

2018

YEAR REPORT



OMBUDSMAN

SINT MAARTEN

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Foreword



The Ombudsman entered into the year 2018 with the motto ‘Shifting Gears’. The theme for the year signifies moving forward and accelerating ‘our game’ with focus on the recovery and rebuilding of Sint Maarten in the aftermath of Hurricanes Irma and Maria in September 2017.

A key element of the shifting gears theme has been addressing the continuation of various aspects of the (after) effects of the hurricanes through systemic or own motion investigations.

As a result three (3) systemic investigations were concluded in 2018 and recommendations issued to government, namely Disaster Risk Reduction and Management (DRR), Dismissal Advisory Committee (DAC) and Rent Tribunal (RT). A fourth systemic investigation regarding the Procurement Management Process at the Princess Juliana International Airport Operating Company (PJIAE N.V.) was initiated at the level of the functionally responsible government body - the Minister of Tourism, Economic Affairs, Transport and Telecommunication (TEATT) - during the fourth quarter of 2018.

In the aftermath of the hurricanes it was considered important to continue to promote and create awareness that the institution is still available to the public and has expanded its role to address the needs and concerns of the people in general. While in preceding years an annual open house was organized, a different approach was utilized to promote awareness of the institution with emphasis amongst the youth. Consequently, a School Ombudsman project was launched to which four academic secondary schools on the island participated.

The project culminated in public presentations by the schools in the form of a competition; the Sint Maarten Academy was selected as the overall winner of the first School Ombudsman project.

Giving further content to the Ombudsmen of the Kingdom platform, the Ombudsman of Sint Maarten and the Ombudsman of the Netherlands representing the BES islands, held meetings with stakeholders in June 2018 regarding the ongoing hurricane recovery and the Trust Fund. A joint letter was issued to Prime Ministers Leona Romeo-Marlin of Sint Maarten and Mark Rutte of the Netherlands, expressing serious concerns, and urging both heads of government to speed up the recovery process involving the average citizens. The Ombudsmen concluded that the recovery needs to be tackled with greater speed in order to protect the citizens of Sint Maarten in the 2018 hurricane season that had already started.

In 2018 the Ombudsman, in her capacity as Regional President for the Caribbean and Latin America on the International Ombudsman institute (IOI) board, attended board meetings in Canada and Belgium. Special attention was requested and subsequently recognized for the threats Ombudsmen were or could be faced with as a result of natural disasters in the region.



In 2018 the IOI celebrated its 40th anniversary. To commemorate this occasion a side event was organized at the United Nations Headquarters in New York. The presence of the Ombudsman on behalf of the Caribbean and Latin American region, provided much needed exposure to the region.

In the month of October the Ombudsman participated in a National Human Rights Commission (NHRC) Conference held in Mexico, discussing the Sustainable Development Goals (SDG’s) of Agenda 2030.

Following the NHRC Conference the Ombudsman chaired a regional meeting fostering closer relationships between Caribbean and Latin American Ombudsman Institutions.

As discussed and agreed upon when conditionally accepting a second term in office in September 2017, due to the impact of Hurricane Irma on the country, Ombudsman Dr. Nilda Arduin requested Parliament in August 2018 to relieve her from her duties effective December 31, 2018. The honorable dismissal as requested, marked the end of the tenure of Sint Maarten’s first Ombudsman. The departure left a well-established institute of the Ombudsman of Sint Maarten, developed pursuant to the Strategic Plan 2011- 2021. The steps of development are duly described in each year report: 2010 ‘the birth of an Institution’; 2011 ‘building a solid foundation’; 2012 ‘focus on the building blocks’; 2013 ‘completion, pending finalizing the ‘punch list’; 2014 ‘delivery, the Ombudsman institution Sint Maarten established’; 2015 ; ‘stepping up our game’; 2016 ‘gearing towards excellence’ and 2017 ‘gearing toward excellence continued.’

On December 14, 2018 the undersigned was sworn in, and the oath taken as the new Ombudsman of Sint Maarten effective January 1, 2019. I pledge to continue to build this important institution and continue its mission as the protector of the rights of the people and the guardian of the Constitution of Sint Maarten.

It is therefore with great pleasure that I hereby present the Year Report 2018 to the Parliament and the people of Sint Maarten.

A handwritten signature in blue ink, appearing to read 'G. Mossel', written over a faint circular stamp.

Gwendolien Mossel, LL.M
Ombudsman Sint Maarten



Executive Summary

I. Introduction

2018 marked a year of unprecedented challenges and transition for the Ombudsman Institute of Sint Maarten. The onslaught of the hurricanes of September 2017 required not only new approaches to address the concerns of the people, but also provided the Ombudsman opportunities to revisit its role and remain relevant to government and the people. In addition to the systemic investigation regarding disaster preparedness which was completed in 2018, the Ombudsman of Sint Maarten finalized two (2) other systemic investigations, namely the Dismissal Advisory Committee and the Rent Tribunal. All three investigations touched on the various facets of the impact the hurricanes of September 2017 had, and continues to have, on the community of Sint Maarten.

