

The Ombudsman

“The birth of a new institution”

Year report 2010

Dr. Nilda Arduin
Ombudsman

BUREAU OMBUDSMAN
SINT MAARTEN

E. Camile Richardson Street #13
Philipsburg, Sint Maarten.

Email: bureauombudsman@gmail.com

Telephone/Fax: 599-5421250

Cel: 599-5207378

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1. Foreword

On October 10, 2010 history was (again) made by major constitutional changes within the Dutch Kingdom; the dismantling of the Netherlands Antilles, and the emerging of Curaçao and Sint Maarten as autonomous partners within the Dutch Kingdom.

The new status introduced a new organizational structure of government, new responsibilities and accountability, new institutions, checks and balances, and not forgetting new challenges. The Ombudsman, a High Council of State, and her Bureau are one of the new institutions anchored in the Constitution.

I consider it a privilege to be appointed the first Ombudsman of St. Maarten, given the trust and opportunity to build this vital institution for our democracy from its foundation. The instruments governing the Ombudsman available on the eve of the new country are found in: articles 78 and 127 sections 3-5 of the State Regulation, popularly known as the Constitution (AB 2010 no.1); the National Ordinance Ombudsman (AB 2010 GT no. 20) and article 17 section 1 of the National Ordinance Constitutional Court (AB 2010 GT no. 29).

Armed with mentioned ordinances I embarked on executing my tasks provided for by law and established by Resolution of October 5, 2010, no. 849 of the Island Council of Sint Maarten, which confirms my appointment. Last mentioned document includes the following consideration: *“considering the urgency that an Ombudsman is nominated before the status of country within the kingdom of the Netherlands is obtained for Sint Maarten, such to guarantee that from the onset of the new status the execution of the regulations anchored in the Constitution regarding the Ombudsman and the Constitutional Court is safeguarded”*: a consideration not to be taken lightly.

Article 22 section 1 of the National Ordinance Ombudsman provides that the Ombudsman yearly presents a report of her activities to the Parliament. Notwithstanding the fact that the year 2010 represents just eighty-two (82) days in office, compliance with the rule of law is essential, more so for the Ombudsman, who is charged with promoting good governance and as guardian of our Constitution. Reporting on the activities of the first eighty-two days of the new institution is equally important for the archives of the country, recording the birth and history of the nation. In compliance with the law I herewith submit the annual report for 2010.

Dr. Nilda Arduin

2. Introduction

On October 10, 2010 the island territory of Sint Maarten acquired a new status of country within the Kingdom of the Netherlands. The State regulation, popularly known as the Constitution of Sint Maarten, is based on democratic principles as anchored in article 43 section 1 of the Charter of the Kingdom, which provides that each of the countries of the Dutch Kingdom should guarantee the proper execution of the basic human rights and freedoms, legal security and good governance.

The Trias Politica, another principle of a democracy, is also anchored in our Constitution, undergirding the checks and balances in our Constitutional State. Article 78 of the Constitution introduces the Institution of the Ombudsman, an independent body which task it is to handle complaints about improper conduct of government bodies.

New in the tradition of the Kingdom of the Netherlands is the Constitutional Court, which shall review all draft and approved laws and policies that are not yet in effect, and review their compatibility with the Constitution of Sint Maarten. While the regular Court will perform a more judicial review of the legality of National Ordinances, the Constitutional Court will do a more in depth review of the regulation, the procedural process and a review on the principles of good governance. A case may only be raised before the Constitutional Court by means of a written petition of the Ombudsman pleading incompatibility with the Constitution. If a National Ordinance is found not to be in keeping with the Constitution, the ordinance will not take effect, except for laws organizing matters of urgent interest. Uniformed Ordinances ("eenvormige landsverordeningen") are not subject to annulment by the Constitutional Court.

It should be noted that in the absence of rules, policies, procedures and interpretations of the law, work and procedural processes, infrastructure and office space not being available to the Ombudsman, nor a formation plan for the Bureau of the Ombudsman having been established as provided for by law to support the core tasks and duties of the Ombudsman, the 2010 activities were primarily limited to drafting plans and procedures required for a basic operation, and providing service mainly in the form of intervention, to citizens in urgent need of assistance.

