombudsman* institution before the complaint is closed. The Ombudsperson and/or the investigative staff should evaluate the investigation the authority conducted.

The following questions should be considered in evaluating the authority's investigation:

- Did the authority conduct a complete and impartial investigation?
- Did authority personnel who did not have a conflict of interest in the matter conduct the investigation?
- Were the investigators experienced in conducting such an investigation? Had they conducted such investigations in the past?
- Did the authority obtain testimony from all witnesses reasonably believed to have information needed to form a conclusion on the allegation of the complaint?
- Did the authority obtain all reasonably relevant information and records?
- Are there any additional witnesses who should be interviewed or evidence that should be examined that the authority overlooked?
- Are the results of the investigation reasonably credible?
- Are there significant questions not examined in the investigation that need to be looked at to determine whether the complainant's allegations were justified?
- If the investigation had been conducted by the *Ombudsman* institution, would the Ombudsperson have approved and signed it?

If the investigation is lacking in significant ways based on the above questions, the Ombudsperson should consider whether an additional investigation could improve the result, whether to begin and conduct a new full investigation, or whether it is not possible to conduct an impartial, independent investigation that would reveal what happened.

#### 12.4. Setting investigative priorities

Occasionally investigators of the *Ombudsman* institution need to set priorities to determine which investigations should be handled first. Complaints are investigated as a general rule in the order they were received. The general rule has exceptions because some complaints are more urgent than others.



# 13. PLANNING AN INVESTIGATION

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## 13. PLANNING AN INVESTIGATION

Imagine that one or more events take place that may be violations of human rights. A number of people may be present when these events take place. Some records may be made of what happened. Perhaps pictures or videos are taken. But no one from the *Ombudsman* institution personally observes the events. When a complaint is made to the *Ombudsman* institution and a decision is taken to investigate it, the investigators and their supervisors will have to figure out what actually happened even though they were not present. The way they attempt to determine the facts is to interview those who may have knowledge of what took place and to examine any records, files, documents, etc., that may contain information about the events.

Deciding whom to interview and what records to examine in which order is the basis for writing an investigative plan.

### 13.1. Importance of investigative plans

Good investigations begin with good planning. Good planning helps the investigator think through which issues to investigate, what is required to prove or disprove each allegation and what actions and resources are needed to conduct and conclude the investigation. Good planning assures appropriate resource use, and prevents spending staff time and money without good results.

Planning helps insure that investigations are rational, methodical and professional. It reduces the likelihood that evidence will be overlooked or that people will remove, change or destroy evidence. A good plan is like a road map—it helps the traveller arrive at the destination with as few detours and as quickly as possible. Good plans help supervise the investigation. The plan's strategy is endorsed by managers who know what to expect and are briefed should the plan need to be changed. It also helps the investigator stay focused and step back from immediate details to see the whole picture.

The Ombudsperson should decide whether investigative plans are written before or after an investigation is authorized. A plan written before authorization makes clear what resources will be required. When an investigation will be conducted regardless, the plan helps to exercise discipline by limiting investigative boundaries.

Other than a preliminary examination of the complaint before deciding to authorize an investigation, plans should be drafted before the authority is asked to respond, witnesses are interviewed, documents are requested or significant investigative effort is undertaken. The plan helps determine how to pursue the investigation, in what order to interview people and seek documents or other information, etc.

As noted in Section 10, writing an allegation is a defining moment in an investigation. An investigation may contain one or a number of allegations. Part of the art in conducting investigations is determining how to write allegation(s) since they structure investigations and may influence what can be determined and recommended.

Complainants do not write allegations because the complaint may raise significant issues that the complainant did not. The Ombudsperson is not restricted to what the complainant says is the complaint or issues the complainant wants the *Ombudsman* institution to examine. The Ombudsperson may know that the complaint relates to systemic problems.

Allegations may be structured individually or contain sub-allegations. Each allegation or sub-allegation will be investigated, analyzed and result in a finding.

## 13.2. Where to begin

An investigative plan may be simple or complex. It provides a strategy and sets limits so only essential information is collected. It can be used as a checklist of who should be interviewed, what records should be reviewed, what questions should be asked and what is the most effective strategy for conducting the investigation. Has the complainant provided sufficient evidence that human rights were violated, and, if not, does it exist? Does the authority agree, and, if so, does it have an explanation that mitigates the violation? Does an argument disprove the explanation? What laws or treaties govern the alleged violations?

An analysis of the allegations is key to developing a good plan. Well-formulated allegations contain a reference to the human right or other rights alleged to have been violated and the specific act that violated the right. The investigator decides what facts, if established, would prove or disprove each allegation or sub-allegation. This might include establishing who acted, what the person did, whether the action was authorized under law, whether the law violated constitutional or human rights, etc.

Based on this analysis, the investigator then decides how those facts can be proved, by interviewing civil servants, officials, witnesses, etc., or reviewing documents and other physical evidence and who or which authority has custody of the evidence. The witnesses and sources of information indicated by the complainant should be included where appropriate as well as others the investigator plans to interview. The investigator should also indicate what resources are needed. These may be items such as time, travel, or technical expertise the staff does not have and any other costs.

Investigators should consider different ways to determine the facts. They should seek methods that take the least amount of time or are most economical but that still meet the reliability needed for confidence in investigative results.

Where the identity of complainants and/or witnesses needs to be protected, the plan should contain strategies for ensuring that confidentiality. It should also specify how to proceed if the investigation cannot continue without identifying individuals who do not wish their identities known outside the *Ombudsman* institution.

While plans are road maps, like road maps they may need to be modified when barriers are encountered, detours are needed or the road does not lead to the destination. Facts may indicate other directions, different priorities, and/or additional facts to be checked or proved. Plans should be flexible and subject to revision. The *Ombudsman* institution's policies and procedures should specify who approves plans and modifications as well as specifying when investigators must seek approval for modifications.

A well-thought plan indicates whom to interview, what evidence to obtain and which authority or individual is most likely to possess it. The investigator should try to think as others involved in the act would have thought. That will suggest where information relevant to the investigation exists and who would have what.

Those who write, approve, supervise and can modify investigative plans embark on a trip best governed by parsimony. Their use of *Ombudsman* institution resources needs to be sparing but not stingy. They need to devote sufficient resources to determine whether the facts support the allegations but not so much effort that they are being wasteful. The standards of proof a good investigation demands need to be met while at the same time the *Ombudsman* institution's limited resources are used wisely and intelligently.

Between the point where a plan is written and the inquiry actually begins, it helps to write out questions to ask in interviews.

While conducting the investigation, questions such as these should be foremost in the investigator's mind:

1. What needs to be established to make a finding/determination on the allegation?
2. What does this interview, this question, this document add to knowledge of facts or law of the investigation?
3. What will the report contain and how will it read?
4. What evidence would contradict the prevailing direction of the investigation and where might it be found?
5. So what? What difference would it make to the investigation if this interview is not conducted, this question is not asked, or this document is not sought?

### 13.3. Investigative methods

Each Ombudsperson and investigator decides which investigative methods work in their country and its governmental culture. Some may work at one time, with one investigation, involving one authority and not work another time with a different investigation of the same or a different authority.

Some investigations may be highly formal, with witnesses interviewed in person under oath and penalty of perjury with tape-recorded interviews and written transcripts. Others may be much more informal with questions asked in telephone calls and no record other than the investigator’s handwritten notes. Some investigators are partial to letters and written questions or interrogatories. Other investigators find them less useful because they want to read an individual’s expressions and body language, observe their demeanour and gather the non-verbal clues lost in telephone conversations and written exchanges.

An investigative strategy defines the order in which activities are undertaken. While the activities of many investigations can be commonly characterized, the order in which they are undertaken can be discussed from opposite perspectives:

Activity	Reasons to do it first or early in an investigation	Reasons to do it last or late in an investigation
Background research on complaint, authority, laws.	Helps the investigator know what is being investigated and what is normal and legal.	The authority can save the investigator time by providing this information or pointing the investigator towards where it may be found
Gather documents and records.	Forms a documentary basis for later interviews. Evidence may be altered or tampered with if gathered later in the process.	Testimony may be altered or tampered with if evidence is gathered first. Getting testimony early reduces the likelihood of witnesses colluding.

Activity	Reasons to do it first or early in an investigation	Reasons to do it last or late in an investigation
Interview witnesses not employed or associated with authority.	Their testimony is not affected by authority staff and is more likely to be accurate if gathered early.	Their testimony is not likely to be affected by authority staff no matter when gathered. Better to get authority testimony earlier.
Interview officials and civil servants of the authority who acted on the matter.	Early testimony by those who are the target of the investigation will tend to fix what they say, making it more difficult for them to change positions or testimony later.	Interviewing target(s) last makes most sense because all evidence will have been gathered. They can then be asked about what has been discovered and will have better opportunities to respond to evidence and testimony that contradicts theirs.

No single strategy works for every investigation. Strategies should be specifically tailored to the situation of each investigation.

# 14. ISSUING NOTICE OF AN INVESTIGATION

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## 14. ISSUING NOTICE OF AN INVESTIGATION

Laws creating *Ombudsman* institutions often specify that the Ombudsperson must notify authorities of the intent to conduct an investigation or when an investigation is initiated. Of course, each Ombudsperson must follow the law creating the institution. Even if the law does not require notice, it is advisable to provide it to appropriate authority officials and civil servants. Notice should also be sent to any individual whose acts are being investigated and subject to being criticized as a result.

Notice is normally made in writing. It should be given once a decision is made to initiate the investigation unless the Ombudsperson determines that notice would hinder the investigation, for example, if evidence might be destroyed or altered.

Notices summarize the substance of the complaint and cite the allegation. They also may provide a brief summary of the investigative process and any laws that protect witnesses or complainants against retribution or denial of benefits.

The notice may also provide additional information where appropriate such as a history of the complaint, relevant background information; an opportunity for the authority to respond in writing; and an indication that the Ombudsperson has not made a determination on the complaint. The notice should also contain any additional information the *Ombudsman* institution usually provides, for example that the authority's response is normally provided to the complainant unless the authority indicates that it does not believe the information should be shared. (The Ombudsperson could disagree and then discuss who is correct before deciding whether to share a copy of the response with the complainant.)

Some *Ombudsman* institution laws require the Ombudsperson to notify the complainant of a decision to investigate. Again, that is advisable even if the law does not require it. The complainant should be informed of any significant action on a complaint.

# 15. FINDING THE FACTS

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## 15. FINDING THE FACTS

### 15.1. Overview

Once a decision has been made to investigate, a plan written and notice given, the next step is to find the facts.

An Ombudsperson's credibility depends on being able to talk to everyone who has knowledge of the events being examined and looking at any documents or records that contain information that will help the *Ombudsman* institution determine the facts. In nearly every country with an *Ombudsman* institution outside Eastern Europe and the Commonwealth of Independent States (CIS), the law gives the Ombudsperson and staff the power to talk to nearly anyone and to review all but any specifically exempted kinds of records or information. Most laws give the *Ombudsman* institution the power to compel testimony and production of records by using a document called a subpoena. This is an order signed by the Ombudsperson that has the power of the courts behind it to compel testimony or production of records, documents and other physical evidence.

Whether an *Ombudsman* institution can compel testimony and production of evidence or not, the quality of the *Ombudsman* institution's investigation will depend on being able to talk to anyone with information and reviewing any records that will help determine the facts.

The five questions at the end of Section 13.2 provide an overall direction to finding the facts. The answer to the first question, "What needs to be established to make a finding/determination on the allegation?" sets the specific direction for fact-finding. The investigator analyzes the allegation(s), determines what facts need to be established to prove or disprove the allegation(s), and then concludes where the evidence to determine those facts might exist.

In investigations conducted by the *Ombudsman* institution, evidence comes from testimony, documents and other records, experts, and site inspections. Testimony and documentary evidence tend to be the most important. The investigator may need to call on expert witnesses for specific knowledge, depending on the issues raised and the expertise of the *Ombudsman* institution's staff.

Large amounts of information are likely collected, only some of which proves central to making a finding on the allegation(s). Investigators need to be careful about spending valuable time and resources searching for information not relevant to making a finding. A good investigative plan draws boundaries around the specific information or types of information required to prove or disprove the allegation(s).

Direct evidence is that which a person saw, heard, felt, smelled, or tasted. Circumstantial evidence is evidence from which facts may be inferred. An inference is a conclusion that possesses some degree of probability, which depends on

the accuracy of the premises from which the inference is drawn. Both kinds are collected during an investigation. Analysis of evidence leads to determining the facts that form the basis for a determination or finding on the complaint.

Information may be sought from individuals in various ways. People may be interviewed by phone or in person. Questions may be posed in writing seeking a written response. Letters can be conversational with questions placed throughout. Or a more formal interrogatory can be used with a set of numbered questions. The art of conducting investigations is choosing the method most likely to yield the information sought, especially if the law does not give the *Ombudsman* institution the power to compel testimony or production of evidence. Because each fact-gathering method has advantages and disadvantages, it may vary in effectiveness with the situation.

The investigator must have access to whatever is needed to determine the facts surrounding the allegation. A complete, credible investigation is only possible with access to the witnesses, documents and other records needed to determine the facts.

## 15.2. Limits on obtaining information

Testimony to an *Ombudsman* institution or production of documents and records are generally subject to some limits. The most important limit is privileges. A privilege is a legal right of the witness to refuse and not be forced to testify. Privileges include the right not to incriminate oneself. Privileged relationships are those where people in them may not be forced to testify about communications between each other such as between lawyer and client, doctor and patient, clergy person and penitent, husband and wife. Where these privileges are legitimately invoked in compliance with the country's court rules, under the rule of law, the *Ombudsman* institution may not compel a witness to answer questions when those answers would violate the privilege.

Laws creating authorities may also limit information to which the *Ombudsman* institution has access if the law creating the *Ombudsman* institution does not include a provision giving the Ombudsperson access to all information held by authorities, confidential or not.

## 15.3. Rules of evidence

Formal rules of evidence rarely apply to Ombudspersons because their investigations are inquiries rather than adversarial proceedings, the *Ombudsman* institution makes recommendations and does not issue binding decisions, and the *Ombudsman* institution provides procedural fairness or natural justice. The rules of evidence are helpful, however, to an investigator because they can help indicate the best evidence.

The most important rule is the test of relevance. Is there a connection between the evidence and the facts being determined? This rule is important both in *Ombudsman* institution investigations and court. Hearsay and opinion are two types of evidence generally excluded in court, although exceptions exist.

Hearsay evidence is information other people provide a witness rather than the witness's first-hand observations. Hearsay is valuable to investigations because it can point to sources of additional evidence. The investigator should seek the original source if available rather than relying on the hearsay.

The only generally allowed opinions are those of experts. In *Ombudsman* institution investigations, individuals may be allowed opinions based on the witness's experience(s) or knowledge based on life experiences even if the witness would not qualify as an expert in court.

#### 15.4. Compelling witnesses to testify: Interview vs. deposition

Most Ombudspersons can obtain information without regard to it being classified secret or confidential by other legislation. Laws establishing the *Ombudsman* institution in a number of countries give the Ombudsperson the power to compel testimony. A few Ombudspersons can compel witnesses to testify even if their answers would incriminate them.

Being able to compel witnesses to testify under oath with the penalty for perjury if the witness lies is the ideal power for an *Ombudsman* institution to be able to find all of the facts needed to make a determination on the complaint. The following information is provided so Ombudspersons and staff who do not have this power can understand how it functions and why it is ideal. Each Ombudsperson should determine whether the law provides that office with the power to compel witnesses to testify and/or produce evidence, and if it does not, whether it would be advisable to seek amendments to the *Ombudsman* institution law that would provide that power.

In those offices that have the power, witnesses are compelled to testify in a number of circumstances:

1. When the witness is reluctant to cooperate or testify without being compelled.
2. When the witness requires the protection of being compelled to testify not to appear to be cooperating.
3. Where the witness would otherwise be restricted from testifying about matters made secret or confidential by law.
4. Where the *Ombudsman* institution wishes the testimony to be taken with the witness under oath and perjury penalties would apply to false testimony.

An investigator who can compel testimony chooses between offering the witness the opportunity to testify voluntarily or being compelled to testify. Though voluntary interviews and compelled testimony are similar, each is more appropriate under certain circumstances.

A voluntary interview is more appropriate to gather routine information from a cooperative witness, when the witness's identity as the source is not important, when overcoming witness hostility is more likely to happen informally than under oath, or the witness is expected to be reluctant to answer all questions.

Compelled testimony under oath is more appropriate to fix testimony from a witness who might otherwise change it later; authenticate documentary or other evidence, especially confidential information; pin down testimony of a critical witness who will be identified in the investigative report; determine the position of an authority that may have acted wrongly and establish whether factual support exists for its actions; gather information from an uncooperative or hostile witness who must be compelled to testify; when an important witness will be leaving the jurisdiction and unavailable later; or when the witness may be subject to retaliation if seen to cooperate with the investigation.

Witnesses asked to appear voluntarily will need to see how that is in their own best interest. Before making a request, the investigator should think about how to phrase it to be in the person's own best interest to agree. The best interest of a witness compelled to appear is in appearing.

Many Ombudspersons prefer to avoid compelling witnesses to appear or produce evidence. They make exceptions when:

1. It is clear that this is the only way they will appear or produce evidence;
2. The witness needs to be compelled so as not to appear to be voluntarily cooperating with the investigation; or
3. A decision has been made to compel *every witness* to appear. Other Ombudspersons freely compel witnesses for these reasons as well as anyone else who is reluctant or refuses to appear when asked.

In offices where the Ombudsperson avoids compelling witnesses or where the *Ombudsman* institution does not have that power, the investigator faces the problem of getting people to cooperate voluntarily. That is best accomplished by persuading the witness that talking to the Ombudsperson or investigator is in the witness's best interest. Interviews are opportunities for witnesses to present their version of events, answer critics and present evidence the investigator might otherwise not receive. Those are positive motivations for witnesses.

Avoiding negative consequences may also motivate voluntary appearances. The *Ombudsman* institution will finish an investigation and make a report whether the witness testifies or not. If the witness does not testify, the report will not contain the witness's view. The report could draw negative conclusions from a refusal to participate absent a legitimate basis to refuse. People who choose not to cooperate without a legitimate basis to refuse could be seen as having something to hide or having done something wrong.

Two schools of thought exist about with whom to make an initial contact in an authority. One suggests starting with the person alleged to have acted (or not acted) and caused a violation of rights. From this perspective, that person has the most information and can provide an explanation that may preclude the need to investigate. The other school suggests starting at the top of that office or that authority. This approach may be indicated if the investigator believes the authority capable of investigating the allegation and remedying the problem itself. Attention from the top may, under these circumstances, be what is required to resolve the problem.

If voluntary cooperation is not forthcoming, the investigator can always use the *Ombudsman* institution's power to compel the appearance or production of evidence.

