



What an Ombuds Charter is and Why it Matters

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ABSTRACT

The organizational ombuds profession has expanded in all sectors - internationally and in government, corporations, colleges and universities, and nonprofits - over the past thirty-plus years that we have been involved in creating, advising, and administering ombuds programs. During this time the role of an ombuds charter has also expanded, and a good (i.e., comprehensive and complete) charter is now critical to the work that ombuds do. Yet despite this progress, some ombuds programs still do not have a charter, and many more do not have good charters. Our purpose here is to explain why we believe this reluctance to adopt a comprehensive charter is not in the best interests of either the organization or the ombuds program it has created.

KEYWORDS

Ombuds Charter, Ombuds, IOA-compliance, Ethics, Confidentiality



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Even more alarming is the resistance in some organizations that have decided to create an ombuds program to adopt a charter endorsed by its executive leadership that comprehensively sets forth the terms and conditions under which the program was established, the key principles on which it operates, and what the ombuds office is authorized to do and, more importantly, what it is not authorized to do. Our purpose here is to explain why we believe this reluctance to adopt a comprehensive charter is not in the best interests of either the organization or the ombuds program it has created.

At one level, the reluctance to create an ombuds charter (and especially a comprehensive charter) is understandable because virtually no other function in an organization has or depends on a charter for its existence or proper functioning, so a charter is a new and unfamiliar concept for some leaders. Organizational ombuds programs, however, whether staffed by an outsourced ombuds team working under a contract or internally by employees of the organization, must be and be seen as both independent of the organization and confidential. These are just two of the four key principles (independence, informality, impartiality, and confidentiality) embodied in IOA's Standards of Practice and Code of Ethics. But these two principles, independence and confidentiality, are what render an ombuds program organizationally unique and different from all other functions in the organization while at the same time, they provide the essential foundation for an effective program.

So, if independence and confidentiality are so important, what enshrines these principles sufficiently to withstand a court challenge to ombuds' confidentiality? Merely saying that the program is independent and confidential is not enough. Rather, for a court to recognize and enforce these principles, there must be some legal basis, and this is one of the primary purposes of an ombuds charter.

WHAT IS AN OMBUDS CHARTER AND WHAT SHOULD A GOOD CHARTER CONTAIN?

An ombuds charter begins with the recognition that there must be a common understanding among organizational leadership, the ombuds program, and visitors who use the ombuds' services about the terms, conditions, and principles on which the program is established and on which it operates, including "terms of use" by visitors, to create a contract that is straightforward and that can be legally recognizable by a court. *Accordingly, the charter is an agreement among the organization, its ombuds program, and visitors who voluntarily use the ombuds' services that describes the terms, conditions, and principles on which the resource was established and on which it will operate.* The charter expresses how an ombuds will function within the organization and is the document on which the organization, its visitors (employees, staff, faculty, students, etc.), and the ombuds team can all rely and that a court, in the event of a challenge, can enforce.



The introduction section of a charter should articulate why the organization has created the ombuds program and why that program serves important public policy interests, such as supporting the highest standards of organizational governance, informal and prompt resolution of conflict, improving organizational culture, etc. In the event of a legal challenge, articulating these purposes in a charter assists in asserting a claim of privilege where that is feasible and otherwise informing a court or regulatory authority of the important public policy purposes served by an organizational ombuds program.

A good charter articulates the contours of the four key principles in the IOA Standards of Practice, especially independence and confidentiality, and describes what is meant by each of these principles. It clarifies the scope of services that ombuds provide and other important terms and conditions of the program. The most important of these is that the use of the program by visitors is entirely voluntary (no one can be required to use it) but that those who do use it will be understood to have agreed to abide by the terms and conditions under which it was created and on which it operates. This is what creates the "terms of use" agreement that a court can enforce. It is also particularly important to elaborate on some of the specific "terms of use" relating to confidentiality: that both visitors and the organization will not call on the ombuds to testify or produce documents in any legal, administrative, or other matter; that confidentiality of communications with the ombuds cannot be waived by others; and that the ombuds will use the provisions of the charter, the IOA Standards of Practice, and any other applicable rule or statute to resist attempts by visitors or third parties to compel disclosure of confidential communications with the ombuds.

A good charter specifies what the ombuds are authorized to do and what they are not authorized to do. Describing what services or roles an ombuds is "authorized" to undertake and "not authorized" to do is a critical part of the charter. It is important for visitors to understand the various ways that ombuds can help them (listening, helping them develop options to resolve conflict or surface issues, explaining policies or procedures, etc.), but listing what the ombuds are not authorized to do is even more important to minimize risk to the organization that confidential information known only by the ombuds will create liability for the organization. For this reason, a good charter should state that under the charter creating the program, the ombuds are not authorized to make or change business or policy decisions or serve as an agent of the organization for the purpose of receiving notice of claims against the organization or its agents. Likewise, the charter should state that the ombuds are not authorized to serve as anyone's counselor, lawyer, or advocate, and they have no authority to conduct investigations or participate in formal proceedings of any kind.

Because courts often analyze the issue of imputed notice - the idea that the organization could be held liable for facts or claims known only by the ombuds and then "imputed" to the organization - the limitations on authority of an ombuds (not to serve as an agent of the organization for purposes of asserting claims, for example) must be explicit and publicized so that it is clear that the ombuds have no such authority and that it would be unreasonable to believe that the ombuds do have this authority.

HOW DOES A GOOD CHARTER HELP VISITORS, THE OMBUDS PROGRAM, AND THE ORGANIZATION?