II. Activities

The Ombudsman continued to strengthen its base by meeting and seeking support on international level. Attending regional and IOI Board of Directors meetings in Toronto, as well as the celebrations of the 40th Anniversary of IOI at the office of the United Nations in New York and a Conference in Brussel, provided ample opportunities to learn more about complaint handling under unusual circumstances. Other activities during 2018 included: training of staff of the Bureau Ombudsman on report writing, facilitated by the Ombudsman; attendance to the Hurricane Preparedness Conference organized by the Prime Minister of Sint Maarten; a Procurement symposium organized by the World Bank; a meeting with Economic Commission for Latin American and the Caribbean (ECLAC) regarding the implementation of Sustainable Development Goals, and a symposium on Climate Change organized by the Governor of Sint Maarten.

III. Complaints handled

After experiencing a decrease in new complaints in 2017, the Ombudsman of Sint Maarten saw an increase in 2018. A total of 76 new complaints were registered in 2018. The majority of the complaints (24%) were against the Ministry of Justice, followed by the Ministry of Public Health, Social Development and Labor/VSA (14.5 %). The Ministry of Justice shows a significant decrease in complaints against the police department, mainly attributed to properly following up on recommendations issued by the Ombudsman. Requests for residence permits, HR related and lack of proper services top the list of complaints filed against the Ministry of Justice. The highest number of complaints filed were against the Immigration & Naturalization Department regarding requests for residence permits. Non-response to the investigations continues to be a great concern. The Ombudsman registered an increase of complaints filed against the Ministries of General Affairs (8%), TEATT (11%) and VSA (14%). The amount of complaints filed against the Ministry of VROMI remained the same (11%), while the Ministry of Finance experienced a slight decrease (4%).

IV. Systemic Investigations

Pursuant to the National Ordinance Ombudsman the Ombudsman is authorized to initiate an investigation on its own initiative when there are indications or suspicion that certain administrative tasks are structurally hampered, or for whatever reason not properly executed. In this chapter three systemic investigations are discussed, namely: Dismissal Advisory Committee (DAC), Rent Tribunal and Procurement Management Policy PJIAE N.V.

V. Constitutional Court

Though there were no new cases presented by the Ombudsman to the Constitutional Court in 2018, it is noteworthy to mention that the decision of the Court dated 7 July 2016 (Case 2015/1), squashing the National Ordinance Integrity Chamber (AB 2015, no. 18), served government and Parliament well in response to one of the conditions stated by the government of the Netherlands to provide Sint Maarten extraordinary funds for reconstruction and recovery in the aftermath of the hurricanes in September 2017. Sint Maarten was required to cooperate in establishing an Integrity Chamber for which a new National Ordinance was required. The preconditions, noted obscurities and suggestions established in the mentioned decision of the Constitutional Court, provided government and Parliament a comprehensive guideline to produce an adequate Ordinance, protecting procedural rights of persons under investigation as well as third parties, guaranteeing fair play and safeguarding the fundamental human rights of persons involved.

VI. Financial Reporting

The total budget provided to the Ombudsman in 2018 amounted to Nafl. 1.535.294,00. Based on the unaudited financial report for the year 2018, a total of Nafl. 1.430.400,06 was spent.

VII. Appendices

Appendix 1: Balance Sheet 2018; Appendix 2: Financial Report 2018.

I. Introduction

2018 marked a year of unprecedented challenges and transition for the Ombudsman Institute of Sint Maarten. The onslaught of the hurricanes of September 2017 required not only new approaches to address the concerns of the people, but also provided the Ombudsman opportunities to revisit its role and remain relevant to government and the people. It has been a year of actively calling on the support of its regional and international network to meet its needs to serve the people of Sint Maarten in the midst of despair, as well as securing continuity of the institute in preparation of a new Ombudsman.

The formation of a new government as a result of Parliamentary Elections held in the aftermath of the hurricanes in February 2018 was yet another challenge the Ombudsman was faced with; information to conclude the three Systemic investigations initiated in 2017 was delayed. A fourth Systemic investigation regarding the procurement procedures and management at the government owned company, Princess Juliana International Airport (PJIAE), initiated at the level of the functionally responsible Minister of TEATT appeared to be misunderstood, resulting in inadequate responses being provided by the Ministry. Rather than embracing the query from the Ombudsman and responding to questions posed as a tool and guide to evaluate the procurement process, particularly in light of the reconstruction of the airport, the investigation was met with resistance from the Minister of TEATT, failing to underscore the merits of the investigation and provide clarity. In doing so dismissing international norms and standards pertaining to transparency of procurement procedures required from government and government agencies.

