

## CHAPTER 2 PROCEDURES

[Prior to 3/30/94, see 210—Chapter 2, rules 6.1(601G) and 7.1(601G)]

### **141—2.1(2C) Definitions.** As used in this chapter:

*“Administrative action”* means any action, decision, omission, policy, practice, procedure, or rule of an agency or any failure of an agency to act pursuant to law.

*“Agency”* means all governmental entities, departments, boards, commissions, councils or institutions, and any officer, employee or member thereof acting or purporting to act in the exercise of official duties. *“Agency”* includes any person providing child welfare or juvenile justice services under contract with an agency that is subject to investigation by the ombudsman. *“Agency”* does not include:

1. Any court or judge or appurtenant judicial staff;
2. The members, committees, or permanent or temporary staffs of the Iowa general assembly;
3. The governor of Iowa or the governor’s personal staff;
4. Any instrumentality formed pursuant to an interstate compact and answerable to more than one state; and
5. Any agency, official or employee of the federal government.

*“Employee”* means any employee of any agency.

*“Officer”* means any officer of any agency.

*“Person”* means an individual, aggregate of individuals, corporation, partnership, or unincorporated association.

*“Records”* or *“documents”* means any writings, drawings, graphs, charts, photographs, phonorecords, audio recordings, video recordings, and any other data or information stored or preserved in any medium.

[Adopted and published 10/26/16 pursuant to Iowa Code section 2C.9(5), effective 11/1/16]

### **141—2.2(2C) Complaints.**

**2.2(1) *Persons who may contact office.*** Any person may contact the ombudsman concerning an administrative action by an agency. If a person contacts the ombudsman on behalf of another person whose specific right or interest is directly affected by an administrative action, the ombudsman may request that the affected person contact the ombudsman as the complainant or obtain the consent of the affected person before considering the complaint.

**2.2(2) *Methods of contact.*** The ombudsman may be contacted at the office of ombudsman or at the site of an agency or other location specified by the ombudsman. Contact may be made by mail, email, telephone, facsimile (fax), or any other method deemed acceptable by the ombudsman, except as provided in subrule 2.2(3). Contact may also be made indirectly by the receipt of a person’s correspondence which is referred or forwarded to the office of the ombudsman.

**2.2(3) *Written complaints.*** The ombudsman may require complaints to be submitted in writing or on a form prescribed by the ombudsman.

**2.2(4) *Assistance by the ombudsman.*** If a person is incapable of submitting a written complaint or has difficulty communicating with the ombudsman because of a disability or language barrier, the ombudsman shall assist that person in completing the complaint or make accommodations to facilitate communication with that person.

**2.2(5) *Self-initiated complaints.*** An investigation into an agency’s administrative action may be initiated on the ombudsman’s own motion, if the ombudsman determines it is an appropriate subject for investigation.

**2.2(6) *Anonymous complaints.*** The ombudsman may accept a complaint from an anonymous person. However, if the ombudsman at any time determines the complainant’s identity is needed to pursue an investigation of the complaint, the ombudsman may request that the complainant’s identity be disclosed. If the identity of the complainant is not disclosed as requested, the ombudsman may decline to pursue investigation of the complaint.

**2.2(7) Information requests.** If a person who contacts the ombudsman requests information, the ombudsman may provide such information, if it relates to state and local government, or refer the person to another agency or to any other appropriate entity or source for the information.

**2.2(8) No fee or charge.** The ombudsman shall not assess any monetary or other charge against any person who contacts the office of ombudsman for assistance.

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#### **141—2.3(2C) Institutional communications.**

**2.3(1) Correspondence.** Any correspondence from a person confined or residing in an institution or facility under the control of an agency shall be forwarded, unopened and without undue delay, to the office of ombudsman by the institution or facility. Any correspondence from the office of ombudsman to such a person shall be delivered, unopened and without undue delay, by the institution or facility to that person.

**2.3(2) Telephonic communication.** A telephonic communication between a person confined or residing in an institution or facility under an agency's control and any staff member of the office of ombudsman shall not be monitored by any officer or employee of that agency.