#### 15.4.1. Uncooperative witnesses

It is important to report uncooperative witnesses or government officials/civil servants who refuse to testify or produce documents or records to the *Ombudsman* institution, who determines what action to take.

Witnesses may refuse to cooperate for different reasons. Some are afraid of appearing to cooperate with the investigation and fear retribution. Others may have been involved with what was alleged to have taken place. Occasionally, the investigator may persuade reluctant or uncooperative witnesses that being interviewed is to their advantage. That is not, however, always possible.

Witnesses who refuse to cooperate should be informed that the *Ombudsman* institution will complete the investigation and make a finding whether or not they cooperate. If the Ombudsperson agrees, the witness may also be informed that the *Ombudsman* institution may draw negative conclusions from a refusal to participate or answer questions for which there is no legitimate basis to refuse.

Lack of cooperation is a serious threat to an Ombudsperson's powers that must be taken seriously. Ombudspersons who have the power should consider compelling uncooperative witnesses and seeking court enforcement in cases where witnesses still refuse to appear or produce evidence. An Ombud-

person who accepts such lack of cooperation undermines the credibility of the office and of the institution. (See Section 17 for possible actions.)

## 15.5. Interviewing and interviewing hints

### 15.5.1. Who should be interviewed and in what order

All relevant witnesses should be interviewed. They should be identified as far as possible in the plan. Add any others who surface during the investigation. For many *Ombudsman* institutions, initial contact in a complaint is made with the officer or employee responsible for the action against which the complaint is filed. If no individual is identified, contact the director, manager, supervisor or head of the office or authority.

Some Ombudspersons instruct staff to interview the subject of the complaint last to collect as much information as possible first. They say this approach helps determine appropriate questions for the subject and minimizes risks of evidence tampering or witness intimidation. Interviewing the subject last does not apply in some situations, e.g. in cases where available evidence demonstrates the conduct alleged.

The investigator determines the order of interviews most likely to yield the best investigative results. If the subject is interviewed first or early and the investigation is tending to prove the allegations, the subject should be interviewed again last to provide procedural fairness by presenting the allegation(s), the evidence the investigator considers most relevant and important, and an opportunity to respond. Witnesses may need to be interviewed as closely together as possible to minimize opportunities to collude.

### 15.5.2. Interviewer

One of the most important factors for a successful interview is the investigator. The investigator should be in control of the interview, even though it might seem otherwise to the witness or an observer. The investigator knows the goals and objectives of each interview and has planned a series of questions designed to win the witness's confidence and gather the information sought.

The investigator will be sensitive to the witness's feelings and emotions during the interview, keep the witness talking about the important topics to be discussed and control the interview but not with an iron hand. The investigator can control the amount of stress to help the subject remember important facts and tell the truth. At times the investigator is more personally kind and understanding and at other times more reserved and

distantly professional and even respectfully persistent in seeking the facts and finding the truth. The investigator should always be impartial and respectful of the witness.

Good investigators know and understand their culture's body language and recognize that it may differ from other cultures in the same country. With important questions, for example, the investigator can lean forward. Leaning forward during a response may put greater importance on an answer. Crossing arms or legs or moving away from the witness can indicate doubt or disapproval of what the witness is saying.

Investigators have used a variety of questioning styles in witness interviews. Styles vary from being aggressive and persistent to persistent but not aggressive or being outwardly professional and remote, not showing the witness any emotion or response. No one style is right for every interview. Investigators should think about interview style, decide what works best in their country, for them as individuals and in the specific situation. Investigators find interview styles evolve as they experiment and see what works. Investigators may be more likely to succeed when they are themselves.

### 15.5.3. Setting

Choose the most appropriate location for the interview. The right location can help an interview succeed; the wrong one can cause failure. Allowing witnesses to choose the location, as long as it is distraction free, can reduce interview stress. Accommodating witnesses helps win their cooperation. Interviewing a hostile witness in the investigator's office or a more formal setting asserts investigator control and may create an advantage.

Physical arrangements in the interview room make it more or less formal, more stressful or more relaxing for the witness. In most cultures, sitting next to one another is more informal, more relaxing. Sitting across a desk from each other is more formal, more stressful. A tape recorder between the investigator and witness can be a barrier to good communication. Better to place it off to one side, under the supervision and control of a second investigator, and not look at it during the interview.

### 15.5.4. Preparation for the interview

Good interviews result from good planning by skilled investigators who are familiar with the complaint, its allegations, the authority, what has been found and what needs to be discovered. The interview plan indicates how to treat the witness, the questions to ask, in what order and what the focus is with each witness.

Some general interviewing principles are suggested and can be followed unless good reasons exist to make exceptions. Two *Ombudsman* institution

staff should conduct interviews of significance. One investigator asks the questions and the other operates a tape recorder, takes notes and looks for follow-up questions.

The interview begins with an explanation of its purpose, who is present and why, how it will be conducted, and what use will be made of it and the testimony. This normally puts everyone at ease. The investigator asks questions least likely to cause stress to put the witness further at ease while confirming facts that may already be known. The investigator can then focus on specific events with questions designed to elicit narrative answers. "What happened? What happened next?" Or the witness may be asked to describe certain events.

The investigator later asks questions with more specific answers to fill in details and cover facts that need to be established to understand the events. Here "who, what, why, when, where and how" questions seek missing details.

If the subject of the complaint is being interviewed, the investigator presents the allegation(s) in detail, describes the evidence gathered so far and asks the subject to respond to possible findings.

Where appropriate, witnesses should be asked to suggest recommendations the *Ombudsman* institution could consider making. At the end of the interview, the investigator should ask if any other questions should have been asked or if the witness has anything to add. The witness should be encouraged to submit any additional information and testimony at any time until the investigation is made final. The investigator should explain the investigative process until the investigation is final.

#### 15.5.5. Questions to ask

Part of the interview preparation consists of drafting every question the investigator can think of that might be asked. These questions can then be put in a logical order that moves from least stressful to most important and perhaps most stressful. Reviewing the list before the interview and bringing it along allows the investigator to refer to it at appropriate moments even if only at the end.

Investigators are free to follow leads that develop during an interview and ask questions where the witness hasn't been clear or provided enough detail.

Two types of approaches to interviews exist. One is a more friendly approach where the investigator asks open-ended questions and seeks any information that might help in the investigation. The other is more professional, persistent and asks the tough questions that some investigations

demand. The goal of both approaches is to find the facts. With the friendly approach, the investigator figuratively walks alongside the witness for an amicable conversation. With the more professional approach the investigator asks difficult questions and may cross-examine the witness to test answers. No unfair questions are asked or pressure applied to the witness. Witnesses should have the time they desire to answer questions and explain their actions without being badgered.

An investigator using either approach treats witnesses with respect. Difficult questions can be introduced by saying "I'm sorry to have to ask this question, but those who read the investigative report will want to know XYZ." People accused of wrongdoing should have the opportunity to answer accusers. They are occasionally grateful for that.

### 15.5.6. Documenting interviews: Tape recording/note taking

A record should be made of every interview. Offices with tape recorders can consider whether to tape every interview. Some offices that tape interviews prepare transcripts and give them to the witnesses. Other offices choose not to prepare transcripts and will give a copy of the tape to a witness after the investigation is concluded. If questions arise about something the witness said, the tape can be played to find the specific quotation and it can be played back to a witness.

Tapes allow investigators to listen more closely to what was said and left out. Taping can be time-consuming and expensive if an office feels compelled to make transcripts. A second investigator at an interview should operate a tape recorder and/or take notes so the investigator asking questions is not distracted and can maintain good eye contact with the witness.

Investigators in most countries must receive the permission and acknowledgment of the person being interviewed to tape them. That permission should be captured on tape once it is given before turning on the tape recorder. Even if the law permits, most Ombudspersons will not allow secret recordings of interviews or phone conversations since it does not fit public expectations of an *Ombudsman* institution.

### 15.5.7. Presence of third parties

The Ombudsperson or investigator determines who can attend an interview. While the witness can ask for others to be present, the Ombudsperson decides whether to allow anyone else to be present. Requests to attend and/or participate have been made from third parties such as attorneys (representing the witness or, if the witness is a civil servant or government official, the authority), union leaders or representatives, friends, relatives, colleagues or other advisers.

These considerations help investigators decide who may be present on what basis:

1. Most Ombudspersons acknowledge the right of a witness to be accompanied by an attorney representing the witness or anyone else the witness may request as long as the third party understands that this does not entitle that person to participate without the investigator's consent. Attorneys generally may advise their clients but not speak, respond or object to questions. Authority attorneys should be allowed to attend only if the witness requests and affirms that request at the beginning of the interview. Investigators should not allow authority attorneys to be present when witnesses object.
2. Ombudspersons do not permit the media to be present because *Ombudsman* institution investigations are confidential and conducted in private. The interview can be rescheduled if needed.
3. If confidential matters will be discussed that the third party has no right to know, the Ombudsperson may prevent the third party from attending all or part of an interview.
4. If the third party will be a witness or asked by more than one witness to attend, the third party should not witness someone else's interview.

### 15.5.8. Interviewing state officials who are the subject of the complaint

Deciding when to interview the state official or other person who is the subject of the complaint is discussed in Section 15.5.1. The timing of such an interview in the investigative process will influence how the interview is conducted and possibly the purpose of the interview.

When the official is interviewed early in the process, the investigator may not have as much information about what took place and may not have found the important facts that will influence what is determined about the allegation. Early interviews of the subject of the complaint are most often done when the early evidence demonstrates that an official violated human rights. In situations such as this, the questions are often best directed towards creating a record of the official's statement of what happened, in what order, who was present, what documentation or records were made of the events, etc. The strategy for such an early interview is to find as many of the facts as possible. The risks of an early interview are that someone may tamper with the evidence or intimidate other witnesses.

Interviewing the state official who is the subject of the complaint later in the process may call for a different interview strategy and could involve other

risks. If the subject is interviewed once after the most important witnesses have been interviewed, the chances are better that one interview may be sufficient. In that one interview the investigator may ask open-ended questions designed to have the subject describe what happened and later may ask specific and perhaps even pointed questions based on the facts already found.

No matter when the subject is interviewed, procedural fairness must be provided to the subject of the complaint. (See Section 16.) If the investigation will find the allegation is justified or supported and the subject will be criticized, procedural fairness requires the investigator to provide the official with a clear statement of all the evidence on which the criticism is based. The investigator also must offer the official an opportunity to respond fully to the allegation and evidence and offer any additional evidence, witnesses or documents that could reasonably tend to point towards a conclusion that would find the official did not violate the complainant's human rights.

When the investigator is considering whether enough interviewing of the state official has been done, these questions should all be answered with a 'yes' before concluding the final interview:

- Did the investigator ask the state official open-ended, impartial questions that provided the official with the opportunity to describe what took place, why the official took or did not take the actions complained about, what additional witnesses or evidence might exist to support the official's answers?
- Did the investigator fully explain the facts that had been found and the conclusions that might be reached based on them?
- Did the investigator interview any additional witnesses suggested by the official who could reasonably be believed to have additional credible information that would provide additional facts?
- Did the investigator examine any additional records suggested by the official that could reasonably be believed to have additional credible information that would provide additional facts?
- Did the investigator offer to receive any additional evidence, information or testimony that the official might wish to present before the investigation was made final and closed?

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5.9

### 15.5.9. Expert witnesses

Investigators of *Ombudsman* institutions tend to be generalists. Even Ombudspersons with large, diverse staffs have a large collection of generalists

whose total expertise may not encompass every issue the *Ombudsman* institution investigates. If someone on the staff does not have the knowledge or abilities needed in a specific investigation, an expert is required. Experts can be found in government, the private sector, through professional associations or on the Internet. Management should approve in advance using an expert. If the expert is paid, the expert's services should be contracted for in accord with any relevant legislation, policies or procedures.

Non-governmental organizations (NGOs) may also have experts who have knowledge, skills or abilities that complement the *Ombudsman* institution's staff. The question that should be considered in deciding whether to use them is how independent they will be and whether they can be trusted to do the work of an expert witness independently and impartially. If a certain result would benefit the expert witness or the NGO, the *Ombudsman* institution's investigation would be more credible not using such a person. The same tests for conflicts of interest that an Ombudsperson would apply to staff conducting an investigation should also be applied to NGOs and expert witnesses in general.

Individuals the *Ombudsman* institution is considering as expert witnesses should be interviewed to see whether they have goals unacceptable to the office. References should also be checked to see how they have performed in previous expert situations and whether they are reputable, experienced, qualified, independent and impartial. If they are not and individuals of that nature cannot be found, the *Ombudsman* institution will have to consider whether it is possible to conduct the investigation without expert testimony on that specific point.

### 15.5.10. Statements/Interrogatories

Some investigators of the *Ombudsman* institution value written statements sought in response to interrogatories—written lists of questions sent to a witness. The investigator will write a series of questions and send them to a witness or to individuals accused of having violated someone's human rights. The advantage of interrogatories is that they allow the investigator to put as much thought as is needed into the questions while writing them and then to wait for the response. This gives the witness time to prepare answers and submit them. While some investigators believe this saves time and yields better answers, other investigators dispute those beliefs.

In-person interviews give investigators more detail with which to evaluate the responses from tone of voice, facial expressions and body language to eye contact and other indicators. A written statement tends to be more concrete and fixed in the investigator's mind than would a spoken response. Relying too much on a written statement can be dangerous where assessing the value of responses is critical.

Interrogatories are not appropriate for and should not be used with people who cannot write clearly or easily. They may delay the investigation and allow witnesses to coordinate their testimony.

Investigators considering the use of interrogatories should assess the circumstances and situation of each investigation and determine whether written questions and answers are appropriate and will yield good responses to help make a determination on the complaint. In some instances, they may and in others they may not.

### 15.5.11. Good interview techniques/interview guidelines

The two most important skills for good interviews are good questioning and good listening. Most people talk more than listen. A good investigator lets the interview flow and skilfully but subtly controls it indirectly. A good listener hears what is said and what is not said, where contradictions are and where more facts or information are needed.

Good listening is often active. The listener shows that what has been said was heard and understood. It recognizes the witness's feelings and helps build rapport between investigator and witness. The investigator also asks questions that reflect and summarize an understanding of what has been said. The investigator resists saying anything that agrees with the witness or supports what the witness is saying.

Passive listening can be used to silently encourage witnesses to continue. In many cultures, silence is a void to be filled. If the investigator remains silent, appearing to expect the witness to say more at a crucial point, the witness will likely say more, possibly even something important that otherwise would have been left out.

Cooperative witnesses can be asked broad questions with open-ended answers early in an interview. Questions that ask for 'yes' or 'no' answers or specific information later help add detail. Keep questions simple. Ask only one at a time. Keep any remarks prefacing a question short. Avoid asking questions that imply their answers.

When the relevant questions have been asked and answered, end the interview. Summarize what the witness said. That gives the witness an opportunity to correct any misunderstandings. Also explain the next steps in the investigation and offer to receive any additional information the witness remembers later.

These interview guidelines are based on investigator experiences. They could be used to develop similar specific national guidelines based on investigative experience in each country. Guidelines should be periodically examined, tested against additional experience and updated.

**Good interview guidelines:**

*Establish rapport with a witness. Find a link.* People with whom an investigator has established rapport are likely to be forthcoming, at ease with the investigator and likely to supply additional information beyond that specifically requested. Specific links between individuals help create an easier relationship.

*Plan the order in which to ask questions.* Interviews have a logic to them. The questions should be posed to the witness in a logical order designed to move from the general to the specific and from the known to the unknown.

*Write questions in advance.* This helps ensure that all areas where the witness may have information are covered. The questions can then be arranged in logical order and taken to the interview. If need be, the investigator can refer to the list near the end of the interview saying something like “I made a list of topics I wanted to discuss with you. Let me check it to be sure we have covered everything.”

*Ask one question at a time.* Experienced witnesses asked more than one question at a time answer the one they want to answer—usually the easiest one or the one whose answer is most favourable to themselves. Asking questions one at a time insures that the witness answers each question.

*Ask questions without implied answers.* Pose questions in ways where expected or implied answers are not clear to the witness.

*Judicious use of the pause.* Pause after a question that has an important answer but that may not have been completely answered. The result may be more information—information that the witness might otherwise have preferred not to provide. This tactic must be employed sparingly or it will be obvious.

*Always ask the question the investigator fears asking.* Most important interviews require difficult or delicate questions to be posed. If they are not asked because the investigator fears asking them, the interview will not be complete. A critical piece of the investigation may be missing. The easiest way to ask difficult questions is to displace responsibility for them from the investigator. “People who read the report on this investigation will want to know—(followed by the question):” “It would not be fair to you if I did not give you an opportunity to answer your critics who have said that (a statement critical of the witness that requires a response).”

*The interview is not over until the investigator leaves.* Once formal aspects of an interview end—the investigator stops asking questions, closes a note-

book, puts the tape recorder away—the witness relaxes thinking the worst is over. If conversation continues, the investigator should remain alert. Information volunteered then may be significant.

*Friends may come and go, but enemies accumulate.* A difficult and aggressive interviewing style may create enemies for the office or investigator. Those who have not been treated respectfully will remember and may eventually harm the office.

*Never assume anything.* Assuming often makes the investigator appear to be a fool when the assumption proves wrong. If in doubt, ask more questions.

*Gather all relevant information, not just that which supports the complaint.* The Ombudsman institution must be impartial. Investigations should begin from the premise that the truth of allegations is unknown. Only the investigative process determines that truth. All relevant information must be sought. Once the investigator suspects the findings, the investigator should seek information that would tend to disprove the apparent findings. If it exists, others will know about it. Not finding it could be problematic for the Ombudsman and the office.

*The only dumb question is the one investigators only ask themselves.* There is no such thing as a dumb question. Investigators should ask the questions that occur to them. Not to do so could be foolish and a mistake.

*Two heads are better than one. Observe a lot just by watching. Take along a colleague.* Two investigators at an interview learn more than twice what one investigator learns. Comparing impressions, they learn even more.

*Always ask if other questions should have been asked. Ask if the witness wants to say more.* These open-ended questions at the end of an interview offer the witness the opportunity to add anything the interview might have missed.

## 15.6. Reviewing documentary evidence

Documentary evidence is anything tangible. Documentary evidence may be important for the Ombudsperson or investigator to review because it can provide information about the complaint that cannot be obtained any other way. Such evidence includes, for example, any document, paper, memorandum, book, letter, file, drawing, map, photo, photographic file, videotape or motion picture, audio recording, film, microfilm, exhibit, computer hard drive, computer floppy disk or flash drive, or other items. Most Ombudsman institution laws give the Ombudsperson access to all government records. Some

laws exclude specific items the Ombudsperson is not entitled to see. Many *Ombudsman* institution laws allow the Ombudsperson to compel production of documentary evidence. Even when an Ombudsperson does not have the power to compel production of documentary evidence, being able to review it can be crucial in some cases to making a determination on a complaint.