The Ombudsman embarked on a project geared towards the academic high schools on Sint Maarten. The project entitled “ The Best School Ombudsman”, catered to high school students in the pre-exam classes. The aim of the project was to educate the students about the role of the Ombudsman as well as to increase the awareness of the institution. The project culminated in competition whereby the students were judged on their participation, presentation and overall understanding of the role of the Ombudsman.

In this Year Report a summary of the main activities of 2018 will be provided (chapter 2), followed by statistics of complaints handled (chapter 3) and the conclusions and recommendations issued in two systemic investigations closed in 2018, as well as reporting on a new own motion investigation started in 2018 (chapter 4). Though no new law was presented to the Constitutional Court for review in 2018, the importance of constitutional review will be highlighted (chapter 5). Chapter 6 provides financial reporting of the institution pursuant to the National Ordinance Accountability, followed by an overview of appendices (chapter 7).

II Activities

Learning about the overall concerns and approaches offering relief and assistance with the recovery of the island through courtesy visits to the Ombudsman by various agencies that visited the island, - such as the Head of the Dutch Civil Mission, ‘*Vereniging van Nederlandse Gemeenten*’ (VNG), Netherlands Red Cross, the quartermasters of the Integrity Chamber, the Dutch representative Trust Fund Steering Committee and the local interim Recovery Committee Chair -, the Ombudsman followed-up on the information gathered by a joint mission with the National Ombudsman of the Netherlands. Visits to the President of Parliament, the Prime Minister of Sint Maarten, the Dutch representative stationed on Sint Maarten, and talks with NGO’s revealed that the plight of the ordinary citizens got lost in the rather complicated web of procedures established for Sint Maarten to access the recovery funds. As such a joint letter was sent to both Prime Ministers of the Netherlands and Sint Maarten, expressing concerns regarding the findings during the joint mission with the Ombudsman of the Netherlands. Due attention for same was requested from both governments.

In the meantime the Ombudsman continued to strengthen its base by meeting and seeking support on international level. Attending regional and IOI Board of Directors meetings in Toronto, as well as the celebrations of the 40th Anniversary of IOI at the office of the United Nations in New York and a Conference in Brussel, provided ample opportunities to learn more about complaint handling under unusual circumstances. The challenges faced by an Ombudsman institute as a result of a natural disaster were recognized as a circumstance which places the Ombudsman under threat. This viewpoint was included in the Strategic Plan of IOI as an area of consideration and required attention. Attendance to a Conference of the National Human Rights Commission of Mexico and subsequent chairing of a meeting of the Caribbean and Latin America region provided the Ombudsman various tools to deal with the supervision of progress made on Sint Maarten with regard to the Sustainable Development Goals established by the Agenda 2030.

Other activities during 2018 included: training of staff of the Bureau Ombudsman on report writing, facilitated by the Ombudsman; attendance to the Hurricane Preparedness Conference organized by the Prime Minister of Sint Maarten; a Procurement symposium organized by the World Bank; a meeting with Economic Commission for Latin American and the Caribbean (ECLAC) regarding the implementation of Sustainable Development Goals, and a symposium on Climate Change organized by the Governor of Sint Maarten.

In line with commitments made to the Presidium of Parliament by conditionally accepting a second term in office, the transition for the appointment of a new Ombudsman for Sint Maarten took center stage. As such the Legal Advisor of the Bureau Ombudsman/Substitute Ombudsman was charged with additional responsibilities, and represented the Ombudsman at the celebration of the fifteenth Anniversary of the Ombudsman Institute of Curaçao, presented the position of the Ombudsman at a Mediation Conference organized by VNG, attended an Own Motion Conference in Belfast, paid an orientation visit to the offices of the National Ombudsman in the Netherlands, and lead the School Ombudsman Project, which was organized to bring about awareness of the institute among the youth, organized and lead a training regarding propriety

required in serving the public for SZV staff. By decision of Parliament dated 7 November 2018 the new Ombudsman for Sint Maarten was appointed and took the oath on 14 December 2018.

2.1 Pictorial



Report Writing Training Staff BOBM



High Councils Sports Day



SZV Staff Training at Bureau Ombudsman



IOI Directors Meeting with Governor
Of Toronto



World Bank Procurement



IOI Board Gathering at UN
Headquarters New York



School Ombudsman Project (Training session)



Winners School Ombudsman Project
Ombudsman Project (Sint Maarten Academy)



*Joint Meeting with National Ombudsman Netherlands/
BES Representative White & Yellow Cross Foundation*



*Ombudsman Dr. Nilda Arduin at
the United Nations Headquarters
IOI 40th Anniversary Meeting*



Quarter Masters Integrity Chamber



Visit Netherlands Red Cross



*Dutch Representative & Representative Steering Committee
World Bank Trust Fund*



*Courtesy Information Session
with New Members Parliament*



World Bank Representatives



Courtesy visit new Public Prosecutor Sint Maarten Mr. Jeroen Steenbrink



*National Human Rights Commission
2030 Agenda
Conference in Mexico*



Swearing in Ceremony New Ombudsman



New Ombudsman



*Presentation 2017 Year Report to Prime Minister
Leona Marlin-Romeo*



*Presentation Year Report 2017 to President of
Parliament Sarah Wescot-Williams*



Staff of Bureau Ombudsman 2018

III. Complaints handled

Still struggling with the aftermath of the hurricanes of September 2017 people were rather reserved and reluctant to formally file their complaints with the Ombudsman, which often appeared to be of a general nature involving housing, need for assistance to repair roofs, dismissal and financial aid. Rather than filing a complaint, people often expressed their concerns informally to the Ombudsman and or staff, while acknowledging and or expressing confidence that the Ombudsman would bring the plight of the people to the attention of government through among others the ongoing systemic investigations.