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#### **141—2.4(2C,70A) Whistleblower reprisal complaints.**

**2.4(1) State employees.** Notwithstanding the limitations of subrule 2.6(1), the ombudsman may investigate a complaint filed by an employee of a state employment system who alleges that an adverse employment action has been taken against the employee as provided in Iowa Code section 70A.28(2). This provision does not apply to employees of those entities excluded from the definition of "agency" under Iowa Code section 2C.1(2). This provision applies only to employees who are non-merit employees and employees not covered by a collective bargaining agreement. Complaints must be made to the ombudsman within 30 calendar days following the effective date of the adverse employment action.

**2.4(2) Investigation.** If an investigation of the employee's complaint occurs, the ombudsman shall issue findings to the employee and the agency in an expeditious manner.

**2.4(3) Investigative findings.** If the employee files an appeal of the adverse employment action with the public employment relations board pursuant to Iowa Code section 70A.28(6), the written findings issued by the ombudsman may be introduced as evidence before the public employment relations board.

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#### **141—2.5(2C) Preliminary review and inquiry.**

**2.5(1) Review of complaint.** The ombudsman shall review and consider each complaint to determine if it is within the ombudsman's jurisdiction, if it is an appropriate subject for investigation, and if it warrants an investigation, under the criteria in rule 141—2.6(2C).

**2.5(2) Preliminary inquiry.** The ombudsman may make a preliminary inquiry to obtain information for the purpose of making the determination required in subrule 2.5(1). A preliminary inquiry may utilize any of the methods available for investigations under subrule 2.9(1). However, a preliminary inquiry shall not be considered an investigation.

**2.5(3) Resolution without investigation.** If, in the course of a preliminary inquiry on the complaint, an agency provides an explanation or response or takes an action which resolves the complaint, the ombudsman may decline to investigate the complaint. The ombudsman shall inform the complainant regarding the resolution of the complaint. However, the resolution of a complaint during a preliminary review and inquiry does not preclude the ombudsman from conducting an investigation into the complaint.

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#### **141—2.6(2C) Criteria for investigation.**

**2.6(1) Jurisdiction.** The ombudsman has jurisdiction to investigate any administrative action of an agency; however, the ombudsman shall not investigate the complaint of an employee of an agency in regard to that employee's employment relationship with the agency, except as provided in rule 141—2.4(2C,70A).

**2.6(2) Subjects for investigation.**

*a.* An appropriate subject for investigation includes any administrative action which the ombudsman has reason to believe might be:

- (1) Contrary to law or regulation;
- (2) Unreasonable, unfair, oppressive, or inconsistent with the general course of an agency's functioning, even though it is in accordance with the law;
- (3) Based on a mistake of law;
- (4) Arbitrary in ascertainties of fact;
- (5) Based on improper motivation or irrelevant consideration; or
- (6) Unaccompanied by an adequate statement of reasons.

*b.* The ombudsman may also inquire into an agency's policy, practice or procedure if the ombudsman has reason to believe improvements can be made to the policy, practice or procedure which lessen the risk that objectionable administrative actions will occur.

**2.6(3) Reasons to decline investigation.** The ombudsman may decline to investigate a complaint if the ombudsman finds substantiating facts that:

- a.* The complainant has available another remedy or channel of complaint which the complainant could reasonably be expected to use;
- b.* The complaint pertains to a matter outside the ombudsman's power;
- c.* The complainant has no substantive or procedural interest which is directly affected by the matter complained about;
- d.* The complaint is trivial, frivolous, or vexatious or not made in good faith;
- e.* Other complaints are more worthy of attention;
- f.* The resources of the ombudsman are insufficient for adequate investigation;
- g.* The complaint has been delayed too long to justify present examination of its merit;
- h.* The complainant does not provide or refuses to provide, without good reason, information in the complainant's possession or knowledge which is requested by the ombudsman;
- i.* A previous determination has been made by the ombudsman regarding the subject matter of the complaint; or
- j.* The complaint has been resolved due to a change in the complainant's circumstances or in the law, or due to an action taken by the agency during a preliminary review and inquiry on the complaint.