Documentary evidence that has not been forged may be some of the most reliable evidence in an investigation. Documents tend not to tell lies, except those forged or created to lie or mislead. If opportunities exist for documents to be destroyed or removed from files, all relevant evidence should be obtained and secured early in an investigation. Documentary evidence produced after a file has been secured is suspect.

Before asking for documentary evidence, determine what records the authority keeps. Where are they kept? How are they arranged? How are they handled? Who normally has access to them? Is access recorded in a log? Remember evidence that may be stored on computers such as electronic mail, memoranda, “erased” files on hard drives or computer records that have been archived.

Ombudspersons are of two minds whether to take originals or make photocopies. One school of thought says an investigator should always take originals because features such as pencil notations or notes taped on a page may not show up in photocopies. The other school says that taking originals is dangerous because it leaves the *Ombudsman* institution open to charges of altering evidence or not handling and securing it correctly. Each Ombudsperson decides which course of action is most appropriate. Either way, documents and photocopies should be kept in secure locations where the Ombudsperson is certain they will not be tampered with or stolen. Originals should not be marked or changed in any way. If they are taken, where feasible examine photocopies of them to preserve the originals intact and in the same files and order as they were taken.

Documentary evidence may establish the sequence in which events happened, why the authority acted as it did, and what relationships existed between the complainant and the authority. In some cases, it may be helpful to develop a chronology of events relevant to the allegation(s). Documents help do that.

## 15.7. Inspecting premises

Most *Ombudsman* institution laws give the Ombudsperson and staff the right to inspect institutions in which persons are held against their will (for example, jails, prisons, penitentiaries, hospitals and institutions for the handicapped or mentally ill). They also allow the *Ombudsman* institution to inspect

the premises of any authority under the *Ombudsman* institution's competence. Some Ombudspersons must personally approve any inspections in advance. When possible, investigation inspections are conducted by at least two staff.

Inspections offer the opportunity to visit the location of any events to see it and assess the physical layout and any other characteristics that might be important to understanding the allegation. They are also opportunities to interview witnesses at the site. Notes, diagrams or photographs help document and recall what was observed.

# 16. FAIRNESS IN THE *OMBUDSMAN* INSTITUTION'S INVESTIGATIVE PROCESS

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## 16. FAIRNESS IN THE OMBUDSMAN INSTITUTION'S INVESTIGATIVE PROCESS

Since the *Ombudsman* institution is a rule of law institution that examines whether authorities are following the law and implementing procedural fairness, the *Ombudsman* institution must also follow an investigative procedural fairness.

Procedural fairness protects individuals whose rights or interests are being affected. Procedural fairness is not a burden or impediment to investigations, rather it is a key element that benefits investigators and those being investigated.

For investigators, following procedural fairness helps check facts and identify issues that might otherwise be missed. Consulting with the subject of a complaint may reveal weaknesses in the investigation and provide a warning about any attacks that might be made against the report.

Procedural fairness helps the *Ombudsman* institution ensure that the investigative report is fair and reasonable. It consists of informing any persons or authorities of the allegations made against them and the evidence the *Ombudsman* institution considers probative. Those being investigated should have a reasonable opportunity to respond, be able to be represented by counsel, have the right to remain silent or not to incriminate themselves as well as to claim any constitutional, statutory or common law privileges. It also means the *Ombudsman* institution listens to all, considers what they say and concludes the investigation in a timely manner.

Any person whose rights, interests or legitimate expectations will be affected by a finding is entitled to an adequate opportunity to be heard. To properly respond, the person must know the evidence on which a finding is to be made, what the *Ombudsman* institution has determined are the facts and the law(s) that govern those facts, how the situation has been analyzed and the grounds for the criticism.

The person should be able to respond and explain what happened, provide any evidence to mitigate the allegations, and challenge representations of others or the *Ombudsman* institution's findings of fact and analysis. Procedural fairness requires that before making a report final, anyone criticized in it will have the opportunity to comment on the report and make any additional presentations the individual wants the *Ombudsman* institution to consider. Where the law on the *Ombudsman* institution does not allow showing anyone criticized a preliminary confidential version of the report, fairness requires that any individual being criticized know the full extent of the criticism, what facts it is based on and have an opportunity to comment or make any ad-

ditional presentations the individual wishes the *Ombudsman* institution to consider before making a final determination on the allegation. Essential to full responses are clear explanations of the reasons for findings in an investigation conducted by an *Ombudsman* institution. Such clear explanations are also important so that complainants understand the basis for findings and recommendations.

Where an investigation involves different steps before an investigative report is final, procedural fairness exists if the process as a whole provides procedural fairness.

Ombudspersons and investigators often ponder when is an appropriate moment to inform the person or authority being investigated about the substance of the complaint and its allegations. That may differ with each complaint.

As a general rule subject to exceptions easily granted, it may be best to inform such persons or authorities as soon as is reasonably possible. The reason exceptions should be granted easily is that the *Ombudsman* institution's investigative process is an inquiry. Repeated opportunities to know the substance of allegations will exist, as will opportunities to respond. Until the report is ready to be made final, additional representations should be allowed. The *Ombudsman* institution should be ready to consider any new evidence and to make a different finding if the facts and evidence indicate.

If evidence might be altered or fraudulently created, or witnesses pressured or induced to change their testimony, it is appropriate to withhold the substance of the allegations. The investigation's integrity is important and may need to outweigh early disclosure of allegations. The allegations will be communicated at the appropriate time, and the *Ombudsman* institution will remain ready to hear or read responses.

Where criminal prosecutions may result, it may be appropriate not to inform the person targeted in the complaint of the allegations before referring the matter to the appropriate criminal authorities to investigate and prosecute.

In many cases, the individual or authority may be informed of the allegations prior to being asked to respond to them. Investigators decide whether procedural fairness requires written or in-person responses. In-person responses allow the investigator to assess the individual's credibility and read body language. That takes more time than reading a written response. Unless the response is taped, what was said could be a matter of contention. Written responses reduce but do not completely eliminate such contention.

Finally, procedural fairness is often enhanced if the person who signs an investigation and the investigator are two different persons. Additional re-

views by supervisors and managers help improve an investigation's quality and impartiality.

Because an *Ombudsman* institution's investigation is independent and impartial, it must not be tainted by any hint of bias or prejudice. Flippant, dismissive, prejudicial, gratuitous or other inappropriate comments erode the *Ombudsman* institution's impartiality and have no place in an Ombudsperson's office, official records, complaint files or investigative reports.

# 17. THOSE WHO REFUSE TO COOPERATE

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## 17. THOSE WHO REFUSE TO COOPERATE

### 17.1. Attempting to secure cooperation

Anyone who refuses to cooperate with an *Ombudsman* institution investigation should be reported immediately to the Ombudsperson. The first effort would be to seek voluntary cooperation. If necessary, the Deputy Ombudsperson or the Ombudsperson should communicate with the person who is refusing to cooperate to discuss the reasons for such a refusal. Sometimes such a discussion removes objections and clarifies the *Ombudsman* institution's right to investigate or to have access to information and individuals.

### 17.2. When voluntary cooperation is not obtained

Some *Ombudsman* institution laws provide penalties for individuals who refuse to cooperate or hinder an investigation conducted by an *Ombudsman* institution. Sometimes simply reading those provisions to an individual who is not cooperating may be enough to secure the person's cooperation. Ombudspersons whose laws do not provide such penalties may wish to consider whether seeking an amendment to enact such penalties would reduce the number of people who refuse to cooperate with the *Ombudsman* institution's investigation.

If persuasion and education do not work, the Ombudsperson and management decide what to do. The only alternative that should probably be rejected is to do nothing. Other alternatives range from attempting to prosecute the person refusing to cooperate if the *Ombudsman* institution law provides penalties for such an offence, seeking cooperation from the person's superior or reporting the violation to parliament and the public.

If the Ombudsperson is considering prosecution under provisions in the *Ombudsman* institution law allowing that, the first time it should only be done with a strong case the Ombudsperson feels very confident of winning. If the first prosecution is lost, it will be difficult to bring a second one. If a second one is lost, a third is most unlikely. A series of losing prosecutions tells government officials and civil servants that they don't have to cooperate with investigations and they can escape punishment. That cannot be tolerated if the *Ombudsman* institution is to conduct credible investigations.

# 18. DOCUMENTING, RECORD KEEPING

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## 18. DOCUMENTATION, RECORD KEEPING

While *Ombudsman* institution laws often provide for confidentiality of the office's records, they normally are silent on what investigative records the *Ombudsman* institution should keep or for how long.

Much *Ombudsman* institution record keeping is based on common sense. An investigative file should record what the investigator did and include communications with all parties, evidence obtained, etc. The record should allow a staff member other than the investigator to understand what took place and what might remain to complete the investigation.

Other than standard office practice, the reason to keep such records is that investigations may be transferred, the Ombudsperson may need to be briefed on what took place when and what was found. Good investigations require good record keeping.

### 18.1. Investigative files

Standardizing the order of contents of investigative files is more important than the specific order that is standardized. Because others may need to read a file and quickly find what they seek, the *Ombudsman* institution's policies and procedures should specify what records are kept in what order in an investigative file.

These types of information are normally included in an investigative file:

- Legible notes of what the investigator did, when and what was found, including notes on interviews, phone calls and other communications with complainants, authorities, civil servants or government officials. These notes should be kept chronologically to create an investigative timeline. (Notes should be dated, indicate where the interview occurred, their author and a reference to the complaint they deal with and document every person contacted during the investigation.)
- Copies of all correspondence, including notice of the investigation to the authority and complainant, requests for information, records or testimony, communicating the results and findings of the investigation.
- Investigative reports and responses from the authorities to the report.
- Whether the complainant has waived any requirements to keep the complainant's identity confidential.
- Copies of records examined in the investigation. Copies should recreate the originals and follow the same order with all pages copied.
- Transcripts or tape recordings of testimony if made.

- Anything else discovered or developed during the investigation that would be helpful or needed if the investigation were transferred to another investigator or if the Ombudsperson chose to be briefed in detail on the investigation.
- A record of the time spent on each activity if required by the Ombudsperson.

Records of investigations should be kept in secure locations where only persons entitled to view them have access and where the possibility of tampering is eliminated. Some offices may not have access to completely secure locations where investigative records can be locked. In those situations, the Ombudsperson and staff should take whatever measures they have available to make the records as secure as possible within the constraints of the office's resources.

Once an investigation closes, the file should be reviewed and made ready to be archived. Each Ombudsperson should decide what investigative records to retain, for how long and what will be discarded. (Discarded records are destroyed so that it is impossible for someone to read them. Usually, this means crosscut shredding or completely burning documents and stirring the ashes so no one can reconstruct them.) No uniform time period exists for archiving investigative records. Some offices will destroy records on complaints that do not result in investigations after a year or two and keep essential materials on full investigations as long as forever.

Archived files should allow someone to return years later and understand what was done, what was found, who was interviewed, etc. Any legal provisions covering records, what they can contain and how long they need to be stored should be observed.

## 18.2. Access to information in investigative files

Requests for access to information in investigative files normally come from three types of requestors—complainants, authorities that were the subject of the complaint, and third parties. The basis for determining whether to honour such requests is the law creating the *Ombudsman* institution. Laws on privacy, freedom of information and other authorities may also be relevant. Since these laws vary, each Ombudsperson should observe the country's laws governing these matters to decide whether records may, may not or must be disclosed.

One *Ombudsman* institution whose records are confidential by law decided to give complainants copies of records the complainants provided and authorities copies of records they provided. Essentially, any person or authority could have a copy of what it had provided to the *Ombudsman* in-

stitution. No other person or authority could have copies from the *Ombudsman* institution's files of records collected or created during an investigation because that would have violated this *Ombudsman* institution's statutory confidentiality requirement.

Ombudspersons occasionally have defended confidentiality provisions in court to prevent access to their records.

Most Ombudspersons may disclose confidential information to fulfil their responsibilities under the law creating their offices. An Ombudsperson may also need to determine what to do in cases of a serious threat of imminent harm to a person's life or health or advance knowledge of a criminal act about to be committed. The Ombudsperson may need legal advice to determine whether or how that information may be revealed.

Ombudspersons generally do not give information to authorities that would harm complainants. This preserves the integrity of the *Ombudsman* institution as a place where individuals may bring complaints—not a place where information will be passed to authorities to be used against complainants.

# 19. INVESTIGATIVE PROBLEMS

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## 19. INVESTIGATIVE PROBLEMS

### 19.1. Investigative traps

Certain attitudes investigators may have can be traps preventing them from conducting high-quality investigations efficiently and effectively. These attitudes and whether they compromise investigations may vary according to country and culture.

*Believing you have to know everything . . .* Investigators who believe they have to know everything about an investigation or a specific aspect of it are likely to spend much time trying to find information other people can provide. Investigators should seek the most efficient but still reliable means to finding information.

*Believing you know everything.* Investigators who believe they know everything about the investigation or some part of it are likely to make mistakes. No investigator EVER knows EVERYTHING about an investigation or even a specific part of it. Recognizing where information of significance is lacking leads to better investigations.

*Being afraid to appear ignorant.* Some investigators fear being or even appearing ignorant. Ignorance, real or even feigned, can be a very helpful tool. It can lead witnesses to reveal information about which they might otherwise have been silent. Since no one knows everything, investigators should not fear being or appearing ignorant.

*Making assumptions.* In determining the facts, checking to be sure they are really the facts is critical. Making assumptions is likely to cause the investigator to make mistakes that can be fatal to investigations. Investigators should question their assumptions and check the facts to make sure they are correct.

*Making statements that are findings.* Findings in investigations are made in reports approved by the Ombudsperson. Investigators don't make public findings. They need to be careful not to say anything that could be interpreted or misinterpreted as being an official finding on a complaint or aspect of it. That should not, however, prevent them from testing possible findings with witnesses.

*Thinking you shouldn't start to assess the investigation as you conduct it.* Some investigators think they should gather all the evidence and testimony before they assess what they have found. Assessment of the investigation should begin while the investigation is still being conducted. It indicates where more investigation may be needed and helps the investigator determine when fact-finding is concluded.

*Making up your mind too soon.* If the investigator starts to assess the investigation early, it could lead to reaching a conclusion before all of the facts are in. Assess the investigation as it is being conducted and also investigate against the direction of the conclusion forming about the allegations. Thinking about what the investigation indicates helps the investigator see what more might be needed to conclude the investigation and where to seek evidence that

may disprove the tentative conclusions. The investigator should keep an open mind nearly until the end of the investigation.

*Not making up your mind at all.* An investigator who seeks to keep an open mind may not reach a conclusion. At some point, the investigation must be finished, and the findings and recommendations prepared for the Ombudsperson to consider.

*Not being able to admit being wrong.* Investigators are human and make mistakes. The most important aspect about making mistakes is to admit being wrong. Trying to cover up a mistake is a bigger mistake.

## 19.2. Transferring investigations

Transferring investigations should be done only if it serves to resolve a complaint more quickly or efficiently or prevent a conflict of interest. Typically, complaints will be transferred when another staff member’s specialized knowledge or experience will speed up an investigation, balance investigative workloads, avoid conflicts of interest or distribute the work of an investigator leaving the office.

The investigator transferring the complaint prepares a brief memo, outlining the complaint, the issues to be investigated and activities so far. The investigator receiving the complaint should always contact the complainant before proceeding. This contact informs the complainant of the change and gives the receiving investigator the opportunity to hear about the complaint first-hand, reducing chances of confusion or misinterpretation.

## 19.3. Common investigation pitfalls

One Ombudsperson has listed these as the ten most common reasons investigations are not done correctly:

- Lack of planning.
- Lack of clear investigation objectives and/or unachievable objectives.
- Lack of objectivity by the investigator (resulting either from bias, conflict of interest or rigid adherence to preconceived views).
- Reliance on unproven assumptions.
- Failure to follow procedural fairness, due process, natural justice.
- Failure to obtain all relevant evidence available.
- Failure to consider evidence that is exculpatory or otherwise does not support the allegations.
- Lack of resources and/or poor use of resources.
- Shortcuts, and
- Failure to appropriately distinguish the investigation and adjudication processes.

The Ombudsperson also suggested that these pitfalls might cause an investigation to fail, show limited success or become subject to heavy criticism:

- Lack of leadership.
- Poor investigation documentation.
- Lack of transparency.
- Lack of continuity.
- Lack of training.
- Failure to consider organizational culture of the authority being investigated, and
- Making unrealistic recommendations.

## 19.4. Troubleshooting an investigation

The following will help investigators, managers and Ombudspersons troubleshoot and deal with investigative problems.

*Recognize, acknowledge and fix problems as soon as they are found.* Report problems to Ombudsman institution's managers and fix them immediately wherever possible.

*Transfer complaints where investigators have or develop conflicts of interest or where the investigator is not the one who should conduct the investigation.* As soon as real or apparent conflicts of interests are identified, managers should decide whether to transfer the investigation or contact those most likely to be affected by the conflict (the complainant and the subject of the investigation) to see whether they are willing to have the investigator continue. If one or the other is unwilling to have the current investigator continue the investigation, transfer it to another investigator who has no conflicts.

No matter how investigations are assigned, the person who conducts an investigation should be the person best qualified on the staff to conduct it. Occasionally, investigations will be assigned to a staff person who later turns out not to be the best investigator for that complaint. While transfers may be delicate staff matters, if handled with sensitivity to the feelings of all involved, the transfer can result in a better investigation.

*Deal with delay.* Investigations delayed are Ombudsman institution justice denied. Investigators and managers should not allow delay to become excessive. Managers should help investigators manage their workloads so enough time is reserved for investigative work. Investigators should give priority to the oldest complaints or those that have some priority reason for moving ahead of others received earlier.

*Act to ensure procedural fairness.* If at any point the investigator realizes that procedural fairness has not been provided to the subject of the investigation, the investigator should take the necessary steps to provide it. Procedural fairness can be provided at nearly any stage of an investigation and must be provided before the investigation is closed.

*Document witness interviews.* Not taking good notes or recording witness interviews is a mistake that may cause problems later. The Ombudsperson and staff should consider under what circumstances to tape record witness interviews and whether transcripts will be prepared and provided to witnesses. Investigators may choose to have another investigator present to take notes while the first investigator conducts the interview. Good notes taken contemporaneously with an interview can be more useful than a tape recording. Finding relevant passages in tape-recorded testimony can be time-consuming. Investigators should be trained how to take good notes.

*Secure documentary evidence.* To ensure that copied documents are not altered or stolen, they should be kept under affordable security. Loss of confidential records is at least embarrassing and at worst causes problems for the office and possibly the people who were the subject of the documents. Prevention is the best cure.

*Identify potential criminal matters early.* Since the office does not conduct criminal investigations and does not want to be the cause of a failed prosecution, evidence of criminal matters needs to be identified as soon as possible. The investigation should then halt until a determination can be made whether to refer the matter to the appropriate authorities or to continue the investigation.

