

# What Happens to Confidentiality if the Visitor Refuses to Report Unacceptable Behavior?

MARY ROWE

## ABSTRACT

This article examines a common question frequently posed to organizational ombuds about what they would do if a visitor refuses to report or otherwise act responsibly about a situation that might present a risk of serious harm. It briefly reviews the Code of Ethics on confidentiality, and the concepts of “imminent risk” and serious harm. The article affirms the importance of seeking advice if there is time, without mentioning identities of those involved if that is possible, but being prepared to breach confidentiality if necessary to prevent serious harm. It discusses some options for getting information where it needs to go, on a timely basis, without the ombuds practitioner having to breach confidentiality, and points out that such options usually exist.

## KEYWORDS

zero barrier office, confidentiality, organizational ombudsman, zero tolerance, whistleblowing, Ombudsman Code of Ethics

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Practicing “near-absolute” confidentiality is one of the four major principles of being an organizational ombud. “Near-absolute” confidentiality in the ombuds office can be seen as the cornerstone for being, and being seen as, a “zero-barrier” office within an organization.

This professional practice is often interpreted as meaning: that ombuds keep no case records for the employer, that ombuds will not take action or speak about a visit to the ombuds office without permission to do so (and even then the ombuds has to agree to act or speak) and that the only exceptions to this practice are in very extreme cases.

However, people are often puzzled by how it is possible to keep confidences nearly all the time. People often ask organizational ombuds about the “limits of confidentiality.” For example, a manager may be concerned about ombuds action if faced with a visitor who describes totally unacceptable behavior. If the visitor refuses to act to stop the behavior, and this visitor also refuses to report it, what will the ombud do?

Questions about confidentiality sometimes are couched in the context of an imagined scenario. The ombud might be asked, “What happens to confidentiality when your visitor discusses a terrible safety problem, or a racial or sexual assault, or a major embezzlement, and the visitor will not report it? Will you breach confidentiality?”

The ombud may wish to answer such questions in three separate steps. The first is to quote, and perhaps discuss, the relevant sentences in the IOA Code of Ethics. The second step is to outline what visitors to the ombuds office are told about confidentiality. And the third step is to point out that—almost always—there are options other than a) keeping silent or b) breaching confidentiality.

### 1) The IOA Code of Ethics<sup>1</sup>

The Code of Ethics gives the following instruction about confidentiality:

The Ombudsman holds all communications with those seeking assistance in strict confidence, and does not disclose confidential communications unless given permission to do so. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm.

It is clear from the Code of Ethics that all organizational ombuds should be prepared for an imminent-risk situation when they do have to breach confidentiality. “Near-absolute” confidentiality is not the same as “absolute” confidentiality. It is important therefore to understand the parameters of *imminence* and *serious harm*.

Imminence may vary by context, and serious situations are usually quite complex. How might the ombud judge if serious harm is imminent? For example, if a visitor discusses possible destructive action by an individual, the ombud will likely be thinking, is this an imminently dangerous situation with this individual? In particular, according to the guidance of experts<sup>2</sup>, “*Under what circumstances might the named individual act in a dangerous fashion with respect to a specific target?*”

Predictions of “dangerousness” are generally not very reliable beyond a few hours or days. An ombud may therefore think about “imminence” in terms of a day or a couple of days unless a specific date is named for the “serious harm.” An ombuds practitioner will likely consider breaching confidentiality — *if that is the only alternative to serious harm* — when, in the ombud’s judgment, serious harm will ensue within a day or two, or by a credible specified date, if there is no intervention.

It follows that, when the question arises, the practitioner might first ask himself or herself is, “**Is this an emergency?** Could I call someone in my organization, or an expert outside the organization, and ask advice in a way that does not breach confidence? Could I speak in hypotheticals, disclosing no names, and get the information that I need? **Do I have time to ask advice**, for example, from another ombud?” If so, the ombud will usually seek advice — and usually in a way that does not compromise confidentiality. In a true emergency, however, the ombud must be prepared, alone, to make a judgment of imminent risk and serious harm.