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**141—2.7(2C) Decision not to investigate.**

**2.7(1) Notice of decision.** If, after preliminary review and consideration of a complaint, the ombudsman decides not to investigate the complaint, the complainant shall be informed of the decision and the reasons for the decision. The ombudsman may also inform the agency involved of the decision, if such notice is deemed appropriate.

**2.7(2) Referral of nonjurisdictional complaint.** If the ombudsman does not have jurisdictional authority to investigate a complaint, the complainant may be referred to an agency or other appropriate entity or person for assistance.

**2.7(3) Effect of declining investigation.** A decision to decline investigation of a complaint under subrule 2.6(3) does not preclude the ombudsman from inquiring into the complaint or a related subject matter in the future.

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**141—2.8(2C) Decision to investigate.**

**2.8(1) Notice of decision.** If, after preliminary review and inquiry and consideration, the ombudsman decides to investigate a complaint, the complainant and the agency involved in the complaint shall be notified of the decision.

**2.8(2) Notice to agency.** A notice of investigation to an agency shall be directed to an official or employee of the agency. Such notice may be given simultaneously or in conjunction with any investigative action that is initiated under rule 141—2.9(2C).

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#### **141—2.9(2C) Investigations.**

**2.9(1) Methods.** The ombudsman may use any one or more of the following methods in conducting an investigation:

- a. Review applicable laws, rules, regulations, and policies;
- b. Request a statement from an agency providing reasons for taking an administrative action;
- c. Make informal verbal or written inquiries to an agency and other persons for assistance or information;
- d. Take testimony from any person as provided under rule 141—2.11(2C).
- e. Examine and copy records or documents of an agency;
- f. Enter and inspect without advance notice any premises within an agency's control;
- g. Attend administrative hearings or proceedings;
- h. Issue a subpoena to compel a person to provide sworn testimony or to produce relevant records or documents;
- i. Hold private hearings;
- j. Convene a public hearing as a forum to obtain public input or comment on a subject of general or broad public concern;
- k. Any other method determined appropriate by the ombudsman.

**2.9(2) Ex parte communications.** A communication or receipt of information by the ombudsman or any person in the course of an investigation shall not be considered an ex parte communication as described in Iowa Code section 17A.17.

**2.9(3) Status reports.** The ombudsman shall report the status of an investigation to the complainant upon request of the complainant or whenever it is deemed appropriate.

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#### **141—2.10(2C) Subpoenas.**

**2.10(1) Issuance.** Pursuant to Iowa Code subsection 2C.9(5), the ombudsman has power to issue a subpoena to compel any person to appear, give sworn testimony, or produce documentary or other evidence relevant to a matter under inquiry.

**2.10(2) Notice.** The ombudsman shall give reasonable notice of the date, time, place, and purpose for the taking of testimony or the production of documentary or other evidence. Notice shall be served in accordance with the law applicable to the service of subpoenas in civil actions.

**2.10(3) Fees.** A person required to give testimony or produce documentary or other evidence is entitled to payment of the same fees and travel allowances as are payable to a witness whose attendance has been required in a district court of this state.

**2.10(4) Enforcement.** If a person fails or refuses to obey a subpoena, the ombudsman may file a petition with the district court having jurisdiction for an order directing obedience to the subpoena under Iowa Code subsection 2C.9(5).

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#### **141—2.11(2C) The taking of testimony.**

**2.11(1) Purpose.** The taking of testimony is an internal device used by the ombudsman to gather information and to assist in arriving at conclusions or recommendations regarding an agency's actions.

**2.11(2) Witnesses.** Any person may be called to give testimony relating to a matter before the ombudsman.

**2.11(3) Notice.** The ombudsman shall provide to the person whose testimony is sought reasonable notice of the date, time, and place for taking that person's testimony. If the ombudsman issues a subpoena compelling a person to give testimony, notice shall be provided in the subpoena.

**2.11(4) Location.** The ombudsman has discretion to take testimony from a person at the ombudsman's office or at another location deemed appropriate by the ombudsman, or by telephone or other electronic means.