This report is limited to a summary of the main activities executed during the eighty-two days in office in 2010, given the limited resources thus far available to the Bureau to assist and support the Ombudsman in executing the tasks and duties. A list of the standard documents drafted during these first weeks in office is provided in the appendices (*appendix 8*).

3. The Tasks of the Ombudsman

The Ombudsman is a High Council of State anchored in the Constitution. Pursuant to article 78 of the Constitution, based on complaints from citizens or on her own account, the Ombudsman investigates conduct of government bodies and other bodies charged with public authority. The Ombudsman investigates if a specific conduct of a government body is in compliance with the established criteria of good governance, in order to give a judgment, conclusion, and recommendations accordingly.

The Ombudsman has the authority to intervene, or during the investigation make proposals to the complainant and the government body to resolve the conflict which is the bases for the complaint.

The Constitution provides that the Ombudsman can also be charged with other tasks. Another task of the Ombudsman is regulated by the National Ordinance Constitutional Court (AB 2010 GT no. 29). Pursuant to article 17 section 1 of this Ordinance the Ombudsman can present a newly approved law or policy within six weeks of ratification to the Constitutional Court for (complete or partial) annulment, if deemed incompatible with the Constitution. Pending the case the law or policy presented for annulment will not take effect, unless there is an urgent reason justifying immediate application of the law.

The first Ombudsman was sworn in on October 10, 2010 during the official ceremony marking the birth of Country Sint Maarten. The Members of the Constitutional Court were sworn in on November 15, 2010 in a formal court session in the Court House in Philipsburg, St. Maarten. The speech prepared and presented by the Ombudsman on this occasion is attached as *appendix 2* to this report.

4. Formation of Bureau Ombudsman

Based on a generic “Functieboek” for the National Ombudsman, dated July 27, 2010, a Formation plan was drafted and discussed with the Quartermaster Mr. Roy Ferouge, the Government advisor Mr. Dennis Richardson and Mr. Luud Hakkens, Section Head Personnel, Organization and Policy. The final draft was presented to the Department of Legal Affairs for review¹, and submitted on November 23, 2010 to the President of Parliament for ratification in accordance with article 12 section 4 of the Ordinance Ombudsman.

By letter of November 26, 2010 signed by the Deputy Secretary General of the Ministry Tourism, Economic Affairs, Transport & Telecommunications (TEZVT) and Chairman of the Placement Committee the first vacancy of the Bureau was filled by the placement of Miss Patricia M. Philips at the Bureau Ombudsman as Administrative Advisor cq. Secretary General/Policy Advisor as established in the Formation Plan.

On December 20 and 21, 2010 the first round of interviews were held to select one (1) Complaint Officer and an All-round Administrative worker. The Selection Committee consisted of the Vice-Chair of the Advisory Council, the Secretary General/Advisor of the Ombudsman and the Ombudsman. One week later a second round of interviews was held; after which the additional staff was selected from the twelve candidates interviewed.

Vacancies were filled from applications reaching the Personnel and Organization Department of government via its website, and from applications sent directly to the Ombudsman.

¹ *Approximately one month later the Ombudsman was informed that Legal Affairs was not charged with review of documents on behalf of Parliament, reason why the document was not considered.*

5. CAROA

In consultation with the Quartermaster Roy Ferouge and Government advisor Dennis Richardson it was decided that the Ombudsman would advance the costs to attend the Sixth Biennial CAROA Conference to be held on Curaçao, and register as a Member of this regional Ombudsman organization.

Attendance to the Sixth Biennial CAROA Conference on Curaçao from October 31st to November 5th 2010 was important to establish contacts and relationships regionally, as well as internationally, and provided more insight regarding the role of the Ombudsman. During the Conference the Ombudsman registered as a Member of CAROA by paying the annual membership fee for July 2010 - June 2011.