Parliament and the public were kept informed about the steps taken regarding the systemic investigations. The Bureau registered a remarkable increase of concerns at the Information Window in 2018 (414 compared to 267 in 2017), which is reflected in in fig.8.

Statistics

A total of 76 new complaints were registered in 2018, of which 22 (28.9 %) were closed through intervention and 18.4% (14 cases) through a full investigation. Five (5) cases were put on hold upon request of the Ministry of Justice until January 2019 and 35 brought over for further investigation in 2019. While 15.8 % of the complaints filed against government departments were related to personnel affairs/human resources, the Ministry of Justice (still) topped the list with the overall most registered complaints (23.9 %), followed by Public Health, Social Development and Labor/VSA (14.5 %). The Ministry of Justice shows a significant decrease in complaints against the police department, mainly attributed to properly following up on recommendations issued by the Ombudsman. Requests for residence permits, HR related and lack of proper services top the list of complaints filed against the Ministry of Justice. The highest number of complaints filed was against the Immigration & Naturalization Department regarding requests for residence permits. Non-response to the investigations continues to be a great concern. The Ombudsman registered an increase of complaints filed against the Ministries of General Affairs, TEATT and VSA.

	Year	
	2018	2017
TOTAL COMPLAINTS SUBMITTED	76	70
Complaints closed in year	14	37
Closed through intervention	22	20
Complaints on hold	5	5
Open complaints	35	8

Fig 1: New complaints registered in 2018 & 2017

Approximately twenty-six percent (26.3 %) of the complaints in 2018 were filed against private entities with public authority (*ZBO's*), of which 65 % were against SZV, mainly pertaining to

medical assistance. SZV continues however to promptly respond and cooperate with investigations initiated by the Ombudsman, and follows up on recommendations.

It should be noted that since the Ombudsman formally established competence to investigate complaints against the behavior of *ZBO's* in 2017, there has been a decrease of complaints against the behavior of private entities with public authority in 2018. Notwithstanding an elaborate report drafted by the Ombudsman (*‘Rechtszekerheid en Betrouwbaarheid gegevens Kadaster en Openbare registers’*) in 2012, which was discussed on numerous occasions with both government and Parliament, 15 % of the complaints filed against *ZBO's* are against Kadaster, representing issues covered by mentioned report.

	Year	
	2018	2017
MINISTRIES		
General affairs	6	4
Finance	3	3
Education, Culture Youth Affairs and Sports	2	6
Justice	18	17
Tourism, Economic Affairs, Transportation and Telecommunication	8	6
Public Housing, Spatial Planning, Environment and Infrastructure	8	8
Public Health, Social Development and Labor	11	7
ZBO	2018	2017
Algemeen Pensioenfonds St.Maarten (APS)	1	1
Central Bank of Curaçao and Sint Maarten	0	1
Court of Guardianship	0	2
Postal Services St. Maarten	0	4
Rental Committee	1	2
Sociale Ziektekosten Verzekering (SZV)	13	7
Stichting Kadaster & Hypotheekwezen	3	1
SXM Housing & Dev. Foundation	0	1
Stichting Katholieke Onderwijs St. Maarten	1	0
Princess Juliana International Airport	1	0
Total	76	70

Fig 2: Incoming complaints registered per ministry in 2018 compared to 2017

The Ombudsman noted a considerable increase of the *standard of adequate organization of service* not being observed by the various departments, while regrettfully violation of the *standards of active and adequate information provision* and *promptness* remain high in 2018. The standards of *fair play*, providing *legal certainty* and proper *reason* in dealing with the public require due attention. Citizens may expect at all times to be treated correct by the government administration.