**2.11(5) Rights of witnesses.** A person who gives testimony is accorded the same privileges and immunities as are extended to witnesses in the courts of this state. The witness is entitled to be accompanied and advised by counsel or other representative while being questioned, but only counsel may speak or raise objections to questions on behalf of the witness. Objections to questions shall be noted, but the witness shall answer all questions, except when a privilege or immunity accorded to the witness has been asserted.

**2.11(6) Conduct of testimony.** The ombudsman may administer oaths to persons giving testimony before the ombudsman. The ombudsman determines the order for the taking of testimony and may sequester witnesses or examine a witness privately. Questions will be posed by the ombudsman. At the conclusion of the ombudsman's examination of a witness, counsel for the witness may be permitted to question the witness, after which the ombudsman may inquire further into any matters raised during the examination. The scope of the questions shall be decided and may be limited by the ombudsman.

**2.11(7) Evidence.** Strict rules of evidence shall not apply. The probative nature of any evidentiary matter shall be determined by the ombudsman.

**2.11(8) Record.** The ombudsman may record the testimony by audio or video recording or by use of a certified court reporter. A copy of the witness's testimony record may be provided to the witness upon request at the conclusion of the investigation in order to prepare a comment in response to conclusions or recommendations that criticize the witness, pursuant to Iowa Code section 2C.15.

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#### **141—2.12(2C) Disposition after investigation.**

**2.12(1) Complaint unsubstantiated.** If, after completing an investigation, the ombudsman determines the complaint is not substantiated based upon a preponderance of the evidence, the ombudsman shall inform the complainant and the agency involved of such determination.

**2.12(2) Complaint indeterminate.** If, after completing an investigation, the ombudsman is unable to conclusively determine based upon a preponderance of the evidence whether the complaint is substantiated or unsubstantiated, the ombudsman shall inform the complainant and the agency involved of such conclusion.

**2.12(3) Complaint substantiated.** If, after completing an investigation, the ombudsman determines the complaint is substantiated based upon a preponderance of the evidence, the ombudsman shall inform the complainant and the agency involved of the findings of fact and conclusions. If appropriate, the ombudsman shall also inform the agency of any recommendation that:

- a. The matter be further considered by the agency;
- b. The administrative action be modified or canceled;
- c. A rule on which an administrative action is based be altered;
- d. Reasons be given for an administrative action; or
- e. Any other action be taken by the agency.

**2.12(4) Agency response to recommendations.** If the ombudsman requests, the agency shall notify the ombudsman within 20 days in writing of any action taken or to be taken on the recommendations or the reasons for not complying with the recommendations.

**2.12(5) Legislative action.** If the ombudsman believes that a law resulted in administrative action which was unfair or otherwise objectionable, the ombudsman shall notify the general assembly of desirable statutory change. The ombudsman may give notification by submitting a legislative proposal or by presenting testimony or statements to the general assembly or one of its committees or members regarding the statutory change.

**2.12(6) Referral for disciplinary or criminal action.** The ombudsman shall refer a public official, employee or other person for disciplinary or criminal proceeding, if such referral is warranted under rule 141—2.15(2C).

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**141—2.13(2C) Investigative reports.**

**2.13(1) Issuance of reports.** The ombudsman may prepare a report of the findings of fact, conclusions, and recommendations relevant to an investigation.

*a. Critical reports.* If the ombudsman determines as a result of an investigation that an administrative action of an agency, officer or employee warrants criticism, the ombudsman may issue a critical report containing the findings, conclusions and recommendations relevant to that investigation.

*b. Special reports.* A special report may be issued if the findings of fact, conclusions, or recommendations are not critical of an agency, or an officer or employee of an agency, but are of significant interest to the public.

**2.13(2) Publication of reports.** The ombudsman may publish and send a critical report or a special report to the governor, the general assembly or any of the committees of the general assembly. Any published report sent to the governor, the general assembly or any of its committees becomes public information and may be disseminated to the news media and to any interested members of the general public upon request.