The benefit of having a good charter for potential visitors is straightforward: a visitor can review the charter and know with a high degree of certainty what services the ombuds can provide and how the program operates. More than that, they can see from the endorsement of the charter by senior leadership that the program is legitimate and that the organization itself will not attempt to



breach ombuds confidentiality by seeking to compel the ombuds to participate or supply testimony or documents in formal proceedings either inside the organization or in administrative or legal matters external to the organization. Many visitors are afraid or unwilling to seek assistance from other venues in the organization where they could obtain help on or surface an issue. But because the confidentiality and off-the-record nature of ombuds services are often seen as the most important considerations by visitors, a clear and comprehensive charter gives them greater assurance that they can discuss matters with the ombuds in confidence.

The lack of a clear and comprehensive charter risks creating confusion because the concept of an organizational type of ombuds program is often not fully understood by visitors or courts. Other types of programs within organizations that could be interpreted by employees to be (and are even named) "ombuds programs," operate on principles that are different from the IOA Standards of Practice. Such confusion creates the risk that visitors and/or courts will misunderstand what the program is and how it works, which can lead to litigation over the ombuds' role and further risk the possibility of adverse decisions by courts. Indeed, this has already happened in some reported decisions where courts have supplied their own understanding of an ombuds program that was not supported by facts in the case. For example, if an ombuds charter is not explicit that ombuds' confidentiality may not be waived by others, potential litigants adverse to the ombuds program and courts may assume that ombuds confidentiality is akin to attorney-client confidentiality and can be waived by the "client." In contrast, once organizational ombuds charters developed to the point of being very explicit on what ombuds do and do not do and that program visitors are deemed to have agreed to the terms and conditions on which the program was created (including that ombuds' confidentiality cannot be waived by others), these types of legal challenges almost ceased to exist.

It is hard for us to see why an organization would want to leave an ombuds program's involvement in litigation to chance or risk adverse court rulings, rather than define its ombuds' function and authority for itself. Why risk the cost and uncertainty of litigation if a clear provision in the charter can set forth the "terms" applicable to a potential issue that otherwise might arise? After all, if at any time the organization were to determine that it no longer wants an ombuds office, it could simply rescind the charter. A charter allows an organization to act affirmatively to specifically address two of the greatest potential litigation risks in a terms-of-use agreement with visitors that a court can understand and easily enforce: the ombuds' lack of authority to serve as a notice channel for imputed notice to the organization and an ombuds being drawn in to testify or produce documents in formal proceedings. In addition, such clarity also encourages visitors to make use of the ombuds services to resolve conflict and surface issues that would likely not be raised through the official notice channels of legal, HR, compliance, and management but which undermine the effective operations of the organization.

HOW A CHARTER DOVETAILS WITH IOA'S STANDARDS OF PRACTICE

A good charter is necessary for the organization and the ombuds program to represent that the ombuds practice is in accordance with the IOA Standards of Practice. Without a charter, an ombuds program cannot represent that it adheres to the IOA Standards of Practice since Standard 1.4 states: "Each Ombuds program shall have a *charter*, terms of reference or detailed program description *approved by the executive leadership of the organization* that complies with the provisions of the IOA Code of Ethics and Standards of Practice and that articulates the basis on which the Ombuds operates." (Emphasis added.) Being able to represent that the program adheres to the IOA Standards of Practice is highly desirable both for the organization and the ombuds program because the Standards articulate various aspects of the key principles that would apply to the program but without the need to repeat them in full in the charter. In this



regard, the provisions of section 5 are particularly significant. Standard 5.1 defines confidential information, and Standard 5.2 provides that it is confidential to the maximum extent permitted by law. The ensuing section 5 Standards delineate exceptions to confidentiality, but Standard 5.4 goes further in articulating for a court the appropriate standard of review: "The Ombuds shall oppose disclosing confidential information in any formal, administrative, or legal matter external to the organization *unless an appropriate judicial or regulatory authority determines that disclosure is necessary to prevent a manifest injustice or that disclosure is required because the interests served by disclosure clearly outweigh the interests served by ombuds confidentiality.*" (Emphasis added.) By representing that the ombuds program adheres to the IOA Standards of Practice, this high standard of review becomes one of the terms, conditions, and principles of the program and greatly increases the burden on any potential plaintiff who might seek to compel the ombuds to breach their confidentiality obligations.

Although ombuds' confidentiality can also be asserted in some cases on other grounds such as privilege (in federal courts, for example, under Federal Rule of Evidence 501) and mediation and other ADR statutes and rules, these claims may be both harder to establish and not always available in a particular jurisdiction because of variations in state statutory law and legal restrictions on a court's ability to recognize new common law privileges in many jurisdictions. In contrast, a contractual "terms and conditions" claim of confidentiality is easier to establish and can be used in virtually any jurisdiction.

In short, having a clear and comprehensive charter completes a circle that protects the organization. It helps people understand what an organizational ombuds office is and emphasizes the independent status of the office and its confidentiality, which encourages people to feel safe using the office to help resolve conflict or seek help in surfacing issues. It protects this confidentiality and the organization by creating a straightforward legal basis for the office to be considered independent of the organization even though it was created by the organization. It specifies what the terms, conditions, and principles of the program are, and that users of the program are bound by those terms and conditions. It identifies what ombuds are authorized to do and what they are not authorized to do, reducing the risk of confusion and potential for claims by a plaintiff that he or she put the organization on notice of a claim by speaking with the ombuds. This simultaneously reduces the risk of litigation, and if litigation were to occur, increases the likelihood that ombuds' confidentiality will be recognized, especially since a charter incorporating the IOA Standards of Practice protects confidentiality to the maximum extent permitted by law and creates a high standard of review by a court or regulatory authority. And finally, the strength of the program and the clarity of the charter help people surface issues that might not otherwise have been raised with the organization to create a better environment and address issues that could adversely affect the organization.



AUTHOR BIOS

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