*Transfer investigations that become too complex, lose their way or their focus.* A good investigator is a curious person, prone to look at everything seeking evidence of wrongdoing. That good trait can also cause problems by allowing investigations to become too complex, lose their way or their focus and continue for an inappropriately long time. Good management supervision might help narrow the focus, reduce the complexity and get the investigation back on plan. If that is not possible, the investigation should be transferred to an investigator who can refocus, simplify and follow the plan.



# 20. FINDING THE LEGAL BASIS THAT GOVERNS THE MATTER

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## 20. FINDING THE LEGAL BASIS THAT GOVERNS THE MATTER

### 20.1. Computer databases

Once the investigation has revealed the facts, the investigator determines what law governs those facts. The investigator faces the question of how to find this information in the quickest way that at the same time yields correct information. The investigator generally should ask the authority what legal bases govern the specific situation. That often saves much time. It may, however, not be completely correct. The investigator can then check what the authority has said rather than researching the law from the beginning.

An analysis by the *Ombudsman* institution of the hierarchy of governing laws or other legal acts is essential. In searching for the law that governs, the investigator may discover laws in conflict with constitutional provisions, which may be in conflict with the country's international treaty obligations. The investigator needs to understand how to resolve those conflicts and may need legal advice.

Discovering the governing law is easiest when a country's laws are codified and available in searchable computer databases. In some countries, finding copies of the current legislation is difficult. Since the *Ombudsman* institution refers to the authority of the law in analyzing the facts, the Ombudsperson and staff must have access to current laws.

Many *Ombudsman* institutions build libraries of national legislation, international treaties on human rights and other reference documents useful in conducting investigations and writing investigative analyses. Whether laws are available in codified computer databases or only uncoded and on paper, easy and immediate access to them for investigators and the Ombudsperson is indispensable.

## 21. ANALYZING FACTS IN THE LIGHT OF THE LAW

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## 21. ANALYZING FACTS IN LIGHT OF THE LAW

In a guide such as this, separately discussing the different tasks in an investigation is helpful. Finding facts, assessing their relevance and importance, determining the law that governs, beginning to form conclusions and findings and making recommendations are discussed separately. In the practical world, they are neither separate nor distinct investigative phases. They normally intertwine. The relevance of what a complainant tells the investigator starts to be assessed when the complaint is received. Investigators may also find that when they are writing reports, determinations and recommendations for the Ombudsperson's consideration, more fact-finding may be necessary if something does not make sense or an important aspect is missing.

### 21.1. Assessing evidence

Assessing evidence is not a distinctly separate phase of an investigation. It begins simultaneously with the gathering of evidence. While investigators question witnesses they form opinions and conclusions about each witness's trustworthiness, truthfulness, credibility and whether the witness is exaggerating or downplaying details and facts. Investigators will also apply a healthy scepticism to documents and judge whether they may have been tampered with or fraudulently created.

The investigator will also determine the relevance of the evidence. Does a fact, once it has been determined actually to be a fact, tend to prove the allegation, disprove it or do neither? Which types of evidence and the facts they prove or disprove are most important and which are least important? When physical evidence and or witnesses disagree, how does the investigator assess that disagreement or resolve it? Is it critical, important or irrelevant to resolve specific discrepancies among evidence and testimony?

Early in planning an investigation, the investigator begins to think about what facts need to be determined to prove or disprove the allegation(s) of the complaint. Those considerations help the investigator decide whom to interview, what evidence to seek and review, etc. Similarly, when additional, unanticipated evidence arises, the investigator determines its relevance and importance in proving or disproving the allegation(s).

Among an investigator's best assets is a healthy scepticism. Experienced investigators learn that things often are not what they first appear. Some witnesses tell the truth and nothing but the truth. Others may be truthful in everything they say but relate only facts that favour them and leave out those that don't. Still other witnesses may shade the truth slightly but be

truthful in the remainder of what they say. Some minimize their participation to downplay whatever they did that was wrong. Others play up what they did to impress the investigator and make themselves appear important, perhaps more important than they were. Finally the accounts of some are wholly false. They may lie to divert attention from wrongs they have committed or for other reasons.

The scene and setting for taking testimony may influence responses. Similarly, how questions were asked, the investigator's approach and relationship with the witnesses can subtly or significantly influence a witness's answers, especially if the witness detects what answers the investigator seeks. Questioning techniques are factors in whether witnesses tell the truth, shade it or lie.

Testimony depends on a witness's memory, credibility, trustworthiness, powers of observation and ability to communicate clearly what the person saw, heard, touched or smelled. Physical evidence also should be examined with a healthy scepticism. It may or may not be as it first appears. It could be authentic, altered or completely fabricated. It could have been created on the date indicated or backdated. Physical evidence can be inserted or removed from files. Tape recordings can be edited. Computer records can be forged. The investigator's powers of observation, attention to detail, ability to detect fraudulent or altered documents is as important as the ability to assess a witness's credibility.

Aside from assessing witness credibility, the investigator weighs different types of evidence. Is testimony more important than documents or vice versa? Is first-hand testimony more important than hearsay? What finding does the investigator recommend to the Ombudsperson when any finding would rest on the word of one person against another? Does the *Ombudsman* institution's legal basis allow a finding of 'indeterminate'—that the Ombudsperson cannot determine the facts? Or must the Ombudsperson sort out contradictory testimony and evidence when nothing corroborates either?

An investigator's ability to examine different types and pieces of evidence in an investigation and figure out how they relate to one another, whether they tend to corroborate or contradict each other, whether they are critically relevant, partially relevant, or irrelevant is an *Ombudsman* institution's invaluable asset. Only an investigator with sufficient experience and expertise, whose common sense can help reason through contradictory facts and testimony, can fit puzzle pieces together to make sense and paint a picture internally consistent with the facts. Those facts then need to be interpreted under the laws that govern them.

## 21.2. Analyzing assessed evidence

Once the investigator has examined all of the evidence and assessed its relevance and importance to the allegation, the investigator analyzes it in light of the laws or other legal bases to propose a finding for the *Ombudsman* institution to make on the allegation.

For this task, there is no substitute for brainpower. The investigator separates elements of each allegation, determines the facts, reads and interprets laws that govern the situation and sees how the facts indicate whether the laws have been properly implemented or whether they and the rights of the complainant have been violated.

One technique some investigators have found useful is to talk with colleagues about the allegation(s), the facts that were found, the law(s) governing them and what that means. Listening to what one says is important. Relating this to someone else can help the investigator understand what has been found and what it means. Another technique investigators use is to begin to write analysis early. This helps them see what is missing and what additional investigation is needed to complete the fact-finding.

## 21.3. Analysis tools

The tools investigators use to analyze the facts and the law tend to be either scientific or legal.

Scientific analysis is either qualitative or quantitative. Qualitative analysis uses narrative, is humanistic and based on experience and learning. What is important is bringing logic, reason and coherence to bear on the evidence. Does the emerging picture of the facts make sense? Is what people have been alleged to have done what they reasonably might have done? Does the evidence indicate that is what they did? How do evidence and facts mesh with the law—was it legal to do what was done or not?

Quantitative analysis uses statistics to analyze data. The analysis can be simple or complex depending on the amount and level of data complexity.

Legal analysis brings cases previously adjudicated in the courts or investigated by the *Ombudsman* institution to bear on the current facts. Precedent is used. Because an action or inaction was found to have violated rights in the past, it still violates rights in the present.

Legal analysis can also depend on statutory interpretation. The three most important rules about statutory interpretation are:

Read the statute. **Read the statute.** *Read the statute!*

## 21.4. Statutory interpretation

A number of principles can be applied to interpreting statutes.

**Plain Meaning Rule:** The statute means what it says. Sometimes a statute is so clear that reading it gives a clear meaning of what it was intended to accomplish.

**Absurdity:** Interpret so there is no absurd result. Other times, statutes can be read a variety of ways, some of which would be plainly absurd. Statutes are assumed not to have absurd results and should be read so that no absurd result is derived.

**Textual Analysis:** Consider associated words, limited classes of words, implied exclusions, and understand text as part of a larger context. On occasion, the interpreter stands back from a statute's individual words and determines the larger context in which the statute informs the public what is legal and what is not.

**Purposive Analysis Rule:** Ascertain legislative intent. In countries where it is possible and records exist that help do this, the intent of the body that passed the legislation can be determined and the purpose legislation was meant to serve ascertained.

## 21.5. Standards of proof

Once the evidence has been gathered and assessed and the laws that govern the facts found, the investigator determines what standards of proof govern the specific complaint or allegation. The legal bases of some offices set standards of proof the *Ombudsman* institution may use in making a finding on an allegation. In most cases, the legal bases do not set standards of proof and the *Ombudsman* institution has the power to do that.

If the *Ombudsman* institution's statute sets the standard or standards of proof, the Ombudsperson follows them. If the statute does not set standards, the Ombudsperson needs to set them.

Some standards to consider:

*Beyond a reasonable doubt* is the standard most often used in criminal investigations. It does not mean beyond all doubt but rather beyond doubt that would give a reasonable person sufficient reason to hesitate or pause in very important situations. Since the *Ombudsman* institution does not

conduct criminal investigations, *Ombudsman* institution investigations do not need to meet the “beyond a reasonable doubt” standard.

*Clear and convincing evidence* means that the evidence is sufficient to convince an ordinarily reasonable person.

*Preponderance of the evidence* means that most evidence favours a certain finding or determination. It is less than ‘clear and convincing’, which in turn is less than ‘beyond a reasonable doubt’.

*Balance of probabilities* is described in the United Nations publication on National Human Rights Institutions. It is less than ‘preponderance of the evidence’. It means that on balance, the probability is that a certain finding is correct or it is more probable than not that the finding is correct.

If the law creating the *Ombudsman* institution contains a standard, it should be followed. If it does not contain a standard, the Ombudsperson is free to set one. Good practice indicates that the same standard of proof be followed in *Ombudsman* institution investigations. Only when good and sufficient reasons exist to deviate to a higher or lower standard should that be done. The good and sufficient reason for changing the standard should be explained in the *Ombudsman* institution’s public report on the investigation.

Investigators should also take care not to reduce or increase the standard for reasons extraneous to the investigation. The standard should not be increased to protect the public from offenders, for example, or decreased to protect children in the care of the nation or the state.

# 22. MAKING A DETERMINATION

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## 22. MAKING A DETERMINATION

### 22.1. When to make a determination

An investigation is ready to be concluded and reported once the investigator has *sufficient* evidence and testimony to move from subjective impressions and intuitions to an objective presentation of facts, laws governing them and analysis of both to make a determination that substantiates or refutes an allegation or provides sufficient evidence to secure resolution of the complaint. When an investigation is ready to be concluded, the investigator recommends a determination for the Ombudsperson to consider.

### 22.2. Who makes the determination

Under most *Ombudsman* institution legislation, the Ombudsperson has the sole or final power to make a determination on a complaint. The Ombudsperson may delegate this responsibility to others if the *Ombudsman* institution law allows. If the responsibility cannot be delegated or if the Ombudsperson chooses not to delegate it, the Ombudsperson makes a determination on the allegation(s) of a complaint.

In most offices, the volume of complaints and investigations is so large that the Ombudsperson cannot handle all this work alone and must delegate at least some part of it to investigative staff. The *Ombudsman* institution's policies and procedures will clearly indicate that staff cannot express their opinions or recommendations to an authority under the *Ombudsman* institution's competence. This is the Ombudsperson's responsibility.

If the Ombudsperson determines the allegations are supported, the Ombudsperson may also then make recommendations to restore violated rights or prevent future violations. Often *Ombudsman* institution legislation spells out types of recommendations the Ombudsperson may make. Sometimes they are not specified and the Ombudsperson may make any recommendation that resolves the problem, restores rights or prevents more violations.

Normally the investigator who conducted the investigation prepares a draft report for the Ombudsperson's consideration. The investigator's supervisors or managers review it and may ask for additional investigation or modification(s) before submitting it to the Ombudsperson. (Section 23 discusses drafting recommendations. Section 24 discusses reports, their contents and writing them.)

Once the Ombudsperson reviews and approves the report, it is submitted to the authority for a review and response. This tests the report's quality. The authority will not have seen it earlier and may not know precisely what evidence the investigator examined, found relevant and significant, and how

that was analyzed. The authority is invited to respond, cite any errors, submit additional testimony or evidence, and comment on the recommendations and whether it will implement them.

### 22.3. What is determined

A finding is the Ombudsperson's determination on the allegations made by the complainant. *Ombudsman* institution laws occasionally include the types of findings that may be issued. Most often, the *Ombudsman* institution's regulations, statute or by-laws set out standard findings that can be made on the allegations of any complaint. While the specific words used may vary, the concepts behind them are typically similar to these:

*Substantiated, sustained, supported, or justified:* The investigation established that the acts complained about in the allegation(s) did in fact occur and violated at least one of the complainant's rights.

*Partially substantiated, partially sustained, partially supported, or partially justified:* The investigation looked at more than one allegation and found at least one was substantiated, sustained, supported, or justified and at least one more was not substantiated, not sustained, not supported or not justified or was indeterminate.

*Not substantiated, not sustained, not supported or not justified:* The acts complained about did not occur or if they occurred did not violate the complainant's rights.

*Indeterminate:* The investigation did not find sufficient evidence for the Ombudsperson to determine conclusively whether the acts took place or if they occurred whether they violated the complainant's rights.



# 23. MAKING RECOMMENDATIONS

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## 23. MAKING RECOMMENDATIONS

### 23.1. Resolutions preferred to investigations/recommendations

Recommendations are made once an investigation is completed. They are presented to the authority in a report. At any point after a complaint is received and before the investigation is concluded in a report to the authority, a complaint may be resolved. Generally, only the Ombudsperson makes recommendations. The Ombudsperson reviews each investigation and approves its recommendations.

Allowing staff to make informal suggestions to authorities is one way to help facilitate a resolution short of a full investigation with recommendations. Aside from the Ombudsperson having to approve recommendations formally and the staff being able to make suggestions informally, another distinction between the two is that the Ombudsperson normally can require an authority to respond to formal recommendations. If they are not accepted, the Ombudsperson can appeal for their implementation to the highest levels of government, the public and media. The Ombudsperson would not normally do that with suggestions. If informal suggestions are not adopted, a full investigation with formal recommendations might result.

### 23.2. Why make recommendations

When the *Ombudsman* institution finds a complaint's allegations supported or partially supported, the Ombudsperson may then make recommendations to restore rights by remedying the complainant's problems, prevent future violations or a combination of the two. Recommendations are perhaps an Ombudsperson's most important contribution to better government because they help promote, protect and defend people's rights. Good recommendations resolve the complainant's problem and help the authority protect people's rights, follow national legislation and the rule of law, and conform to international standards.

### 23.3. Power to have a recommendation implemented

An *Ombudsman* institution's only real 'power' to have recommendations implemented is the power of persuasion—the ability to convince an authority that it violated a person's rights and ought to restore them. The key to persuasion is the authority's voluntary acceptance of an agreement to implement the Ombudsperson's recommendation(s). Voluntary acceptance of a recommendation makes the authority responsible for successfully implementing recommendations. Ombudspersons argue that if they had the power to issue binding orders over an authority's objections, the probability of a successful

outcome would decline. In fact, binding orders would likely motivate some authorities not to implement them successfully.

### 23.4. Qualities of good recommendations

The best recommendations are those that will actually solve problems, restore rights, prevent similar problems in the future, and that the authority will implement. Good recommendations are solidly grounded in law and show sensitivity to the context in which they are to be implemented. Recommendations should be within an authority's legal ability to implement them. They should take into account budget and personnel limitations and other claims on the authority's time and resources.

### 23.5. Developing recommendations

One of the best ways to develop recommendations the authority will accept and implement is to ask the authority what it could do that would solve the problem. Asking authorities, officials and their civil servants what the *Ombudsman* institutions should consider recommending is one of the best ways to develop good recommendations. Before deciding to recommend that, however, the Ombudsperson must determine whether it would actually solve the problem or prevent it from happening again. If it will not, the Ombudsperson should not recommend it. If what the authority suggests will, however, resolve the problem, the Ombudsperson should consider making that recommendation because it will most likely be adopted and implemented. The next best recommendations are those the authority suggests even though it may not want to implement them. Some of the least acceptable recommendations are those the *Ombudsman* institution develops without consulting authorities.

Other methods to develop recommendations that the authority will accept and implement include:

Examine how the problem is handled in law, regulation, policy or procedure in other countries. See if there are any international precedents that would help. If national or international professional organizations exist, any guidelines from them might help. Discuss these and any other ideas with authority officials and civil servants to see what barriers might exist and if there are none whether it would be possible to implement them.

Review any past investigations and recommendations to see if the *Ombudsman* institution has considered the issue before and whether the authority has implemented recommendations it accepted earlier. This maintains a consistency in the *Ombudsman* institution's recommendations and prevents unknowingly reversing earlier recommendations.

## 23.6. Recommendation principles

These principles form the foundation for writing recommendations that authorities will adopt and implement:

- Authorities must protect the rights of people with whom the authority interacts whether or not each person is legally entitled to redress.
- Authorities should accept responsibility to address and remedy any violations of rights they have caused.
- People whose rights have been violated should be restored ideally to the position they would have been in before their rights were violated. Redress may not be possible or warranted in all rights violations. In that case, people whose rights were violated should be offered financial compensation or other ways to remedy or redress the violations of their rights that are reasonable and fair to all concerned.
- Redress must be appropriate and proportional to the harm caused by the violation of rights and must be fair to both the person harmed and the authority concerned.

Other possible outcomes may result from investigative recommendations:

- Additional investigation by another authority or prosecution for any crimes committed in the violation of rights.
- Changes in legislation, administrative policies, procedures and practices to remedy the current situation and prevent violations from reoccurring.
- Disciplinary action up to and including dismissal for those who have been proved to have violated the rights of others.

Authorities may agree that rights were violated, but disagree whether redress is warranted or, if warranted, to what degree or what may be appropriate. Redress can take the form of:

**Resolutions acceptable to the complainant:** Reached in appropriate situations through mediation, negotiation, conciliation or other alternative methods of dispute resolution. Resolutions may include reinstating benefits, reversing penalties, or acting in other ways to restore rights.

**Rectifying, mitigating, reversing the violation:** By acting or not acting in ways that preserve complainants' rights; amend laws or regulations; change policies, procedures, practices to bring them into compliance with national legislation and international human rights agreements; halt action that will cause harm; and repair damage.

**Payment:** For physical or mental harm, medical expenses, anxiety/stress, damage to health, property, finances, reputation, lost income and/or benefits. Payments are best used in cases of quantifiable loss attributable to a violation of right(s). They must be made in accord with or based on national legislation.