Ministries

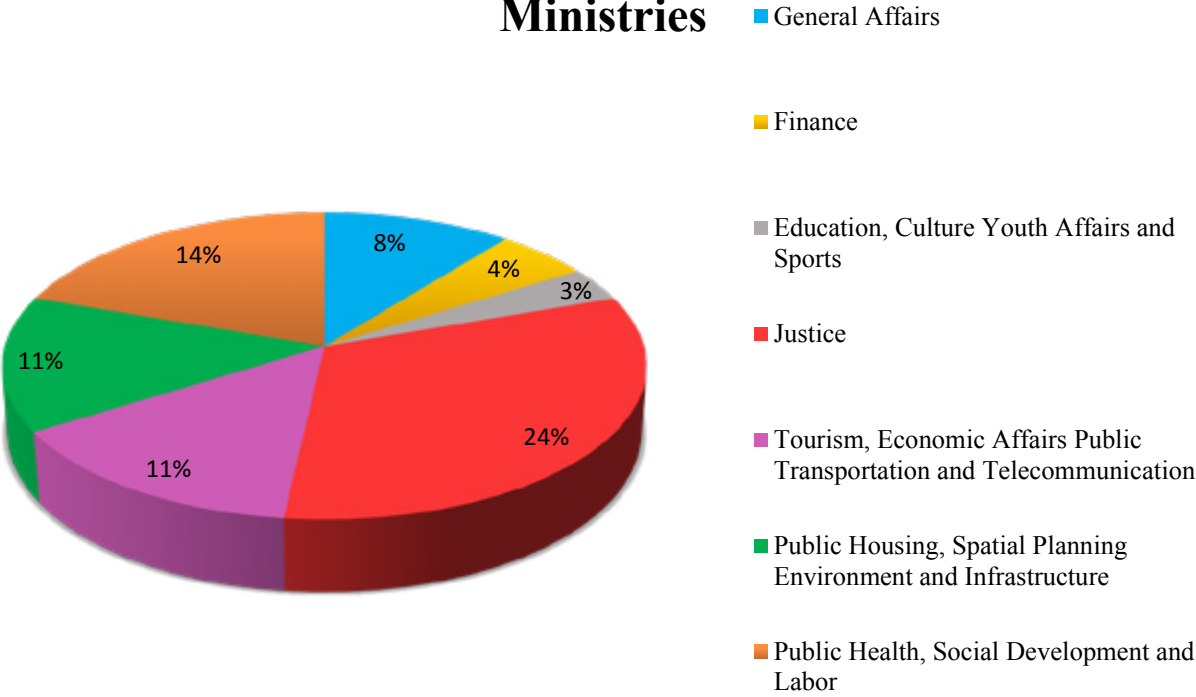


Fig 3: Pie chart complaints filed per Ministry in 2018

ZBO's

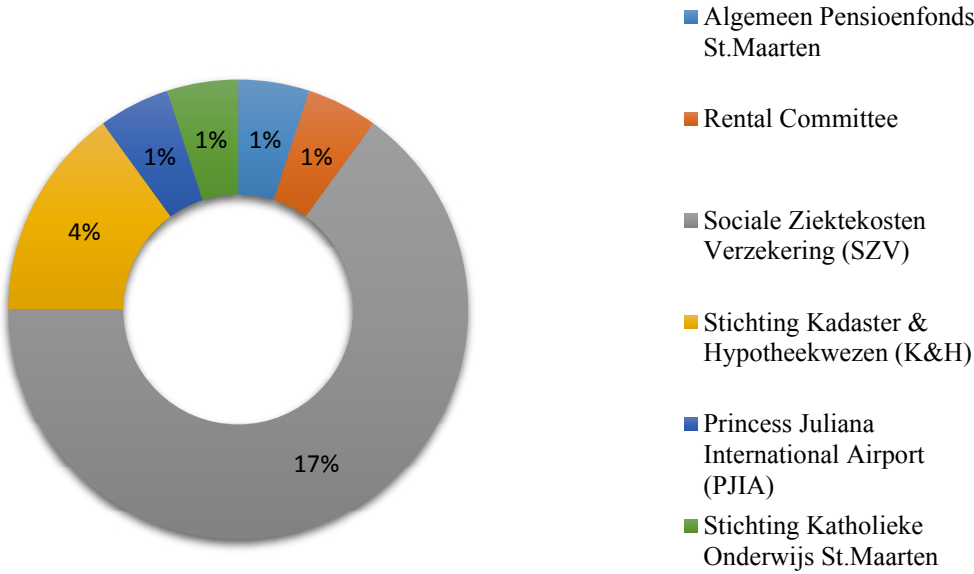


Fig 4: Donut chart complaints filed per ZBO's in 2018



Complaint Topics 2018 vs 2017

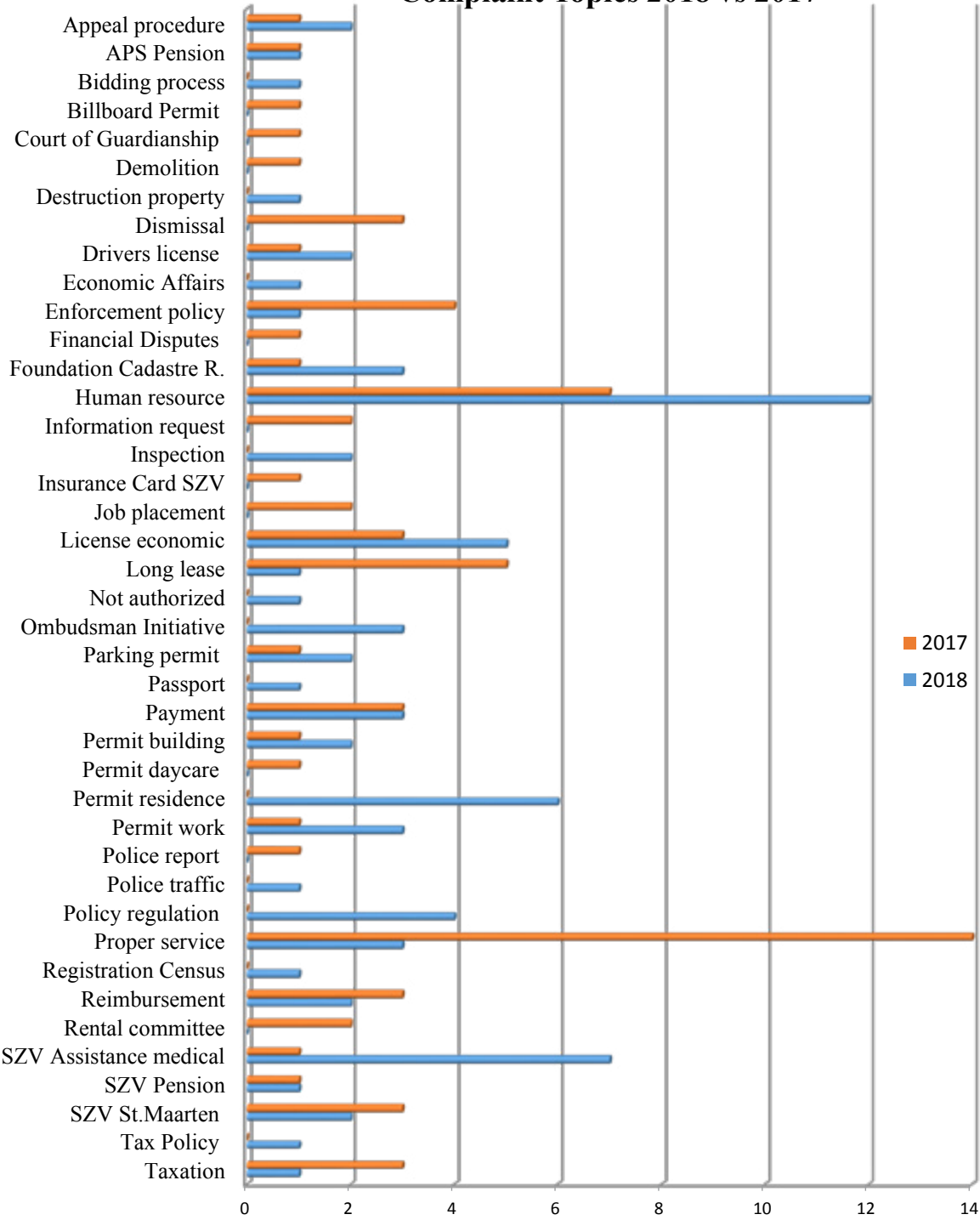


Fig 5: Chart of complaint topics filed in 2018 vs 2017



Addressing complaints since 2017 first through a simple intervention by the Ombudsman rather than initiating a full investigation, resulted in greater efficiency and more cases being closed per year. The number of open complaints at the end of 2018 predominantly stem from the failure of the Departments to cooperate and respond within a reasonable timeframe to the investigation of the Ombudsman. The response time of the Ministries to complaints filed by the people should be greatly improved, more so as it relates to the processing of formal applications and responding to letters or grievances submitted by the general public.

Standards of proper conduct	2018	2017
Active and adequate information provision	10	12
Adequate organization of services	13	4
Cooperation	1	1
Correct treatment	2	1
Fair play	4	1
Legal certainty	3	1
Legitimate expectation	0	1
Proportionality	0	1
Promptness	15	11
Reasons	3	1
Reasonableness	0	1