The Caribbean Ombudsman Association (CAROA) is the regional organization for Ombudsman, which aims to strengthen the offices of Ombudsman in the Caribbean so as to foster co-operative work; to support the promotion and protection of Human Rights Agencies in the Caribbean and to develop governmental and non-governmental institutions relating to Human Right. The Association further encourages the development of the institution of the Ombudsman, through the development of professionalism in the discharge of the duties of Ombudsman, maintaining the integrity of the role of Ombudsman, facilitating the exchange of experiences and information, sponsoring training and educational programs, encouraging and supporting study and research. The Association collects, stores and disseminates information and research about the institution of Ombudsman and plans, arranges and supervises periodic Caribbean Ombudsman Conferences.

The Ombudsman of Sint Maarten opted to host the next Biennial Conference on Sint Maarten in 2012. During the Sixth Biennial Conference the Ombudsman was introduced to the IOI, the International Ombudsman Institute, and encouraged to register Sint Maarten to become a member.

At the Conference the Ombudsman was introduced to the National Ombudsman of The Netherlands, Dr. Alex F.M. Brenninkmeijer, as well as the Executive Officer of the "Gemeentelijke Ombudsman" of Amsterdam and surroundings, Petra Visscher. A promise was made for further contact, cooperation, exchange and support to the Ombudsman of Sint Maarten in establishing the institution.

6. Official Courtesy visits

Official Courtesy visits were extended to the following government officials and the honorable judge charged with administrative cases.

- The Honorable Prime Minister Mrs. Sarah Wescot-Williams **(November 2010).**
- The Honorable Minister Mr. Roland Duncan (December 2, 2010)
- The Honorable Minister Mrs. Maria Buncamper-Molanus (December 2, 2010)
- The Honorable Minister Mr. Franklin Meyers (December 2, 2010)
- The Honorable Minister Mr. Hiro Shigemoto (December 6, 2010)
- The Honorable Minister Mr. Theodore Heyliger (December 6, 2010)
- The Honorable Minister Ms. Rhoda Arrindell (December 8, 2010)

The vision of the Ombudsman regarding the function, and the operation of the Bureau were discussed, and the cooperation of the Ministers was sought to secure cooperation from the administration in the execution of the task of the Ombudsman.

Each Minister was requested to designate a contact person to liaise with the Bureau, and provide the Ombudsman with the organizational structure, the regulations and policies of their Ministries, a list of the entities as well as Appeal Committees attached to respective Ministries.

The matter of access to newly ratified laws for the execution of the task of the Ombudsman regulated in article 17 section 1 of the National Ordinance Constitutional Court was discussed with the Prime Minister. The Ombudsman would be informed regarding the manner by which immediate access to all ratified laws would be organized.

- The Honorable President of Parliament drs. Gracita Arrindell (November 25, 2010)

A list of all ratified Organic laws of Country Sint Maarten was presented to the Ombudsman by the President of Parliament, as well as the pertinent ordinances in digital form (USB stick).

- The Honorable Judge mr. Rene van Veen, charged with the administration of justice in administrative cases (December 7, 2010)

Various aspects of administrative law were discussed, in particular the application of article 2 section 1 of the National Ordinance on Administrative Law (the 'LAR'), which law is both relevant regarding the competence of the Administrative Court and the Ombudsman. The matter of independent (private) government bodies was elaborated on; a follow up meeting was held on the last mentioned topic.

7. Other meetings

- With BAK (“Binnenlandse Aangelegenheden en Koninkrijksrelaties”): (Steering Committee). Meetings pertaining to the IVB (Institutionele Versterking en Bestuurskracht) Project High Councils of State (November 16 and December 14, 2010).

An Agreement to execute the IVB Project pertaining to the High Councils of State and the SER was signed between USONA and government on December 20th 2010.

A project leader (“For a Change”, managed by Pyt Lucas) was selected in accordance with USONA requirements to coordinate the execution of the IVB-Project.

- Various meetings with the Vice-Chair of the Advisory Council, the Chair and (prospective) Secretary General of the General Audit Chamber and the Ombudsman were held regarding establishing of the High Councils of State.
- Follow up meeting held on December 29, 2010 with the Prime Minister, the Vice-Chair of the Advisory Council, a Board Member of the General Audit Chamber, and the Ombudsman regarding: the budget, challenges faced by the High Councils of State, management of finances, appointment of staff and the execution of the IVB-Project.
- Meetings with General and Internal Affairs (DIV) regarding official registering of correspondence to government bodies, an Archive plan for Bureau Ombudsman, and more.