**Apologies:** Expressions of regret if warranted and given immediately in a way that does not imply acceptance of legal liability. Delayed apologies are less effective. An *Ombudsman* institution should not seek apologies without having examined the legal implications for authorities of an apology. For an apology to be a workable form of redress, it should not constitute an admission of liability, not be relevant to the determination of fault or liability of any kind nor be admitted in court as evidence of fault or liability.

Apologies should be seen under law as positive acts that can help remedy harm caused by a violation of rights. If current national legislation does not view them that way, the Ombudsperson could recommend amendments so they could be used that way in the future. Apologies are most appropriate with violations of rights that have not resulted in serious harm. They may not be appropriate in cases where harm results from violence, death, serious injury, torture, and psychological or psychiatric abuse.

### 23.7. Principles for redress<sup>2</sup>

These principles can be applied to develop recommendations to redress situations the *Ombudsman* institution has determined constitute violations of rights:

Redress should be:

- Fair and reasonable.
- A comprehensive resolution of the issue.
- Responsive and procedurally sound.
- Ethically sound.
- Timely.

<sup>2</sup> This section on principles governing redress is quoted, summarized, condensed or drawn from 'Options for Redress', published by the Ombudsperson of the Australian state of New South Wales in February 2000 and reprinted March 2003. It was also published as chapter 5, *The Complaint Handler's Tool Kit*, May 2000. The publication contains the following note:

'This publication has been prepared as an informative guide for public sector agencies, public officials and members of the public. It is designed to contribute to fairness, integrity and good public administration in relation to handling complaints and investigations.

'We have done the best we can within our resource constraints. Where the matter raises complex questions of law, where there is a real possibility of litigation or where the matter is otherwise highly contentious, further legal or other professional advice should be sought before taking action.'

### 23.7.1. Fair and reasonable

Redress must be fair and reasonable to the person whose rights have been violated and to the authority, considering the circumstances of the violation. Fair redress can be based on broadly interpreting the law. If the solution is based in legal or other technical advice, redress should not ignore how reasonable the advice is and what its effects are. Even if the law does not require redress, a moral obligation to offer it may exist. Fair and reasonable redress may mean avoiding adversarial approaches in favour of mediation or compensation without accepting liability.

Fair redress requires that like cases be treated equally and that the authority not take advantage of any position of strength over the complainant. The authority's position of strength comes from knowledge as well as resources and should always be taken into account. Fair and reasonable redress is proportional to the degree and nature of the violation of rights and the harm suffered.

### 23.7.2. Comprehensive resolution

Comprehensive resolutions cover all appropriate responses to people whose rights have been violated and address all of their consequences. Resolutions that are not comprehensive or fail to deal with all the justified issues raised are likely to result in additional complaints. Comprehensiveness also means providing redress to all whose rights have been violated even if they have not complained to the authority or the *Ombudsman* institution. Efforts should be made to locate all those affected.

### 23.7.3. Responsive and procedurally sound

Redress should be made in accord with ethical principles, including:

- Compensation offers should be based on what is fair and reasonable with authorities not using their position of strength to minimize payments.
- Offers should include adequate information, including how they were calculated, and the reasons why the authority decided to accept, partially accept or reject a claim.
- Partial settlements should not require waiving rights.
- Offers should provide information on the right to complain to the *Ombudsman* institution.
- Agreements made in ignorance of rights are not fair or reasonable and may be invalid.

Precedent and guidelines help provide consistency between like cases. Those who make decisions on redress should be accountable and their decisions should be reviewable. Information on the review process should be presented to the complainant.

#### 23.7.4. Timely

The authority should resolve quickly or deal appropriately with complaints. Consideration of redress may be delayed if investigation continues or appeals remain. The authority should communicate clearly and directly in cases where delay is warranted.

#### 23.7.5. Limitations

These factors limit redress or the amount of redress:

*Time elapsed:* Rights violations in the distant past are less compelling depending on their nature and the time that has elapsed. Some *Ombudsman* institution laws give the Ombudsperson discretion not to investigate events more than a certain period earlier. In determining redress for distant events, what is fair and reasonable under the circumstances is important, as are the reasons for delay in making the complaint.

*Harm remote from violation:* Redress is most appropriate for harm caused directly by the violation of rights. If the harm is remote, the question is whether it likely resulted from the violation or whether other factors could have been involved. Similarly, if the person harmed contributed to the violation or harm in some way, that may affect the nature and scope of the redress.

*Mitigation of harm:* Persons whose rights have been violated and suffered harm as a result should take reasonable steps to minimize the harm—by bringing it to the notice of the authority if that had not been done. The nature and extent of redress is affected by the extent to which the authority and the person harmed acted reasonably to reduce the harm.

*Unwarranted enrichment:* Redress should be proportional to the harm suffered and not provide recipients benefits or advantages beyond those reasonable and fair.

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# 24. OMBUDSMAN INSTITUTION INVESTIGATIVE REPORTS

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## 24. OMBUDSMAN INSTITUTION INVESTIGATIVE REPORTS

### 24.1. Contents of an Ombudsman institution's investigative report

#### 24.1.1. When is a report appropriate

*Ombudsman* institution legislation sets out the circumstances under which the Ombudsperson must or has the discretion to make an investigative report. Normally this is after a completed investigation finds at least one of the following:

- The authority should consider the matter of the complaint further;
- An act of the authority should be modified, reversed or cancelled;
- Reasons should be given for the authority's actions;
- Amendments should be made in law, regulation, policies or procedures;
- The authority's actions had no basis, or the act violated the law or the complainant's human rights and fundamental freedoms.

Ombudspersons with limited staff need to set priorities for their office. They will determine under which circumstances the process for preparing and issuing investigative reports will be followed. In most countries outside Eastern Europe and the CIS, this process or one tailored to local circumstance is normally followed when a full investigation is completed. Investigative reports provide accountability and a degree of transparency to the public for the office. On occasion, resolving problems short of completing full investigations and writing and issuing investigative reports may be one way for an office that does not have adequate resources to allocate them in the most efficient and effective manner.

Ombudspersons deciding whether to write and issue a report should consider not only resource allocation but also the need to make the office transparent and accountable and the amount of public good will investigative reports can bring.

#### 24.1.2. Preliminary reports

Once an investigation is completed, investigators usually prepare a draft report to the authority with preliminary conclusions and draft recommendations. Ombudspersons may not issue an investigative report with opinions that criticize an authority or person, unless the authority or person has had an opportunity to respond to the criticisms. Some *Ombudsman* institution legislation requires this. Even if the law does not require it, a preliminary confidential report is a mechanism to control the quality of *Ombudsman* institution reports. The preliminary report is essentially the last investigative effort to verify the facts the investigation discovered. It guards against factual errors in the final report.

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The draft report should be complete except for any response from the authority or person criticized and the authority's response on accepting and implementing the recommendations. It is not a way to seek answers to unanswered questions. Those matters should be resolved before issuing the draft report.

The report should also not be released publicly. That allows the authority and anyone criticized time to consider and respond to its findings and recommendations. If it is not possible to guarantee the confidentiality of a preliminary report, the Ombudsperson should consider whether to issue one. Another alternative is to seek an amendment to the *Ombudsman* institution law adding a provision authorizing or requiring preliminary confidential reports to authorities and others criticized by a draft report.

Draft preliminary reports should be sent directly to the authority or person criticized—not to a third party. The authority or person should be able to respond in writing or have an opportunity to speak directly with the investigator and/or Ombudsperson about the report. The report must provide the authority or person criticized with the facts the investigator found, the law governing those facts and how both were analyzed to result in criticism. That provides those about to be criticized with procedural fairness.

### 24.1.3. Contents of reports

An investigative report communicates the results of an *Ombudsman* institution investigation. Most *Ombudsman* institution laws contain few provisions on the contents of investigative reports. Since how investigations were conducted and what they find vary, most Ombudspersons give investigators wide discretion to decide what to include in the report in what format. The goal is to communicate clearly and concisely the complaint, what was done to investigate it, how the *Ombudsman* institution views the results, what the Ombudsperson recommends and whether the authority has implemented the recommendations.

The best investigative reports communicate as much as possible as succinctly as possible. That helps motivate the authority to adopt the *Ombudsman* institution's recommendations and remedy or redress any violation of rights. If the investigation did not require extensive activities, the report can be a short letter. Or it can be a full, detailed investigative report.

The following types of information might be included in *Ombudsman* institution investigative reports. Few reports include every section listed below. Each report should be structured and written based on that investigation.

**Executive summary:** For lengthy investigative reports, a shortened version in an executive summary informs those who may never read the full report. Good summaries use language directly from the report and refer the reader to the page on which it appears. The shorter the summary the better.

**The allegation(s):** What the complainant alleges took place that was a violation of rights—the matter(s) the office investigated.

**Background:** Any information not directly germane to the complaint but that helps an otherwise uninformed reader understand the complaint and investigation context.

**The investigation:** If the allegation was separated into sub-allegations or multiple allegations, that should be explained here and set the structure for what follows. What was done to investigate the complaint. If appropriate, a statement that the report does not include every detail investigated.

When the complaint was received and the investigation begun. Who conducted the investigation. Who was interviewed, what records were examined, what inspections took place, etc. This section can be a narrative, chronological or allegation by allegation, depending on which structure best provides the reader with a clear understanding of what was alleged and how it was investigated. It can include information on all allegations together or it can be divided into more than one allegation or sub-allegations. It includes more details from the complainant and responses from the authority. The section can conclude with a summary of the facts determined by the investigation. The section is a straightforward recitation of what was found without analysis, comments or conclusions on whether information was accepted as fact or rejected for some reason.

**Legal background:** The relevant provisions of the Constitution, international treaties and obligations binding on the country, laws, regulations, statutes, bylaws, policies or procedures, or administrative rules that apply to the facts. These may be excerpted to include only the language the investigator has concluded applies. If necessary, the full document(s) can be included as appendices. Any legal advice to the Ombudsperson about complaint issues could be included here.

**Analysis:** A section evaluating the evidence and drawing conclusions about the facts in light of the law. If more than one allegation has been investigated, each will be analyzed separately. Analysis should be balanced, fair and impartial—based on the facts and the laws that apply to them.

**Findings:** The *Ombudsman* institution's findings on each allegation or sub-allegation with reasons why the Ombudsperson is making that finding. The report must clearly indicate to the complainant and the authority the reasons for each finding and the evidence on which it was based. The findings should be clear, concise and unambiguous.

**Recommendations:** The Ombudsperson's recommendations to resolve the problem, restore rights, redress wrongs, prevent the problem from recurring, etc. The recommendations should include statements why they are being made and how they will resolve the problems. This may also include any remedy or redress offered or accepted.

**Additions to final report:** Once the authority and any person criticized in the report have commented, the preliminary report is made final. The responses from the authority or anyone else asked to review the preliminary report or summaries of them are included in the final report. Based on these responses, the *Ombudsman* institution may choose to do nothing more, undertake additional investigation or change findings or recommendations. Some recommendations may be amended or deleted and new ones added. If additional investigation yields a substantially revised report, it should be sent again as a preliminary confidential report to the authority and anyone criticized in it, particularly if criticisms have been added since the earlier version(s).

Some Ombudspersons find it helpful to complainants, the authority and the *Ombudsman* institution's credibility to indicate in a section of the final report what responses were received, what they said, what the *Ombudsman* institution did as a result and whether any findings or recommendations were changed. The *Ombudsman* institution also includes information on whether the authority accepted and implemented the recommendations.

**Cover letter:** The Ombudsperson signs the cover letter for all investigative reports drafted by the investigator. For *preliminary confidential reports*, the letter invites the authority to check the facts to ensure that they are correctly stated, offers to receive any additional facts or evidence the authority believes could justify changing the findings and any other comments the authority wishes to make. The letter can also offer to meet to discuss the report, its findings and recommendations. The cover letter for the preliminary confidential report also indicates the date by which a written response will be due and to whom it should be sent.

The letter briefly summarizes what was investigated, what was found, the recommendations made and in the cover letter of the final report whether they were completely, partially or not implemented. Preliminary reports are normally not sent to the complainant or third parties unless the report expressly or implicitly criticizes the complainant or the third parties. The complainant or a third party may be asked to come to the office to review all or a portion of the preliminary report, with confidential information removed. Authority officials or civil servants the *Ombudsman* institution believes might release the report before it is final can also be invited to read it at the office.

*Final reports and their cover letters* are sent to the authority, any individuals criticized in the report, and the complainant. Most laws also give the Ombudsperson discretion about to whom the office may send copies of the report, including other government officials, parliament, the public and the media.

**Appendices:** Documents of interest in the investigation may be appended to the report. They could include documents such as: detailed chronology of significant events if too long to include in the body of the report, summaries

of testimony, copies of full legislation cited in excerpts in the report, detailed technical background information, any thing else of relevance the investigator believes a reader might need to completely understand the report without having to refer to other documents.

#### 24.1.4. Additional concerns

**Confidentiality:** Public reports usually cannot contain any confidential information. Some Ombudsperson have the power to restrict who may see preliminary reports so they can issue preliminary confidential reports. They remove confidential information for the final public version and put a notice on the cover or first page that confidential information has been removed and cite the *Ombudsman* institution law authorizing this.

**Names:** Each *Ombudsman* institution should determine under its law whether it can reveal names in investigative reports. Most Ombudspersons cannot reveal publicly the names of complainants who wish not to be named. In some cases it may not be possible to issue a public report without identifying the complainant even though the complainant's name is not used. In some instances, the details of a situation are public enough that they would identify the complainant. In other instances, the *Ombudsman* institution can withhold the complainant's identify without the report suffering.

**Recommendations not accepted:** The Ombudsperson, depending on the provisions of the law, may present reports to the president, prime minister, Parliament, the media, the public, some or all of these. The Ombudsperson should consider what to do with such complaints case by case. The goal is to get recommendations or adequate resolutions adopted.

### 24.2. Writing a report

Writing *Ombudsman* institution investigative reports is subjective.

Ombudspersons in various parts of the world seek these characteristics in their reports:

- Clarity
- Well written but simple—understandable by most people
- Short
- Logical
- Complete—presents all relevant evidence
- Shows readers how the Ombudsperson reached the finding
- Helps readers understand why the Ombudsperson makes these recommendations
- Persuades the authority to follow the recommendations

One *Ombudsman* summed it up to investigators this way:

“The best reports we issue are written in a conversational tone understandable by a high school graduate, follow a general outline, have been kept tightly to the point, contain no ‘hot’ or inflammatory phrases or words attributed to us, are objective in presentation of information, insert no suppositions, conclusions or personal opinions in the body of the report, make clear concise recommendations relevant to the authority’s operation or public policy issues, and *do not* contain long run-on sentences like this one!”

Each Ombudsperson decides investigative report characteristics. How to achieve them is each investigator’s personal decision. Writing is a personal, individual process. Hints that work for one investigator may not work for another. This discussion of effective *Ombudsman* institution report writing is offered in that spirit. Each investigator should see what of the following works. Discussion among investigators will raise other helpful strategies.

### 24.2.1. Effective writing

The most important characteristic of effective writers is that they know themselves. They know what situations most help them write well. They recognize effective writing and its opposite. They know what they do before they write that helps start the writing and keeps it flowing. They know what conditions while they are writing make it easier to write. They know what they do after writing that makes it easier to return refreshed to edit, rewrite and polish. The following thoughts are intended to stimulate those who write *Ombudsman* institution investigative reports to think about writing, their own writing and what makes writing effective.

#### 24.2.1.1. Recognize effective writing

Look at the opposite of effective writing: List the characteristics that make a letter or report ineffective.

Define effective writing. Don’t describe its characteristics. Think about the most effective writing you have read recently—or ever. Summarize the subject and approach in a paragraph or two, then list the characteristics that made it effective.

Think about the most effective letter or investigative report the *Ombudsman* institution has issued. List the characteristics that made it so effective.

#### 24.2.1.2. Recognize the process of effective writing

##### **Before writing:**

*What do you do before you start writing?* Think about the most recent business letter longer than a page or two you have written recently. List what

you did once you realized you would write the letter and before you started. What is the purpose of what you will write? What information is needed in the letter or report?

*What makes it easier or more difficult to write?* List the circumstances that make it easier or more difficult for you to write a letter or an investigative report. (Examples: Whether you write on paper or a computer, what environment is most conducive, how helpful is your work environment, does background music help or hinder, etc.?) Remove all distractions if that helps. If possible, close the office door. Ask not to be interrupted. Turn off the phone or ask that calls be held and messages taken.

*Know your audience.* Who are you writing for? What will they read and accept? How can you present what you say so the audience will understand, accept and agree with you, if that is what you seek?

*How do you organize what you are about to write?* Write an outline. It does not need to be detailed. An outline helps structure the report, guides writing it and helps determine what to include and what to leave out. Talk it out with a colleague; listen to what you say. Sleep on it. (The sewing machine and cotton gin were invented in dreams.)

*Make friends with your computer if you write on one.* Machines may not have personalities, but why do they break down just at the moment you most need their help? Learn your software. And keep learning more and more about it. If you have a problem, ask someone for the solution. Don't let writing mechanics or technology interfere.

### **While writing:**

*What's the best way to get something written?* Write it—at least once all the way to the end. What happens when you find something missing? What do you do when you are interrupted? What happens when you can't start or can't keep going? How do you start or get going again?

*What's the best way to communicate complicated thoughts?* Write in plain language. Use images to convey much thought in few words. Build the report step by step in short sentences that do not use jargon. Practice developing images. On occasion we need to explain what an *Ombudsman* institution is in very few words. Using a few sentences at most, write a comparison between an *Ombudsman* institution and something else. It will end with a sentence that reads "An *Ombudsman* institution is like \_\_\_\_\_. This creates a simile—a figure of speech comparing two essentially unlike things and often introduced by "like" or "as."

*How do you persuade?* Know the people for whom you are writing. Know how they are likely to think. Know what motivates them and what will likely persuade them to do what the Ombudsperson recommends.

*Use correct spelling, grammar and punctuation. Errors in these areas interfere with communication.* The office should adopt a standard dictionary and stylebook. Use them consistently. Write an office stylebook to standardize spelling and capitalization of words not found in the dictionary or stylebook. Each office should have a reference library to help investigators be better writers. Offices with Internet access should teach investigators how to find web sites with information they may need for investigations.

**After writing:**

*What do you do when you are finished writing?* Read what you have written to see if it makes sense. Reading difficult portions out loud may help you recognize problems. (Be careful, however, because writing for the ear, like writing for radio, is different from writing for the eye. The eye can go back, the ear cannot.)

*Rewrite and polish the writing.* Edit to cut length. Remove duplication. Reorder elements that do not follow logically or chronologically. Check spelling, grammar and punctuation. If writing with Microsoft Word, use the readability checker to assess the complexity of the writing. Some passages may not be easily simplified. Have someone else read it to see if they understand. Ask a more experienced colleague to review the report before submitting it to a manager. Consider any recommendations to improve it.

Take a five-minute break after 20 minutes of editing. Tired eyes play tricks. Give them a rest. Do something different. Return refreshed to editing.