### 2) Expectations of Confidentiality

Visitors to an ombuds office should know what to expect about confidentiality. Many ombuds post their Terms of Reference and Code of Ethics and Standards of Practice on the office website, and in brochures and other materials. Many ombuds introduce themselves, and mention their code and standards, in an opening statement with all visitors. (These introductions may vary somewhat from office to office, and the organizational context may affect how an ombud might define “serious harm.”)

### 3) Options Other Than Breaching Confidentiality

In real life, in almost all situations, the ombud can help to develop responsible options, within an acceptable time frame, that avoid an unacceptable alternative of silence, and the unwanted alternative of breaching confidentiality.

For example, frequently a visitor may not adequately understand rules and laws and policies relevant to the situation. A thoughtful discussion of the facts, of laws and rules, and of responsible conduct, may suffice to persuade a visitor to act or come forward in a reasonable way. Often a visitor may agree to act responsibly in order to prevent harm to others in the future. And as outlined below, there are many additional options for getting information surfaced in a responsible fashion.

It may be important to start by exploring the options already considered by the visitor. Some visitors have indeed thought about reporting their concerns, but they do not trust the supervisor that would be the obvious person with whom to speak. Extensive discussion may serve to identify other relevant managers who may be seen to be approachable. As a common example, the visitor might be willing to go to a senior manager, after refusing to go to the immediate supervisor.

Many people will agree to talk with (just) one particular person in the organization, although not with others. This fact may be especially helpful when the visitor reports that he himself has done something unacceptable, and when he knows at some level that the facts must be told. It may also work when he or she has been *planning* to do something unacceptable.

A person who might be a danger to self or others might be willing to seek help from just one particular person in a medical department. A person who has done something very wrong is sometimes willing to “turn herself in” to one particular person in security who is known to be respectful and trustworthy. Sometimes a person will agree to act if the ombud accompanies him or her to the medical department or security, or to another line or staff manager.

Some visitors will not act immediately, in the moment, but may be willing to act after some time has passed or after the situation has changed in some way. A person might be willing to come forward after he or she has gotten a transfer to a different job. Some students might feel safer reporting a very serious problem in a class when they have completed the given class. After discussion, the ombud may feel the suggested time frame is acceptable, under the circumstances.

Sometimes what is most needed is just for accurate and sufficient information to get where it needs to go. Some visitors are willing to provide an anonymous factual account to the appropriate managers. For example, a visitor may be willing to slip an effective, polite, factual, anonymous note under the door of a senior manager or compliance officer.

As a different option of the same kind, an ombud may be given permission to act, in place of the visitor, while protecting the identity of the visitor. Many visitors will give permission for the ombud to provide information to relevant managers for action to be taken about the issue, if the ombud can offer a way of doing so without betraying the source of the information. Many ombuds agree to listen to visitors who do not give their names — that is, visitors who come in or call as Person X. Persons X (anonymous visitors) sometimes ask an ombud to get information where it needs to go<sup>3</sup>.

In yet a different option, the ombud may be given permission to instigate a “generic approach” to find and take care of the problem. As an example, suppose the visitor speaks of a serious potential safety problem. Could an apparently routine safety audit catch the relevant problem fast enough? Might the situation then be further improved by enhanced safety training? If so how can the relevant information get to the relevant Environmental Health and Safety office, to catch the problem, and provoke relevant action or training? For a financial issue, how can the relevant

information be provided, anonymously, to the relevant auditors? Could an appropriate new policy on unacceptable behavior, and a training program, serve to prevent unacceptable behavior on field trips?