8. Preparatory Operational Meetings

Preparatory operational meetings were held regarding the following:

- Web design and available options (with webmaster Communication Department (GIS) Ms. Jeanella Mardenborough).
- Consultation on Information Communication Technology (ICT) planning and advice (Ms. Caren Matthew of automation).
- Graphic design for web and logo design (private providers).
- Introduction meeting with Project leader IVB- Project regarding procedures, project priorities, and more.
- Facility Services regarding office space (Mr. Rick Martina).
- Various meetings with the Owner and the contractor of the prospective office space regarding requirements and features to accommodate Bureau Ombudsman.
- Elaborate meetings with office furniture and equipment supplier and preparation of floor plan.
- Attendance to the UTS Workshop on available ICT options (Westin Hotel).

9. International Relations

At the CAROA conference on Curaçao arrangements were made for continued contact regarding possible support, cooperation, and or exchange with in particular:

- The CAROA Board;
- Policy makers and scholars on Government Administration and Management;
- The Ombudsman of Bermuda and Regional VP of International Ombudsman Institute, Ms. Arlene Brock;
- The Ombudsman of Curaçao, Ms. Alba Martijn;
- The National Ombudsman of the Netherlands, Mr. Alex F.M. Brenninkmeijer;
- The Executive Officer of the Municipal Ombudsman of Amsterdam, Almere Landsmeer, Oostzaan, Waterland Weesp, Zaanstad, Ms. Petra Visscher;
- Through Dutch Management Consultancy contact was later established with a representative of 'Bureau Integriteit Amsterdam', Bart Hofstee, Adviseur Bureau Integriteit.

At the installation of the Constitutional Court of Sint Maarten contact was establish for support with:

- 'Directiesecretaris Bestuursrechtspraak Raad van Staat' of the Netherlands, Ms. Annemarie J. Verbeek.

As a result of this connection contact was established with:

- Former National Ombudsman of The Netherlands, Mr. Marten Oosting.

10. Documents produced for the operation of Bureau Ombudsman

In preparation for the operation of the Bureau of the Ombudsman various documents were produced:

- Formation plan, establishing quantity and quality of the Bureau personnel (*appendix 1*);
- Presentation for the occasion of the installation of the Constitutional Court (*appendix 2*);
- Interview questionnaires for selection of staff (*appendix 3*);
- Draft Document outlining the general tasks, work procedures and formation of the Bureau, including an organizational chart of the Bureau (*appendix 4*);
- Draft Strategic plan 2011 (*appendix 5*);
- Budget Bureau Ombudsman 2011 (USONA and Government) (*appendix 6*);
- Draft Archive Plan (*appendix 7*);
- Various standard documents to facilitate the filing and tracking of complaints(*appendix 8*);
- Draft Administrative procedures for) the Bureau Ombudsman (*appendix 9*);

11. Cases handled

In the Introduction to this report it was established that due to the absence of rules, policies, procedures and interpretations of the law, work and procedural processes, infrastructure, and office space nor a formation plan for the Bureau of the Ombudsman having been established to support the core tasks and duties of the Ombudsman as provided for by law, the 2010 activities were primarily limited to drafting of plans and procedures required for the basic operation of the organization. Handling of complaints was both impossible and not responsible under those circumstances.

The public at large, including media and legal professionals, would not understand that there was an Ombudsman provided for by law and appointed, but not operational as of 10-10-10. Emails from citizens and professionals inquiring about actions from the Ombudsman in the case which was termed by the media as the Buncamper-saga, and demands to handle complaints without form or format established by law, are evident to this.

Being a High Council of State, a new entity in the community, demands a thorough and professional information campaign regarding the competence and quality of service required to operate such an institution.