*Put your writing under a microscope.* Look at everything. Take it apart and put it back together. Does the organization work? Is it logical? Where are the important facts? Is it as concise as possible without losing important meaning? Use a word scalpel, otherwise known as the delete key. Cut unnecessary words. Put important information at the top, beginning, end or middle of sentences, paragraphs, letters and reports. Stop editing when you can't explain changes you are making and why you are making them.

*Read.* You can't write effectively or well without reading a great deal. Read EVERYTHING. You never know where you will encounter effective writing or ideas for something you are about ready to write. Mystery novels sharpen an investigator's mind.

**24.2.1.3. Rules of thumb for investigative report writing**

- Be precise.
- Use the most precise word.
- If something is capable of being misinterpreted, someone will misinterpret it.
- Everything should add up, otherwise pieces are missing.

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- If your mother says she loves you, check it out. Be sure the facts are the facts.
- More is accomplished with a carrot than a stick.
- Don't divide the world into "them" and "us."
- A healthy scepticism is one of an investigator's greatest assets.
- Separate emotion from facts and people.
- There is no such thing as coincidence.
- Never step in front of a moving train.
- Keep your sense of humour.
- Be yourself. Follow your instincts.
- "For every human problem there is a solution that is simple, neat and wrong." (H.L. Mencken)

### 24.2.2. Additional investigation that may be required

Investigative report writing can begin at any point where the investigator believes sufficient information has been collected. Writing the report can help find where more information is needed. While writing the report, it may become clear that facts are missing, laws originally thought not to apply do in fact apply, etc.

If that happens, additional investigation should be completed. Additional investigation may be indicated after the authority has reviewed a preliminary report. It is not unknown that findings and recommendations of a preliminary report have been completely reversed in a final report based on additional investigation.

### 24.2.3. Who makes the final decision on report content

The Ombudsperson. In some offices the Ombudsperson is allowed under law to delegate signing investigative reports to others. The investigator drafts a report for the consideration of the Ombudsperson or anyone to whom signing such reports has been delegated. The Ombudsperson will discuss any significant concerns with the investigator. This step is very important, especially if the Ombudsperson has not closely followed the investigation. The investigator best knows what was done. Before changing reports in significant ways, the Ombudsperson and investigator should discuss the proposed changes, the reasons for them and whether there is any disagreement. This can save the embarrassment of serious errors.

When changes are a matter of judgment, the Ombudsperson ultimately makes the final decision. The Ombudsperson is the person appointed and responsible for the office and all of its work.

### 24.2.4. Report review by managers and the Ombudsperson

Before any investigative report is issued, it should receive at least one and preferably two or more reviews by managers and the Ombudsperson before being submitted to the authority, the complainant or made public.

The attitude of managers and the Ombudsperson in this review that most benefits the office and its credibility is to look for every possible mistake or error. Once the report is public or issued to the authority and complainant, people outside the office will try to find errors if they wish to discredit the report. For these final reviews, these questions among others are important:

- Does the report establish as far as possible the facts of what happened?
- Is additional evidence needed or indicated?
- Does the report establish what should have happened? Does it consider all relevant laws and international standards in analyzing what should have happened?
- Have all those believed to have relevant information had an opportunity to present it to the investigator?
- Does the report resolve as far as possible all conflicts in the evidence? If not, did the investigator obtain a comprehensive account from those involved?
- Does the order in which events are described and points made facilitate the reader's understanding?
- Is everything in the report needed? Could anything be removed without compromising the report's integrity?
- Do the facts, analysis and findings make sense?
- Would the recommendations if implemented effectively restore violated rights, resolve the problem, provide redress as far as possible, and prevent future problems? Are any additional recommendations needed?
- Are the recommendations practical and presented in a way that makes their adoption and implementation likely?
- Is confidentiality observed?
- Does the report avoid assuming knowledge the reader will not find in it and might not otherwise have?
- If you were the recipient would you find anything in the report offensive, unhelpful or open to misinterpretation?

Once the Ombudsperson approves the text of the report, staff responsible for the mechanics of report preparation will check it. These questions are helpful:

- Is the report free from typographical errors (including extra spaces or lines)?
- Are spelling, punctuation and grammar correct according to office style?
- Are verb tenses correct and consistent?
- Is it always clear to whom or what pronouns refer? Where appropriate are pronouns gender neutral?
- Is the use of capital letters, hyphenation, numerals and dates consistent?
- Are any internal references to earlier paragraphs clear, correct and consistent?
- Is the use of special terms consistent?
- Have unnecessary abbreviations or technical terms been avoided and necessary ones explained where they first occur?
- Is the structure and layout clear, logical and consistent through the use of sub-heads?
- Has bold, italic or underlined text been used appropriately and consistently?
- Is the language free of bureaucratic and journalistic clichés?
- Does the drafting avoid unnecessary repetition, vagueness, ambiguity, non-sequiturs or awkward phrasing that would jar the reader?
- Are unnecessarily long and complex sentences avoided?
- Are any direct quotations from laws, regulations, policies and procedures or other documents accurate word for word?

## 24.3. Authority responses to reports

### 24.3.1. Possible Ombudsman institution actions

Whether an *Ombudsman* institution creates preliminary reports or not, at some point in the investigative process, the office seeks a response to the report from the authority that was investigated. The Ombudsperson asks the authority if it accepts the report and its recommendation(s), what will be done and when. If the authority does not accept the report and some or all of the recommendations, the Ombudsperson asks for reasons.

When the authority responds to the report, the Ombudsperson may choose what to do next. These possibilities exist depending on whether they are in accord with a specific law creating an *Ombudsman* institution:

- If the authority suggests that more investigation is needed, decide whether the Ombudsperson agrees and if so, conduct the additional investigation, revising the report in accord with any additional conclusions based on additional investigation.
- Ask to meet with authority officials to continue the discussion and dialogue to see if it is possible to reach agreement on actions that will solve the problems, restore violated rights, and/or prevent such violations from occurring in the future.
- Reject the authority's response and make the report final and public including a copy of the response or a summary of it in the final report.

If the authority responds in a way other than accepting the recommendations and implementing them, the Ombudsperson should be open to meet with officials or government employees who have the power to resolve the situation or restore violated rights. The *Ombudsman* institution should always be seeking a response from state authorities that recognizes any problems or rights violations the investigation revealed and a willingness to restore rights, return the situation to what it was before rights were violated and prevent future violations. If the Ombudsperson believes the response from state authorities does not meet those standards, the *Ombudsman* institution should attempt to hold further discussions, appeal to higher authorities, issue a report to parliament, make it public and seek to accomplish the office's purposes in those ways.

The art and skill of being an Ombudsperson is often called upon when state authorities do not respond in ways that address the issues raised or even ignore the *Ombudsman* institution. An Ombudsperson who has assembled a staff with diverse experiences and backgrounds can consult with them to develop strategies that best address inadequate responses or no response at all.

### 24.3.2. Authority responses to critical reports, answering criticism of reports

Anticipating the authority's possible responses to critical reports helps investigators and the Ombudsperson deal with them in ways that strengthen the reports, deflect or defuse the criticism and put authorities in the position where it is difficult not to respond to the report's substance. Additionally, the same types of criticism of investigative reports that come from authorities may also come from other sources. The way to respond to criticism is the same whether it comes from an authority or from some other source.

Possible responses to critical reports and ways to counter them:

Possible authority response:	How Ombudsperson might deal with it:
1. Accept the facts and argue with the law.	Be certain of the law and that it applies in the specific situation.
2. Argue with the facts, suggest more investigation is needed to determine facts that were ignored.	Be willing to investigate more if it is clear that relevant evidence was ignored. (The preliminary report is a quality control mechanism on investigations.)
3. Accept the facts and law and argue that the recommendations will not accomplish the intended result, are too expensive, not required by law governing the authority, not within the <i>Ombudsman</i> institution's authority to make, etc.	Be willing to discuss other possible methods for restoring rights, remedying the violation or preventing future violations while insisting that solutions the authority suggests actually resolve the problem. Examine with the authority whether the recommendations will work, are within the <i>Ombudsman</i> institution's ability to make, are advisable even though not required by law, etc.
4. Disagree with the recommendations without stating grounds or objecting to facts or law.	Ask the authority if the facts are correct. If the authority says they are, ask if the correct laws have been found to govern the situation. If so, respond with a willingness to discuss the recommendations and seek alternatives, but stress that making recommendations is the Ombudsperson's prerogative by law.
4. Personally attack the complainant, investigator or Ombudsperson.	Ensure that the investigator has no conflicts of interest. Respond that personal attacks do not deal with the issues the investigation raised which need to be addressed directly.
5. Question the Ombudsperson's jurisdiction over the complaint.	Be certain of jurisdiction before initiating the investigation. If questions exist, seek expert legal advice on whether jurisdiction exists.
6. The investigation was not fair, individuals were not accorded their rights and the authority did not have a full opportunity to present its position to the Ombudsperson or investigator.	Be certain to follow natural justice, procedural fairness and due process to ensure that anyone criticized has an informed opportunity to respond to allegations and accusations. If procedural fairness was not followed, cure that defect by giving the authority the proper opportunity to respond. If changes are indicated in the report, its findings and conclusions or recommendations, make them.

## 24.4. Making a report public

*Ombudsman* institution laws normally contain provisions governing the Ombudsperson's ability to send investigative and special reports beyond the investigated authority and individuals who were criticized. Those legal provisions must be observed.

The provisions normally give Ombudspersons the discretion to send reports not only to the authority and criticized individuals but also to Parliament and its committees, the president, the procurator and any other government official able to act to restore violated rights or remedy injustices.

The provisions also normally give Ombudspersons the right to make reports public. How this is done depends on how much attention the Ombudsperson wishes to draw. The need for public awareness is particularly acute if recommendations have been rejected or refused and the Ombudsperson strongly believes violated rights should be restored or steps have not been taken to prevent such violations from happening again.

If the Ombudsperson or investigative staff have had access to confidential information that may not be made public, a public version of the report is prepared with confidential information deleted as noted above. Complainants or witnesses who requested and were promised or are entitled to confidentiality should not be named.

In some countries, government officials and civil servants are not individually named; in others they are, particularly those criticized. The Ombudsperson determines whether public reports will name criticized individuals. If they may not be named, care should be taken to remove their names and details that might identify them.

Possible ways to make reports, conclusions and recommendations public with their advantages and disadvantages:

Method of publication:	Advantage(s):	Disadvantage(s):
1. Annual report	Depending on how it is treated in the report, it may play down the attention given.	Delays publication to a time that may be distant from the violation and may render the publication nearly worthless in attracting attention to unresolved problems.
2. News conference	If the media environment is favourable to the Ombudsperson and covering the institution's activities, can bring immediate attention to rights violations and injustices and create public pressure to resolve them. Saves time disseminating a report by speaking to all interested media outlets at once.	The Ombudsperson could be accused of attempting to be a media personality, a publicity seeker, not someone seriously performing the role and responsibilities of the office. If the Ombudsperson does not have a good media presence or does not respond well to critical questions, could result in negative rather than positive publicity.
3. Media release, no interviews with Ombudsperson or other <i>Ombudsman</i> institution staff	Presents that which the Ombudsperson wants the media to have in written form and does not subject the Ombudsperson to a news conference or interviews. Allows Ombudsperson to avoid answering difficult or embarrassing questions.	Does not put a live person before the media, which is a strong disadvantage for broadcast journalism that requires images for TV and voices for radio. May not be covered beyond newspapers, or if covered by mass media the people who speak may represent the authority or <i>Ombudsman</i> institution's critics.
4. Media release with Ombudsperson or other <i>Ombudsman</i> institution staff available for individual interviews with media	Avoids a news conference, which may be an advantage for an Ombudsperson who does better in individual interviews. Allows the Ombudsperson or other staff to present the investigation's facts and conclusions in a personal way, providing images and voices for mass media.	May take more time than a news conference to which the Ombudsperson invites all interested media—print and broadcast—and responds to individual questions.

# 25. SUPERVISING INVESTIGATIONS

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## 25. SUPERVISING INVESTIGATIONS

### 25.1. Who supervises

Each Ombudsperson designs the office's staff structural hierarchy. Depending on size and organization, one or more layers of management may exist between an investigator and the Ombudsperson. The structure might include a regional director, an investigative team director for certain types of investigations or investigations of specific authorities, a director of investigations and Deputy Ombudsperson.

The Ombudsperson assigns investigation supervision to the appropriate managers or supervisors and those individuals supervise investigations on a daily basis. Occasionally, the Ombudsperson directly supervises an important investigation or is in frequent contact with the supervisor of such an investigation.

The goals of investigation supervision are to:

1. Insure that the investigation is being conducted in a manner and at a speed that meets the office's standards and expectations and any special ones the Ombudsperson sets.
2. Provide guidance to the investigator on issues out of the ordinary or where investigative actions require approval of the supervisor or the Ombudsperson.
3. Inform the Ombudsperson of progress on each investigation so the Ombudsperson can answer questions where appropriate and be prepared to receive the investigator's proposed findings and recommendations.
4. Assess the quality and direction of the investigation and offer suggestions to improve both.

### 25.2. Case conferences

Case conferences may assist investigators who want to draw on the broader experience of colleagues and supervisors.

A case conference is a systematic group or team discussion of issues raised by a complaint or investigation of a complaint. They provide investigators with opportunities to learn from each other and test ideas among colleagues.

Methods may vary to conduct case conferences. No one method is optimal. An advance written summary of the complaint or issues the investigator wishes to explore speeds up the discussion and saves valuable time and resources. One way is to have a group or team member brief the others on the facts of a

complaint, present a preliminary analysis of issues raised by the complaint or the ongoing investigation, pose specific questions for discussion, and invite comments.

### 25.3. Case reviews

An integral part of an investigator's caseload management is the periodic review of open cases by the office, group or team supervisor or by the Ombudsperson or Deputy Ombudsperson. Each Ombudsperson or supervisor sets the frequency and extent of caseload reviews. Advance notice to the investigator of the review stimulates closing complaints.

Some supervisors discuss each complaint on an investigator's caseload at each review. Others select the most important cases. For example, the oldest complaints are often the most important to review. Otherwise they tend to become more and more difficult to resolve or to complete the investigations.

Complex investigations may need more frequent review. Investigators may need to consult daily or more frequently with supervisors or the Ombudsperson on investigations of complaints with multiple allegations involving greater numbers of people affected by the actions under investigation, etc.

Supervisors also discuss any complaint the investigator wishes to discuss that might not otherwise be reviewed. Investigators should be free to consult supervisors and managers, including the Ombudsperson, any time they believe such consultation warranted. Ombudspersons should be clear that individual investigators may approach the Ombudsperson directly for consultation at any time. The Ombudsperson along with the investigator will decide which other staff should participate in such consultations.

Investigation reviews look at progress to date on each investigation, monitor the investigation plan for needed modifications and discuss the next actions the investigator will take.

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# 26. ADMINISTRATIVE CONSIDERATIONS

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## 26. ADMINISTRATIVE CONSIDERATIONS

### 26.1. Travel

Some investigations require travel to examine records or other documents or interview witnesses in cities other than where the *Ombudsman* institution is located. The office should budget sufficient amounts to pay investigator expenses for investigative travel. Costs to be covered by the office's budget should include transportation, accommodations and meals, telephone and other necessary expenses.

Because budgets may not be sufficient for the needs that exist, all travel should be approved in advance by managers and budget officers. Likewise, investigators should also undertake to receive complaints and make outreach visits to authorities and other groups to explain the *Ombudsman* institution's role and function where practical.

### 26.2. Pay for expert witnesses

With good planning and wide recruitment, *Ombudsman* institutions with a large number of staff will have employees representing many diverse skills and a broad range of knowledge. Offices with fewer staff will have a more limited range of expertise even with good planning. Both may occasionally need experts with a skill or knowledge not available among the *Ombudsman* institution's staff. Wherever possible, that skill might be sought from other state bodies as long as the individuals involved are not related in any way to the investigation and will not cost the *Ombudsman* institution any fees.

When expert witnesses who must be paid fees are needed, *Ombudsman* institutions have found that either under provisions in their laws or through budget allowances they can usually find the money to hire someone with the knowledge, skills and abilities required for a specific reason in an investigation. Normally, an *Ombudsman* institution hires these individuals with a written contract for specified work. The contract also contains a confidentiality provision preventing the witness from disclosing anything learned working for the *Ombudsman* institution. If there is any question about the individual observing confidentiality, the contract could be written to withhold some portion of the fee until the investigation is complete, a written report drafted and the investigation closed.

While the need for expert witnesses is normally rare, in some investigations they can be crucial to making a determination, particularly if uncommon skills are needed to understand and assess specialized evidence and interpret it under the law. In those instances, it is very important that the Ombudsperson have the power to retain expert witnesses chosen by the office and pay for their services.

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### 26.3. Legal advice

The proportion of lawyers on an *Ombudsman* institution's staff varies from office to office. Some offices hire only lawyers to do investigations. Others prefer a broader mix of backgrounds to work effectively with complainants, witnesses, civil servants and government officials from diverse sectors of the country's society. If the Ombudsperson is not a lawyer, the Ombudsperson needs quick and ready access to good legal advice. That can come from lawyers on the staff or from non-staff legal experts hired for their specific knowledge or ability.

Investigators should have immediate and direct access to lawyers who can answer the legal issues or questions that arise during an investigation quickly and knowledgeably. Ideally an office with even a small number of staff would have at least two lawyers—one who knows very well the laws and any court cases governing *Ombudsman* institution activities and another studying that knowledge in case the first leaves or is absent.

If the office is sued during an investigation, the Ombudsperson may need to hire an attorney for that specific case rather than asking staff lawyers to do their normal work and handle the suit. The Ombudsperson must have the final say in retaining outside legal counsel—both in deciding whether it is needed and in choosing the lawyer. If someone else has the right to make these decisions, the *Ombudsman* institution's independence may be compromised if that other person decides outside counsel is unnecessary or retains someone without the required knowledge, skills and abilities.

*Ombudsman* institution staff normally only provide legal advice to the Ombudsperson, other managers and other *Ombudsman* institution staff and not to complainants or anyone else. Staff may appropriately on occasion remind complainants that they are not permitted to give the complainants legal advice.

### 26.4. Interpreters

All *Ombudsman* institutions will be visited by people who do not speak the official languages comfortably or at all or by those with physical disabilities that make meaningful communication difficult. Ombudspersons do everything possible to communicate with complainants, witnesses, government officials and civil servants in a language and manner that the person is comfortable with and that allows clear, accurate and precise communication.

Sometimes the *Ombudsman* institution must retain the services of paid interpreters. Any impulse to use volunteer interpreters during investigations should be resisted. (The only reason for using volunteer interpreters is if trained professional interpreters who speak the needed language are not available

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and volunteers are.) Trained professional interpreters know how to translate without interjecting themselves into the conversation or shading meanings in ways that distort what the person speaking is attempting to communicate.