**2.13(3) Prepublication procedure for critical reports.** Before publishing a critical report or announcing a conclusion or recommendation which criticizes an agency, officer or employee, the ombudsman shall consult with that agency, officer or employee.

*a. Transmission to agency.* The ombudsman shall transmit a copy of the critical report to the agency and each officer or employee who is a subject of the criticism and allow the agency, officer or employee a reasonable opportunity to reply to the report in writing.

*b. Reply to report.* The agency, officer or employee shall notify the ombudsman within 7 days from the date the critical report is received of any decision by that agency, officer or employee to make a reply. The agency, officer or employee shall be allowed 30 days from the date of receipt of the critical report to submit a written reply to the ombudsman. The ombudsman may for good cause extend the time allowed to submit the reply, if an extension is requested by the agency, officer or employee.

*c. Comment to reply.* The ombudsman may comment on any reply from an agency, officer or employee. The comments may include modifications by the ombudsman to any findings, conclusions, or recommendations in the critical report. The ombudsman shall transmit in writing any comments to the replying agency, officer or employee.

*d. Reply or comment attached to report.* Any unedited reply made by an agency, officer or employee and any written comments by the ombudsman shall be attached to every critical report which is published, sent, or disseminated by the ombudsman, unless inclusion of the reply is waived by the agency, officer or employee.

*e. Confidential information not published.* The ombudsman may not publish any confidential information which the ombudsman is not authorized to disclose or is prohibited from disclosing by law. The ombudsman may prepare, for the purpose of publication, an edited version of the critical report, from which confidential information has been deleted or excluded. The ombudsman shall transmit the edited version of the critical report to the agency, officer or employee and consult with that agency, officer or employee to ensure the report does not contain confidential information that may not be disclosed. Any reply or comment which is attached to this report and which contains confidential information that may not be disclosed shall likewise be edited to delete or exclude the confidential information.

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**141—2.14(2C) Annual reports.**

**2.14(1) When and to whom submitted.** Pursuant to Iowa Code section 2C.18, the ombudsman shall by December 31 of each year submit an economically designed and reproduced annual report to the general assembly and to the governor concerning the activities and work performed during the preceding calendar year.

**2.14(2) Inclusion of reply by agency or official.** If the annual report summarizes or discusses the findings, conclusions or recommendations in a critical report and names the agency, official or employee

involved, the annual report shall also include any unedited reply made by the agency, official or employee to the critical report, unless inclusion of the reply is waived by the agency or official.

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**141—2.15(2C) Referral for disciplinary or criminal action.** If the ombudsman believes that a public official, employee, or other person has acted in a manner warranting a disciplinary or criminal proceeding, the ombudsman shall refer the matter to the appropriate authorities.

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**141—2.16(2C) Privileges and immunities.**

**2.16(1) Immunity of ombudsman.** Except for removal from office as provided in Iowa Code chapter 66 or for employment-related claims, no civil action or other proceeding shall be commenced against the ombudsman or any member of the staff for any official act or omission performed pursuant to the provisions in Iowa Code chapter 2C, unless the act or omission is actuated by malice or is grossly negligent.

**2.16(2) Testimonial privilege.** The ombudsman or any member of the staff shall not be compelled to testify in any judicial or administrative proceeding with respect to any matter involving the exercise of the ombudsman's official duties, except as may be necessary to enforce the provisions of Iowa Code chapter 2C.

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**141—2.17(2C) Penalties for obstruction.**

**2.17(1) Penalties.** As provided in Iowa Code section 2C.22, any person who willfully obstructs or hinders the lawful actions of the ombudsman or any member of the staff, or who willfully misleads or attempts to mislead the ombudsman or a member of the staff in the course of an inquiry or investigation, shall be guilty of a simple misdemeanor.

**2.17(2) Prosecution.** The ombudsman shall refer for prosecution a violation of Iowa Code section 2C.22 to the county attorney in the county where the violation occurred.

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These rules are intended to implement Iowa Code sections 2C.1, 2C.8 to 2C.22, and 70A.28.

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<sup>◊</sup> Two or more ARCs