Fig 6: Comparison standards of proper conduct violated in 2018 vs 2017

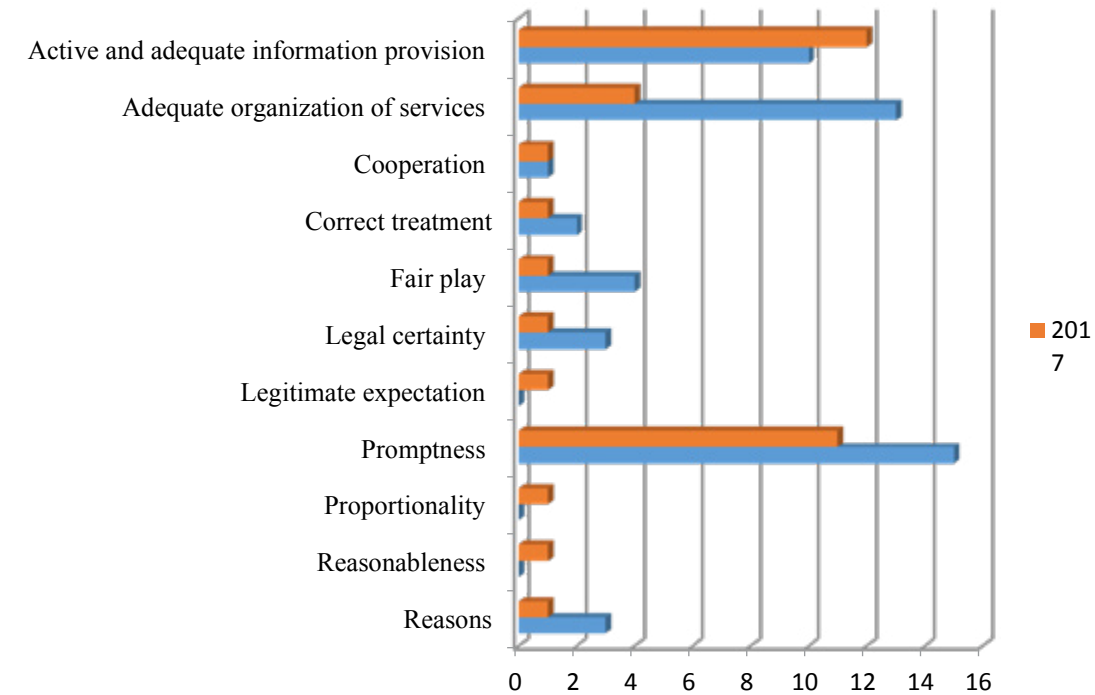


Fig.7: Graph comparison standards of proper conduct violated in 2018 vs 2017

Information Window per topic 2018

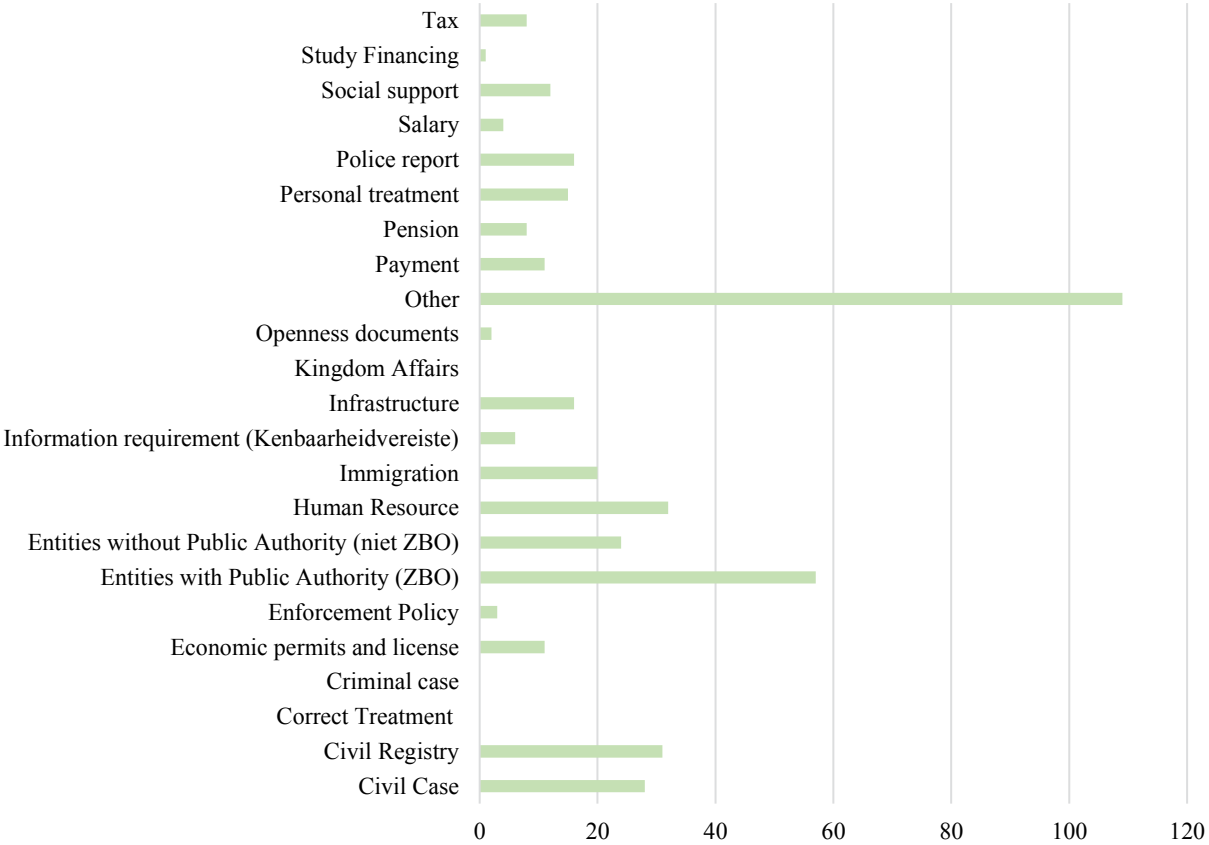


Fig. 8: Graph of information window topics registered in 2018

Recommendations

Article 16, paragraph 6, of the National Ordinance Ombudsman stipulates that the Ombudsman can provide administrative bodies with recommendations to take (corrective) measures. The article further states that the administrative bodies should inform the Ombudsman if and in which way the recommendations will be followed/executed. As such it is up to the discretion of the Ombudsman to provide recommendations to an administrative body, however once a recommendation is provided, the administrative body in turn is obliged to follow up on the recommendation or properly motivate its decision not to do so.

The total amount of closed cases where recommendations were provided for 2017 and 2018 were 14 and 10 respectively. It should be noted that more than one recommendation can be issued in an individual case. Though there were more cases closed with recommendations in 2017, more recommendations were issued in 2018. The total amount of recommendations issued by the Ombudsman for 2017 and 2018 were 30 and 31 respectively; an average of 3 recommendations per case in 2018 compared to 2 per case in 2017. In 2018 the Ombudsman issued 10 recommendations to the Ministry of General Affairs, 3 to the Ministry of Justice, 2 to the Ministry of Public housing, Spatial Planning, Environment and Infrastructure (VROMI), 5 to the

Ministry of Public health, Social development and Labor (VSA), 6 to the Rental Committee (ZBO) and 4 to Kadaster (ZBO). Following preliminary recommendations provided in the PFR, final recommendations were issued in Notices of Termination (NOT/3) and in Final Reports (FR/28).

3.1 Highlights of Complaints handled

The core task of the Ombudsman is the investigation of Propriety applied by government bodies and government agencies in their relationship and dealings with the public. The scope of Propriety goes beyond the law; it reflects the norms expected from government in executing the laws, policies and established procedures. Government is expected to be open and clear, respectful, involved and result oriented, honest and trustworthy.

3.1.1 Kadaster

Summary of Complaint:

Complainant alleged that information on his 2013 Cadastral Extract was changed by ‘Kadaster en Hypotheekwezen’ (K&H) without the required formalities for same. Complainant claimed that his property was auctioned in March 2015 through a Notary.

-According to a Cadastral Extract dated 10 May 2013, Complainant was registered as the sole owner of a property (X) with no registered mortgage.