Subject to budget limitations, the Ombudsperson's office should make every effort to obtain adequate interpreter services for those who need them. Staff should remember that an effective interpreter has not only a fluent understanding of the language but also the skills to provide an unbiased interpretation of the complainant's statements. Policies and procedures should indicate how staff contract for interpreter services and who approves contracts in advance. Interpreter contracts should contain confidentiality provisions preventing the interpreter from disclosing anything learned in providing interpreting service. The method for enforcing that provision is that any interpreter who violates such a contract provision will be banned from interpreting for the office.

# 27. INVESTIGATIONS THAT DISCOVER EVIDENCE OF CRIME

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## 27. INVESTIGATIONS THAT DISCOVER EVIDENCE OF CRIMES

The *Ombudsman* institution may begin investigation of a complaint about a violation of human rights that does not appear to involve any crime. At times the complainant may not have all of the facts about what took place or may not tell the investigator everything. As the investigation progresses, the investigator may discover evidence that tends to indicate a crime may have taken place. As long as the matter being investigated would not result in a criminal prosecution if all the facts are proved, the *Ombudsman* institution can continue to investigate. If during the investigation evidence that a crime may have taken place develops, then the Ombudsperson will have to consider what action to take next.

The *Ombudsman* institution's powers are designed to be used in administrative inquiries and investigations that do not result in criminal prosecutions. The police have appropriate powers to conduct criminal investigations. Ombudspersons and their staff should keep that distinction in mind if they think they have discovered evidence of criminal activity.

As an example, a complaint that the decision of an administrative authority awarding possession of a flat was made incorrectly does not seem at first glance to be an indication of any criminal activity. If the investigator finds evidence that documents have been forged and fraudulently placed in official files or removed illegally from official files, that may be evidence a crime has been committed.

### 27.1. Halting such investigations

*Ombudsman* institution investigators are not normally trained criminal investigators. The *Ombudsman* institution's policies and procedures should instruct them that when they think they have discovered evidence of criminal activity, they should immediately halt what they are doing and consult with managers and the Ombudsperson.

### 27.2. Consulting with the procurator

Once an investigator discovers criminal evidence, the investigator's manager or the Ombudsperson may decide to consult with the procurator. This consultation is to determine whether the procurator would prosecute assuming sufficient evidence exists. The individual consulting the procurator should refrain from using names to preserve confidentiality. If the procurator decides that this is not a case to be prosecuted even assuming good and sufficient evidence, then the Ombudsperson and staff can decide whether to proceed

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INVESTIGATIONS THAT DISCOVER...

with the *Ombudsman* institution's administrative investigation without being concerned that they might compromise a potential prosecution.

### 27.3. Referring criminal matters to the procurator

If the procurator thinks that the case is one that would be prosecuted if good and sufficient evidence exists, then the Ombudsperson should discuss with staff how to refer it to the procurator. The concern is how not to violate confidentiality requirements in the *Ombudsman* institution law. Many laws give the Ombudsperson the power to refer criminal matters to the procurator.

If the law allows the Ombudsperson to refer matters for prosecution, *Ombudsman* institution confidentiality provisions are not paramount and the Ombudsperson may refer the case. The Ombudsperson and staff should also discuss what to provide to the procurator. The provisions in the *Ombudsman* institution law may be interpreted to permit forwarding everything the *Ombudsman* institution has or developed during the investigation that relates to the criminal matter or as little as possible to protect confidential documents and matters. The decision should be based on a close reading and analysis of the *Ombudsman* institution law and staff discussions.

The Ombudsperson and staff should also be sensitive that referring criminal activity to the procurator may not dispose of the complaint. Criminal activities may be only one part of the allegations. The rest of the complaint may still remain to be investigated. If a referral to the procurator is made and the *Ombudsman* institution determines that more remains to be investigated, the Ombudsperson may need to decide whether to continue the investigation or suspend it until concluding it would not hinder the criminal prosecution.

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## 28. COMMUNICATIONS WITH COMPLAINANTS, AUTHORITIES, WITNESSES

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## 28. COMMUNICATION WITH COMPLAINANTS, AUTHORITIES, WITNESSES

### 28.1. Communication in general

*Ombudsman* institution communications should be clear, concise and accurate. They should avoid technical or vague language, bureaucratic euphemisms and abbreviations that will not be understood. Wherever possible, the communication should take place in the recipient's first language even if this requires interpreters. Communications with deaf or sightless persons should be in ways they can understand without needing interpreters except to translate to another language.

Effective Ombudspersons are seen as independent and impartial by both complainants and authorities. The *Ombudsman* institution's communications with all parties should reflect this independence and impartiality.

The *Ombudsman* institution's policies and procedures should spell out in detail how communications with complainants, authorities, witnesses and others are handled. Staff should always have a clear, general understanding of what information can be communicated by whom to each of these groups and how that information may be communicated—whether it can be done on the telephone or must be in writing. That helps avoid problems that result when these rules are not clear.

In setting these policies, cultural norms should be respected. In some countries, for example, it is inappropriate for an investigator to communicate directly with a minister—even if that communication were to be approved in advance by the Ombudsperson. In other cultures, that would be appropriate. Diverse cultures among Guide readers make it difficult to offer rules on who can communicate with whom.

In computerized offices, the word processing programme can store paragraphs and sentences used repeatedly. Microsoft Word's Auto Text feature stores long passages, saving time and effort retyping. Once inserted, Auto Text entries can be customized to fit the specifics of the communication. Word templates can be similarly used.

### 28.2. Who can communicate what to whom

*Ombudsman* institution offices have a number of different types of communications. The following list begins with the most frequent and ends with the least frequent communications. Ombudspersons decide who can sign letters communicating this information, who reviews letters before they are sent, or who can communicate information on the telephone.

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COMMUNICATION WITH...

Normally staff other than the Ombudsperson handle these kinds of communications:

- Acknowledging receipt of a written complaint.
- Requesting more information from the complainant.
- Informing a complainant that the complaint is not about an authority within the *Ombudsman* institution's jurisdiction or about a matter over which the Ombudsperson has competence.
- Notification to the complainant and authority initiating an investigation.
- Notice to the complainant of a refusal to investigate.
- Communicating a resolution or settlement of a complaint.
- Notification to complainant and authority of an unsubstantiated complaint.

These communications are normally in writing signed by an Ombudsperson:

- Notification to an authority initiating an investigation on the Ombudsperson's own motion.
- Letters to ministers, heads of other authorities, members of Parliament, the President and the Presidential Administration.
- Letters presenting reports, findings and recommendations.
- Annual and special reports.

The Ombudsperson may delegate certain types of communications or specific communications to other staff. Those delegations are normally in writing signed by the Ombudsperson.

### 28.3. Communicating with complainants

Staff should be instructed that the only person who can offer an opinion about a complaint is the Ombudsperson unless the law creating the office allows the Ombudsperson to delegate that function or provides otherwise. Intake officers and investigators should learn how to answer appropriately questions that require forming opinions or determinations on complaints. One way is to explain that the power to answer such questions belongs to the Ombudsperson and only happens after an investigation.

Similarly, *Ombudsman* institution staff should not offer personal advice, make predictions on the success or failure of a possible court case, or offer any comments on matters for which they have no direct knowledge. Since opin-

ion or advice offered by a staff member will likely be seen as representing the Ombudsperson, staff must refrain from offering comments and advice that they say is personal rather than official. The distinction between personal and official comment is often lost.

When communicating information complainants are likely not to appreciate or want to hear, staff should be as considerate and sensitive as possible. Communications to complainants should also be sensitive to cultural differences, literacy problems experienced by people who cannot read or write the official language(s), gender differences between the complainant and *Ombudsman* institution staff, and differences in values, social positions, ways of relating to government and of complaining.

### 28.3.1. Creating realistic expectations that can be fulfilled

The two most important goals in communicating with complainants are creating realistic expectations and providing clear, concise communications. Complainants may approach the office with unrealistic expectations about what the *Ombudsman* institution can accomplish. For this reason, the first interchange with *Ombudsman* institution staff is very important because it either confirms or adjusts expectations. Intake staff and investigators find that creating lower expectations and producing results that exceed them is better than allowing high expectations not likely to be fulfilled to continue to exist.

Complainants not familiar with the office or the *Ombudsman* institution's powers should receive an explanation of the office's purpose and how complaints are handled in clear language they understand. A brochure that explains this helps because complainants can read it at home at their leisure. They should understand that the office has heard their complaint and will consider it independently and impartially.

Asking the complainant early in the process what result is desired helps the intake officer or investigator determine whether the complainant's expectations are realistic. If they are not, staff should explain why the *Ombudsman* institution cannot achieve what they seek. This will need to be communicated to some complainants a number of times before they understand.

Complainants should also know what will happen next. If their complaint is not within the *Ombudsman* institution's competence, the reasons why it is not should be provided. The complainant should leave the initial contact understanding the process of how a decision will be made on whether the complaint will be investigated, referred elsewhere or no longer considered and why.

Along with an explanation of the *Ombudsman* institution's powers, the complainant should receive a thorough explanation of confidentiality provisions, particularly if the complainant does not wish to be identified to the

authority. Many complaints cannot be investigated if the complainant is not identified. Often, the *Ombudsman* institution will no longer consider complaints where the complainant refuses to be identified. In such cases, the complainant should be advised and understand that.

### 28.3.2. Providing clear, concise explanations for *Ombudsman* institution action

Once action has been taken on a complaint, the Ombudsperson or the investigator should provide a clear, concise explanation of what the *Ombudsman* institution did and the results. When investigators do not remain in contact with complainants, complainants begin to distrust the investigator, the office and ultimately the Ombudsperson.

Contact is important and so are clear, well-reasoned explanations. In many cases complainants have been treated poorly by authorities when they attempted to inquire about or protect their rights. If the *Ombudsman* institution's staff treats them poorly, then the office becomes no different from the authority.

The test of good explanations is whether complainants can say they understand what the *Ombudsman* institution did, why it was done and why it was proper and appropriate even if they don't like the result. The staff member communicating with the complainant is responsible for making understandable explanations no matter the complainant's education, language, racial/ethnic/religious background, etc. Nearly every matter can be explained so that the country's least educated can understand what happened and why.

Regular communication, particularly when significant actions occur, is very important for complainants to understand and ultimately to accept the results. *Ombudsman* institution staff should always write letters to complainants when the complainant may not remember what was said in conversation or may not remember it accurately.

## 28.4. Communicating with authorities

Communications with authorities should be as clear and concise as those with complainants. They should also respect individuals who are the subject of the complaint. Respectful treatment indicates the complaint will be treated impartially without preconceived notions of whether the complaint is justified. A notice of investigation, for example, should clearly state what the complainant has alleged to have taken place. This is a clear statement to the authority that the Ombudsperson and staff have not made a decision

whether those events occurred or if they did whether they would constitute a rights violation.

Most Ombudspersons have the power under their laws to contact anyone to inquire into a complaint. Those inquiries can be made in writing, on the telephone or in person. Any attempts by authorities to limit how the Ombudsperson and staff approach the authority or with whom the Ombudsperson and staff can communicate should be strongly resisted. Such restrictions would prevent the Ombudsperson from fulfilling the office's statutory responsibilities in determining facts and resolving matters.

Considerable differences exist among *Ombudsman* institutions about where to make initial contacts with authorities. Some instruct investigators to contact the subject of the complaint first to hear that individual's response to the allegation(s). Those who favour this approach believe it accomplishes two goals: First, it records the person's response and reduces the opportunity for fraud or deceit among those who have first-hand knowledge of the events. Second, it offers the opportunity to resolve a complaint at the lowest level. Resolutions are more easily accomplished before positions harden.

Other offices instruct investigators to conduct fact-finding before contacting the subject of the complaint. Those who favour this approach believe it tests the allegations before accusing someone who may be innocent of violating someone else's rights. They suggest that there is no value in asking an authority or its employees to answer false allegations or allegations that could have been determined to be false without interviewing the subject of the complaint. On the other hand, fact-finding may spread these false allegations to others, unnecessarily damaging the subject of the complaint.

Some laws specify a time limit for authorities to respond to *Ombudsman* institution communications. Others are silent on the question. When the law is silent, the Ombudsperson should set a reasonable deadline for a response. The *Ombudsman* institution should willingly entertain and grant requests for extensions as long as they are not motivated by a desire to delay or derail the investigation. Requests for extensions should contain a reason the Ombudsperson finds appropriate to granting the request.

The *Ombudsman* institution should have a mechanism to track deadlines. Authorities should be reminded of them. An Ombudsperson who allows authorities to ignore response deadlines is teaching them and others that the *Ombudsman* institution will not enforce response deadlines. On occasion, the Ombudsperson or another office senior management official may need to issue a strong reminder of the deadline or ask the authority's higher power levels to order timely responses.

All communications oral or written should be recorded in the complaint file or in the computerized complaint registration system.

## 28.5. Communicating with witnesses

Witnesses are important participants in complaint investigations. It is too easy to overlook their needs while communicating with them. Being a witness can be a very difficult experience. The witness can be concerned about appearing to betray others or being viewed as disloyal by authority staff and managers if seeming to be cooperating with the *Ombudsman* institution's investigation. Witnesses may fear retribution or other forms of punishment for truthfully answering the Ombudsperson's questions.

Where legal protections exist for witnesses in the *Ombudsman* institution's law or other statutes, witnesses should be informed of these protections, the extent to which they protect the witness and what would happen if the witness were to experience retribution. Witnesses should also be informed about the extent to which they are protected by confidentiality and whether their testimony may be cited in the investigative report.

If the *Ombudsman* institution's law requires witnesses to observe confidentiality, those provisions should be explained. Witnesses would then be asked not to discuss their testimony, the questions they were asked, their answers, etc., with anyone else.

## 28.6. Communicating with complainant's advisers/representatives

Office policies and procedures should consider confidentiality provisions in the *Ombudsman* institution's law and spell out who can communicate with the *Ombudsman* institution on behalf of a complainant. Will the *Ombudsman* institution allow relatives, lawyers and representatives of non-governmental organizations to communicate on a complainant's behalf with the office? Under what circumstances? Must complainants approve of others communicating on their behalf before the *Ombudsman* institution will engage in discussions with someone other than the complainant?

Some complaints are made directly by the complainant's advisers or representatives. As long as *Ombudsman* institution staff have determined that the complainant has approved of the complaint being made by a representative, they should accept the complaint from such persons and be willing to keep them as informed as the complainant. It should be clear, however, to complainants that they may communicate directly to the office and without

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needing to use paid representatives. Complainants should understand that the *Ombudsman* institution's services are free to all.

### **28.7. Communicating with prisoners, other institutionalized persons**

Most *Ombudsman* institution legislation contains specific provisions guaranteeing the Ombudsperson direct access to prisoners, other institutionalized persons or individuals held against their will under state power. Any denial of such access is a very serious matter that should be immediately reported to the Ombudsperson who should act quickly to obtain access the *Ombudsman* institution law provides.

A letter from the Ombudsperson or staff should be forwarded unopened to the prisoner or other institutionalized person. If appropriate, such letters should be marked confidential with a warning citing the provision in the *Ombudsman* institution law that allows such communication.

Authority staff should bring the letter unopened to the individual who may be required to open the letter in front of the staff to assure them that it contains no illegal objects. Authority staff should not read letters from prisoners to the *Ombudsman* institution or from the *Ombudsman* institution to prisoners.

# 29. CONFIDENTIALITY

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## 29. CONFIDENTIALITY

Various statutes may govern what an *Ombudsman* institution must keep confidential:

The law creating the *Ombudsman* institution will specifically define that the Ombudsperson must keep the complainant's identity and the office's records confidential. It normally specifies that investigations are conducted in private. As a matter of law and procedure, no one but the Ombudsperson and staff to whom this function is delegated are entitled to view the *Ombudsman* institution's investigative records.

Laws creating authorities may specify that certain records must be kept confidential. *Ombudsman* institution laws do not normally permit revealing the contents of confidential records to which the Ombudsperson may have access.

Confidentiality of the complainant's name protects that person from reprisals and retribution for having made a complaint to the *Ombudsman* institution. That confidentiality encourages people whose rights may have been violated to complain to the *Ombudsman* institution and reduces their risks of harm. Confidentiality also supports an investigation's integrity by protecting witnesses and evidence gathered during the course of an investigation.

# 30. WHISTLE-BLOWER PROTECTIONS, PROTECTION AGAINST REPRISALS

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## 30. WHISTLE-BLOWER PROTECTIONS, PROTECTION AGAINST REPRISALS

Whistle-blowers are informants who report wrongdoing in the hope of stopping it. A complainant may be a whistle-blower reporting wrongdoing by government authorities. Witnesses in investigations or anyone who cooperates with an *Ombudsman* institution investigation may be whistle-blowers reporting wrongdoing they have observed.

Whether they are complainants or witnesses, whistle-blowers need the protections that exist in some jurisdictions where statutes provide them with rights and remedies for retaliation. In some jurisdictions, legislation defines complainants and witnesses in *Ombudsman* institution investigations as whistle-blowers protected under the whistle-blowing law.

Those who complain to the Ombudsperson or who cooperate in an *Ombudsman* institution investigation may be subjected to reprisals. If skilfully done, these may be very difficult to detect and ultimately prove. For those who suffer them, whistle-blower protections may not make them whole or resolve the situation.

Whenever the Ombudsperson detects reprisals against complainants or witnesses, the Ombudsperson should attempt to prevent them from continuing and to reverse or redress the harm. Where no whistle-blower protections exist in law, the Ombudsperson could initiate an investigation of the reprisals and make recommendations designed to remedy the situation, including legislation to protect whistle-blowers.

# 31. FREEDOM OF INFORMATION, PRIVACY, CONFIDENTIALITY, PROTECTING AN INVESTIGATION'S INTEGRITY

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### 31. FREEDOM OF INFORMATION, PRIVACY, CONFIDENTIALITY, PROTECTING AN INVESTIGATION'S INTEGRITY

In jurisdictions with freedom of information legislation, the *Ombudsman* institution's statutory confidentiality provisions normally prevent a successful freedom of information request for investigative records. Attempts to access an *Ombudsman* institution's investigative records should be strongly resisted. Ombudspersons should resort to the courts if necessary to prevent access to their confidential records. That confidentiality is a protection for complainants, witnesses and the integrity of an *Ombudsman* institution's investigations.

Privacy laws may make records containing personal information confidential no matter where held. They may apply to records the *Ombudsman* institution creates and records accessed by an *Ombudsman* institution investigation.

The subjects of complaints are entitled at an appropriate moment the Ombudsperson or investigative staff determines to know the evidence that the office has gathered about the allegation(s) and to respond to it as they see fit. They should not be entitled to use freedom of information laws to access information procedural fairness requires they know to present their defence(s).