Some visitors just need to learn the skills they need to act effectively on the spot, or to report a problem effectively. For example, after preparing with the ombud, a visitor may be willing to try a direct approach to a perceived problem person or to a compliance officer. This may happen even in cases where at the outset the visitor flatly refused to take action on his or her own. Sometimes this becomes easier after the visitor has painstakingly collected all the facts of the situation. Some visitors find a direct approach easier if they prepare. As an example, they might write out what they want to say: about facts, apparent damages or potential damage, and any possible remedy<sup>4</sup>.

Some visitors can find an “accompanying person” who shares their concerns, so they do not have to take action alone. Some “bystanders” may be willing to take action if they can do so together with other “bystanders.” Some visitors may be willing to come forward if they know they may be protected by credible policies against retaliation, or whistleblower protection laws. Some can be persuaded by the wish to protect other people: (*“Am I right that you would not want anyone else to be hurt as you describe yourself to have been hurt?”*) Some people may be willing to come forward about part of a problem, in the hopes and expectation that the whole problem will come to light.

The list above is obviously not exhaustive. If none of these ideas work, one need not give up. An ombud may decide that a situation is not an emergency, and find a way to say to the visitor, *“Obviously we both know that some action must be taken here — let’s just touch base every day until we find an option that seems right.”* Thinking about a situation collaboratively, in this way, will — often enough — turn up an acceptable option. On the other hand, an ombud must take care not to be “used” in a subtle fashion, by a visitor who does not wish to take action about something serious. This might for example, be some one who says, *“Well there is no urgency here; after all I can always come in to talk with you here in the ombuds office.”* In situations where there should be an on-going discussion, the ombuds will wish to take care to stay in close touch with the visitor until an acceptable solution is found.

Organizational ombudspeople are in a position of great trust and are required to try their best to live up to this trust<sup>5</sup>. Nowhere is this more important than with maintaining near-absolute confidentiality—and in understanding the need to breach confidentiality where there is no other reasonable option. Ombuds are designated as independent neutrals, and must try to be duly mindful of the interests of all who are stakeholders in a specific situation, including the employer. An ombud might — in a very few cases — have to breach confidentiality, though some organizational ombuds have never had to do so. In nearly all cases an ombud can develop other reasonable options.

## ENDNOTES

<sup>1</sup> When organizational ombuds formed professional associations, one of their first actions was to draft Codes of Ethics. Confidentiality was, from the first, considered essential for professional practice. Carole Trocchio of Southland Corporation drafted the first confidentiality provision for the (then) Corporate Ombudsman Association and a group of academic ombuds drafted the confidential provision for UCOA. The resultant Codes were melded when IOA was formed. Confidentiality is also included in Standard of Practice 3.1: The Ombudsman holds all communications with those seeking assistance in strict confidence and takes all reasonable steps to safeguard confidentiality, including the following:

The Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman Office, nor does the Ombudsman reveal information provided in confidence that could lead to the identification of any individual contacting the Ombudsman Office, without that individual's express permission, given in the course of informal discussions with the Ombudsman; the Ombudsman takes specific action related to an individual's issue only with the individual's express permission and only to the extent permitted, and even then at the sole discretion of the Ombudsman, unless such action can be taken in a way that safeguards the identity of the individual contacting the Ombudsman Office. The only exception to this privilege of confidentiality is where there appears to be imminent risk of serious harm, and where there is no other reasonable option. Whether this risk exists is a determination to be made by the Ombudsman.

<sup>2</sup> This question is discussed in depth in the IOA Ombud Booklet *Dealing with the Fear of Violence: What an Organizational Ombudsman Might Want to Know*

<sup>3</sup> In this respect the ombuds office is in the same role as a hot line. The ombuds practitioner may however be more helpful than a hot line can be, because the practitioner may be able to ask a number of questions to get more information.

<sup>4</sup> An example of an advisory to help in such preparation may be found at <http://web.mit.edu/ombud/self-help/drafting-letter.html>

<sup>5</sup> IOA Standard of Practice 4.8: The Ombudsman endeavors to be worthy of the trust placed in the Ombudsman Office.