Due to the many phone calls and public “calls” for action by the Ombudsman some interventions were done through phone calls to a few government agencies, such as SVB and immigration, to assist citizens to acquire information.

By letter dated December 17, 2010 to the Director of the “Stichting Kadaster en Hypotheekwezen” the Ombudsman started an investigation and inquiries were made regarding the Public Registers and accessibility of the office to the public on official holidays as a result of public statements made by the Director in the media. These statements triggered reactions and concerns among the public. While inquiries initiated by the Ombudsman triggered negative reactions on the side of Kadaster in the media regarding the authority of the Ombudsman.

A legal opinion dated December 21, 2010 (*appendix 10*) was received from the Chairman of the Corporate Governance Committee of Sint Maarten Bar Association regarding article 123 of the Constitution in relation to the National Ordinance Prosecution of Politicians (read: “persons in authority”). The legal opinion reported a plea for amendment of ‘feudal’ legislation in the Sint Maarten Constitution and the mentioned National Ordinance.

The plea for taking corrective measures was not considered by the Ombudsman, first and foremost because of the timing of the written plea. Apart from the status of the laws of the new country, established by transitional law, article 127 section 4 of the Constitution provides for a six weeks period after ratification of a law for the Ombudsman to submit the law or part thereof, for annulment to the Constitutional Court; this period had since expired. The authority of the Ombudsman to submit an ordinance for annulment is limited to ordinance that has not been published. This matter also found its way to the media.

12. Information Campaign

Educating the public, governmental officials and civil servants about the existence and function of the Bureau is vital to the success of the Ombudsman institution.

An informal public information campaign regarding the function, role and tasks of the Ombudsman and her Bureau was organized with appearances on talk shows such as Lloyd Richardson, Oral Gibbs and the Law in Focus.

On December 16, 2010 a presentation was held for the Sint Maarten Mid Isle Rotary Club.

The Ombudsman also made herself regularly available to the media to keep the public informed about the progress of the Bureau and what the community could expect from the new institution.

Publicity is important to support the activities of the Ombudsman; a professional information campaign, including brochures, webpage, posters and more is part of the strategic plan 2011.

13. Conclusion

The Ombudsman supported by a Bureau, is authorized to receive and investigate complaints, and entertain questions about alleged acts, omissions and improprieties, as well as to investigate systemic problems within the jurisdiction defined by law.

Responsibility includes, addressing and examining complaints and issues independently and impartially, and thereafter facilitating efforts to mitigate, mediate and resolve complaints, concerns and conflicts among citizens and government agencies, and report accordingly to Parliament and the public. The Ombudsman provides the citizens additional protection against action or non-action by government, promotes structural democracy through good governance by government bodies.

Effectiveness of the Ombudsman largely depends on its independence, impartiality and maintaining confidentiality in conducting inquiries, research and record keeping; structural independence is the foundation upon which the Bureau Ombudsman is built. Obtaining the proper tools, infrastructure, human resources and independent access to funds are therefore paramount to a successful operation of the Ombudsman to execute her duty timely and effectively. Prompt execution of the IVB-Project through USONA and timely release of budgeted monies allocated for the operation of the Ombudsman is a condition sine qua non to build a respectable foundation for this High Council of State; an unstable foundation will compromise the institution in becoming an authority which will gain the respect, confidence and trust of both people and the government.

It therefore behooves Parliament to ensure that the Ombudsman is provided all required facilities in keeping with article 12 section 2 of the National Ordinance Ombudsman.

Appendices

- 1 Formation plan, establishing quantity and quality of the Bureau personnel.
- 2 Presentation for the occasion of the installation of the Constitutional Court.
- 3 Interview questionnaires for selection of staff.
- 4 Draft document outlining the general tasks, work procedures and formation of the Bureau and organizational chart.
- 5 Draft Strategic plan 2011.
- 6 Budgets Bureau Ombudsman 2011 (USONA and Government).
- 7 Draft Archive Plan.
- 8 List of standard documents to facilitate the filing and tracking of complaints.
- 9 Administrative procedures for the Bureau Ombudsman.
- 10 Legal Opinion of the Bar Association Sint Maarten, dated December 21, 2010.