Third parties normally are not entitled to view the *Ombudsman* institution's investigative records. Any records of the government or the authority under investigation that the *Ombudsman* institution possesses that third parties need could normally be discovered during a legal action against the authority. Access to those records should be subject to court rules on discovery, not to freedom of information requirements.

Third parties may present a subpoena demanding that the office present certain records in the court. Efforts to subpoena an office's records should also be strongly resisted. Any investigator who receives such a subpoena or demand should immediately inform and consult with the Ombudsperson who will involve legal staff and may wish to seek advice and counsel from other *Ombudsman* institutions that have dealt successfully with this problem.

Any successful demand to see confidential *Ombudsman* institution records diminishes the ability of Ombudspersons everywhere to resist such efforts successfully.

Ombudspersons who interpret their laws as not allowing them to resist complying with court orders to protect their records and files should consider seeking an amendment to the law that will provide a legal basis for refusing to comply. Section 3 of Guide for *Ombudsman* Institutions: "How to handle complaints" provides detailed information on confidentiality and transparency, including provisions that could be enacted as amendments to *Ombuds-*

*man* institution legislation that would provide a basis to keep the *Ombudsman* institution's investigative files confidential under appropriate circumstances. Sections 3.6 Transparency and 3.7 Balancing confidentiality and transparency discuss how to provide an appropriate amount of transparency and balance it with the confidentiality needed to protect complainants and witnesses from punishment or retribution for complaining to the *Ombudsman* institution or cooperating in an investigation.



# 32. PROTECTING *OMBUDSMAN* INSTITUTIONS AND WITNESSES FROM DEFAMATION SUITS

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## 32. PROTECTING OMBUDSMAN INSTITUTIONS AND WITNESSES AGAINST DEFAMATION SUITS

Because laws on defamation and libel vary from country to country, to suggest a uniform approach to this issue is not possible. In most countries, an *Ombudsman* institution's investigation is absolutely privileged as an official proceeding. That means any statements made to the *Ombudsman* institution, including those of the complainant and any witnesses, that might be defamatory or libellous if made to a newspaper, for example, would not be successfully actionable because they were made in the context of an official proceeding. *Ombudsman* institution laws in some countries make this absolute privilege explicit. In other countries, the issue is a matter of legal interpretation.

Ombudspersons who have not already done so should consider whether the laws of their countries protect them, their staff, the complainants and witnesses against successful suits for defamation and libel. If the privilege against libel for publishing defamatory statements is not absolute, it may be qualified. In other words, there may be things that can be done in the method of publication or how the words are stated that will provide a qualified privilege and render a suit unsuccessful.

In any event, an Ombudsperson is well advised to look into the question before a suit is filed and to be knowledgeable about how to avoid successful suits for defamation or libel and still publish the results of investigations.

# 33. MEDIA AND INVESTIGATIONS

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### 33. MEDIA AND INVESTIGATIONS

Media relations are extremely important to an *Ombudsman* institution. Without good media relations, the *Ombudsman* institution would be much less effective. One of the *Ombudsman* institution's most important powers is to make investigations public to reveal findings and recommendations that may not have been accepted by the authority. Media are the method by which an Ombudsperson makes investigative results public. Without a free, independent media, the likelihood of an *Ombudsman* institution's success is substantially reduced.

In many *Ombudsman* institutions, the Ombudsperson speaks officially to the media. Since the office is an institution headed by the person appointed as Ombudsperson, normally it is best for the Ombudsperson to be the institution's spokesperson. Some Ombudspersons have decided to have media relations experts handle the office's comments to the media and speak officially on behalf of the office.

An *Ombudsman* institution should have a media plan or include media planning in its strategic plan. This section does not advise how to do that. It is intended to cover briefly the *Ombudsman* institution's media relations as they concern investigations.

#### 33.1. Before an investigation

Most *Ombudsman* institutions interpret their statutory confidentiality obligation to mean that they may not comment on whether the office has received a complaint or is investigating one. Ombudspersons and their staff who may be authorized to speak officially for the office generally do not comment on investigations that have not been completed nor publicly released. Educating journalists about the *Ombudsman* institution's law, its confidentiality provisions and how the Ombudsperson will relate to the media are helpful in handling questions about complaints that may or may not have been made, and may or may not be investigations.

#### 33.2. During an investigation

Nothing prevents complainants from speaking with the media about the specifics of a complaint or even what *Ombudsman* institution staff might have said to the complainant. Responsible journalists will want to confirm with the Ombudsperson or someone officially speaking for the office whatever a complainant has told to the media. Normally the Ombudsperson or the office's media spokesperson will explain confidentiality requirements of the *Ombudsman* institution's law and that any investigation that may be underway will not be divulged nor discussed.

In addition to confidentiality requirements, another reason not to comment on investigations is that such comments could affect the credibility of an investigation or of the resulting report. Journalists often seek comments about the progress of events, preliminary judgments on a complaint, for example, and other statements that would not be appropriate until the Ombudsperson makes an official finding on the complaint.

In most instances these approaches will be fine. In one instance, however, the Ombudsperson needs to decide whether to break the general rule for a specific exception. On occasion, the public becomes very aware that an investigation is actually underway. The Ombudsperson should realize it may be best under such circumstances to confirm that the office is investigating a complaint on the subject but that the Ombudsperson may not disclose more than that because of legal requirements to conduct investigations privately.

### 33.3. After an investigation

Once an investigation is complete, the Ombudsperson may decide whether to release it publicly and to the media. See Section 24.4 Making a report public for more details on how to handle media relations in this case.



# 34. DISCONTINUING INVESTIGATIONS

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### 34. DISCONTINUING INVESTIGATIONS

A number of situations may develop during the course of an investigation that will cause the Ombudsperson or the investigator to discontinue an investigation. Each situation requires some action after discontinuing the investigation.

Situation prompting discontinuing the investigation	Action after discontinuing the investigation
<p>The problem has been solved, perhaps by mediation, negotiation or discussion with the authority, and the complainant's rights have been restored.</p>	<p>A letter to the complainant and the authority outlining the solution confirms that the Ombudsperson understands what happened and confirms the solution that discontinues the investigation and closes the complaint.</p>
<p>New evidence is developed and the Ombudsperson determines that the complaint is no longer within the <i>Ombudsman</i> institution's competence to investigate.</p>	<p>If the authority has been notified of the investigation, a letter to both the authority and the complainant detailing the new evidence and how it shows that the complaint is no longer within the <i>Ombudsman</i> institution's competence discontinues the investigation and closes the complaint.</p>
<p>Disclosing the complainant's name is necessary to investigate or support recommendations and the complainant refuses to allow this disclosure.</p>	<p>A letter to the complainant explaining why it is necessary to disclose the complainant's name to continue the investigation and confirming that the complainant has refused to allow this and the office will discontinue the investigation and close the complaint.</p>
<p>The investigator requests information or a record from the complainant and the complainant fails or refuses to produce it within the time specified by the Ombudsperson or the investigator.</p>	<p>A letter to the complainant stating what was requested and failed to arrive will discontinue the investigation and close the complaint.</p>
<p>The complainant files a court case and the <i>Ombudsman</i> institution's law provides that the Ombudsperson may not investigate matters before the court.</p>	<p>A letter to the complainant citing the provisions of the <i>Ombudsman</i> institution law on this point will discontinue the investigation and close the complaint.</p>
<p>The complainant withdraws the complaint or requests that the investigation be discontinued.</p>	<p>Most offices allow complainants to withdraw complaints. Some Ombudspersons will consider whether the matter is one that should be investigated under the Ombudsperson's own motion.</p>

# 35. CLOSING AN INVESTIGATIONS

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## 35. CLOSING AN INVESTIGATION

### 35.1. Legal requirements

*Ombudsman* institution legislation often includes provisions specifying what must be done to close a complaint or an investigation. Those provisions should be followed.

An investigation is normally closed when no further action is needed or possible on the complaint. Complaints that have been fully investigated with a written report, a finding and one or more recommendations are usually completed once the authority has responded and restored rights. If the authority has not adopted the recommendations, the investigation is closed once the Ombudsperson concludes that nothing more can be done to encourage or persuade the authority to act and follow the report's recommendations and the report has been submitted to higher authorities and/or made public.

Notices closing investigations are sent to the complainant and the authority. If the investigation has resulted in a report, the final version will also be sent to the complainant and the authority if it has not seen the final version earlier. Sending letters to the complainant, the authority, and any individual criticized and issuing the report publicly closes investigations.

Most *Ombudsman* institution legislation requires the office to inform the complainant and the authority of the results of the investigation and any recommendations. Depending on how the *Ombudsman* institution law reads, the Ombudsperson may have discretion on the timing of notices closing investigations—the authority may be notified before the complainant or at the same time. Some legislation gives an authority a specific amount of time to respond to a report. Until that time runs, complaints and investigations cannot be closed.

The *Ombudsman* institution may choose not to notify the complainant until the very last moment if the authority has rejected the recommendations and not acted to rectify any violation of rights. This allows the *Ombudsman* institution to keep the complaint open in the hopes that minds may be changed and the problem resolved.

If a full investigative report has not been prepared, the office provides the complainant in a closing letter with a summary of the complaint and investigation activities undertaken, the finding(s), the recommendation(s), and the authority's action on the recommendation(s). In any such letter as in an investigative report, care should be taken to remove any confidential information that may not be released to the complainant or the public if the results are to be made public.

Once closing communications have been sent, the appropriate actions should be taken in closing the complaint in a computerized caseload system

or in the *Ombudsman* institution's paper records. The investigative file should be organized and made ready to be archived.

Regular follow up is essential to hold authorities accountable and ensure that recommendations have been and remain implemented. Investigators should follow up on completed investigations as warranted. They should ask specific questions the answers to which will reflect if the authority has implemented the *Ombudsman* institution's recommendations and whether the recommendations resolved the problem(s) they were intended to address.

## 35.2. Evaluating *Ombudsman* institution investigations

No objective standards exist to evaluate *Ombudsman* institution investigations. Much depends on who is doing the evaluating, what perspective that person brings to the investigation and what standards are applied.

Complainants often look at the effectiveness of an investigation from the perspective of whether it found their complaint justified and whether their rights, if violated, have been restored. From an objective perspective, those standards can be questioned. If the complaint was not justified, some complainants will not be satisfied, although the *Ombudsman* institution should vindicate authorities that have been the targets of unjustified complaints. In some situations, even if rights have been violated, it may be impossible to restore them, redress the effects of their violation or make the complainant(s) whole. In those circumstances, someone evaluating the *Ombudsman* institution's work would look to see whether there were any recommendations that could be made to restore the complainants' rights. Someone evaluating the *Ombudsman* institution's work on that investigation should also look to see if recommendations were made which if implemented would prevent similar violations in the future.

Authorities often look at the effectiveness of an investigation from the perspective of whether the complaint against them was found not to be justified—in other words, they expect the *Ombudsman* institution to vindicate them. Objectively this standard can be questioned. If the complaint was justified, some authorities will not be satisfied that the *Ombudsman* institution did not find in the authority's favour even if the authority violated an individual's rights. On occasion, authorities that admit they violated rights are not pleased with the *Ombudsman* institution's recommendations. Sometimes they are justified in being displeased. Other times their displeasure is not justified. Again, someone evaluating an investigation from a more objective perspective should look to see if the investigation is complete and the finding supported by the facts and analysis of the law governing those facts. If the authority was legitimately found to have violated someone's rights, was it willing to follow the *Ombudsman* in-

stitution's recommendations or did it propose and take other actions that also remedied the problem and restored the complainant's rights.

Ombudspersons evaluating their investigations should determine whether investigators took those actions reasonably necessary to find the facts and law that governs them, analyzed the facts in light of the law and made a correct determination on the allegation. No investigation is ever totally complete—that would take more time and resources than any office could afford to devote to an investigation and it would not be efficient.

The question is whether there were people who should have been interviewed and weren't, whether there are records that should have been examined and weren't, whether the investigation from the perspective of someone not personally involved either as a complainant or authority staff is an independent and impartial inquiry into the complaint. If the investigation finds a violation of human rights did occur, were the recommendations ones that would reasonably be expected to restore rights or prevent such violations in the future? Also, were they recommendations that the authority could reasonably be expected to accept and implement? Did the Ombudsperson and staff discuss the recommendations with the authority and try to persuade those in power to accept the recommendations or offer equally effective alternatives that the authority would be willing to implement that would resolve the problem, restore the violated rights and prevent similar violations in the future?

Efficiency of an *Ombudsman* institution investigation is difficult to evaluate outside the context of the country in which it took place, the governmental system and culture of officials and civil servants and the process each *Ombudsman* institution uses to conduct investigations. Since investigations often are about determining unknowns, some inefficient steps will normally be taken because it is impossible to plan how to discover unknowns in a completely efficient way.

That said, it is important to recognize that investigators and Ombudspersons may have a tendency to do more than is necessary or do it in ways that are not the most efficient. Some investigators have found it helpful to analyze the elements of a complaint, determine what will need to be proved or disproved to make a finding and then to consider how that information can be obtained in the most efficient and reliable manner. Some methods of investigation take more time than they are worth and could be handled more efficiently.

Increased investigative efficiency often results from looking back at investigations and seeing how they could have been conducted in more efficient ways. Those ways can then be applied in new investigations and yield more efficient but still reliable ways to investigate complaints. The investigative process is an evolving one that never reaches maximum efficiency and perhaps hardly ever reaches optimum efficiency.

# 36. COMPLAINTS ABOUT AN *OMBUDSMAN* INSTITUTION'S INVESTIGATION

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## 36. COMPLAINTS ABOUT AN OMBUDSMAN INSTITUTION'S INVESTIGATION

Complainants will occasionally want to complain about conflicts of interest, the way an *Ombudsman* institution conducted or decided to discontinue an investigation, or the conclusions reached in an investigation. Most Ombudspersons will review any complaint about their offices whether or not that is required under the *Ombudsman* institution's law.

Since there generally is no place to complain about the *Ombudsman* institution, except perhaps to parliament, the Ombudsperson must be willing to entertain complaints about the office in a full, fair, even-handed and timely manner. Complaints should be taken seriously, not only because there is nowhere else to go but also because they help assess the service the office provides and may indicate problems. The *Ombudsman* institution should provide the same sort of response to complaints the institution expects of authorities. In fact, it should set an example if its credibility is to be supported and strengthened.

### 36.1. Complaints about conflict of interest

Complainants may complain about a conflict of interest on the investigator's part or of anyone else in the office involved in handling the complaint. Such complaints should be examined by someone superior to the staff person alleged to have a conflict of interest. If the staff member alleged to have a conflict of interest will be allowed to continue conducting an investigation, that decision should be approved in writing by the Ombudsperson or Deputy Ombudsperson. The approval should explain why the original investigator either does not have a conflict or the conflict is not germane or significant to the investigation. Regional or section managers should transfer complaint investigations for conflicts of interest to other investigators without needing any additional approval.

### 36.2. Additional consideration of complaints

Complainants should be allowed to request additional consideration of their complaints once the Ombudsperson or staff inform them what actions have been taken on the complaint. The staff member investigating the complaint should consider any additional information the complainant provides.

Complainants should be allowed to submit additional information at any time. If the submissions come after a complaint has been closed, it will be necessary to consider opening a new complaint or reopening the complaint that was previously closed. Investigators consult with managers or the Ombudsperson if new submissions made after a complaint has been closed indicate

need for a change in the disposition of the complaint or its outcome or if there is a doubt about what to do.

The complainant should be informed of the outcome of the investigator's consideration of the additional information. Reasons should be included in the explanation for whatever action the investigator recommends to the Ombudsperson. The complainant should be advised that a review of the complaint done either by the Ombudsperson or a senior *Ombudsman* institution manager can be requested.

### 36.3. Review of concluded investigations

Complainants may also wish to request that an already concluded investigation be reviewed because some piece of evidence was not considered, given correct weight or for any other reason. Complainants should be asked to indicate specifically what they wish reviewed. The Ombudsperson may allow such requests to be made orally. Whether the request was made orally or in writing, the staff member receiving the request should confirm in writing what was requested and what the office will do so no disagreement develops later over this issue. Reviews should be conducted by someone other than the original investigator, preferably someone senior to the original investigator.

Decisions to reinvestigate complaints should be approved by the Ombudsperson or senior staff to whom the Ombudsperson has delegated this function in writing. Reinvestigations should be conducted only on presentation of substantial issues or significant problems with the way the original investigation was conducted.

Reviews examine how the complaint was investigated, whether all relevant evidence and testimony were obtained, whether the facts and law were properly analyzed, whether the findings and recommendations were proper, reasonable, fully explained, etc. Reviews may find that the complaint should be re-opened and fully or partially re-investigated, that the original investigation was properly conducted and nothing more is necessary or that no further investigation is necessary but that new findings or recommendations are appropriate.

The original investigator should be informed of the review's results and have an opportunity to respond. The review's conclusions should be examined and approved by the Deputy Ombudsperson or the Ombudsperson and written and communicated to the complainant as soon as practical. If a new finding or recommendations will be made, or if additional investigation will be conducted, the authority will also be informed.

Every complaint made about the *Ombudsman* institution, conflicts of interest or requests made for reviews of investigations should be recorded and documented. The Ombudsperson should decide whether these complaints

and reviews should be open to the public or held confidential. Statistics on the numbers of such complaints or requests for reviews should be included in the *Ombudsman* institution's annual report.

# 37. GLOSSARY

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## 37. GLOSSARY

*Accepting a complaint:* Determining that a complaint is within the Ombudsman institution's competence or jurisdiction as set forth in the law creating the institution.

*Evidence:* Something that helps the Ombudsman institution ascertain the truth of an allegation that is being investigated. Evidence can be testimony, documents, or other physical things that prove or tend to prove facts that help the Ombudsman institution determine the truth of an allegation.

*Finding, determination:* The Ombudsman institution's opinion on whether the allegations made by the complainant are supported by the investigation.

*Investigation:* The Ombudsman institution's process of examining a complaint—determining the facts, the laws governing the facts, analyzing the facts in light of the laws, making a finding on the allegations made by the complainant and making recommendations to restore rights or prevent them from being violated in the future.

*Investigative workload:* The number of complaints or investigations each investigator has open at any given moment. Also the amount of complaints or investigations of what complexity an investigator can be expected to examine or resolve during what period of time.

*Receiving a complaint:* Taking the information a complainant presents to the Ombudsman institution about an alleged violation of human rights or maladministration of a government authority.

*Redress:* Compensation for or correction of a wrong or violation of rights.

*Remedy:* To recover a right or to prevent or obtain redress for a wrong.

*Resolution:* Solving a problem or violation of rights

*Supervision:* Overseeing, not controlling.

*Testimony:* Declarations made in response to questions from the Ombudsperson or members of the Ombudsman institution's staff.

*Values:* Beliefs or ideas held by the Ombudsperson and staff.

*Witness:* Any individual who has information about events that are the subject of a complaint. May be state officials, civil servants or individuals not employed by the state.