-According to a Cadastral Extract dated 22 May 2015 said property (X) is owned by two persons acquired by way of auction registered on 24 March 2015. The property is burdened by two mortgages registered on 26 February 2009 and 24 March 2015.

Complainant alleged that he visited Kadaster in July of 2017 and inquired about the above mentioned changes to the registration of his property. According to Complainant K&H informed him that changes could not be made without documentation, however no documents to justify the pertinent changes were provided to him.

To date of filing the complaint with the Ombudsman on 21 January 2018, no response had been received to Complainant’s request for clarity.

Conclusion:

The main question for consideration in this case is: Did ‘Kadaster & Hypotheekwezen’ (K&H) observe propriety in handling Complainant’s request in July 2017 for clarity regarding the changes made to the registration of his property without the required documents?

After no response to an intervention proposal by the Ombudsman was provided, a full investigation was launched, and a Hearing scheduled.

By email correspondence dated 15 August 2018, the “Interim Hypotheekbewaarder & Acting Director”, Mr. Boekhold, informed the Bureau Ombudsman that K&H was not familiar with the complaint and he had not been informed about the case. As newly appointed Acting Director he required more time to assess the complaint before he could attend a Hearing.

Mr. Boekhold stated that he needed more time to thoroughly research the matter. Upon the completion of his review, his conclusions would be provided.

By email dated 16 August 2018 Mr. Boekhold informed the Ombudsman that the preliminary research established that the parcel of land CB 315/1981 mentioned in the documents drafted by the Ombudsman, should read CB 487/1996 (X) measuring 791m2. Last mentioned parcel of land derived from the parcel CB 315/1981. K&H was provided an additional period of three (3) weeks until 6 September 2018 to respond to the NOC. By letter dated 3 September 2018, a response was received from the K&H outlining the history and changes made to the registration of the pertinent property. Subsequently K&H was requested to provide additional answers to questions posed by the Ombudsman.

By email dated 11 September 2018, Mr. Boekhold concluded and informed the Ombudsman that for unknown reasons changes were made to the records with regard to parcel CB 487/1996 in the period of 2010 to 2013. The supporting documents for the registered changes were not available at the Kadaster Office. The termination of the mortgage on 8 July 2010 by a notarial deed of cancellation was not found in the archives.

Considering the above stated the Ombudsman observed that in the interest of managing the affairs of the citizens, the standard of Active and adequate information provision requires that public bodies are transparent, open and clear in providing adequate information to the citizens. Providing adequate information can clear up the air between public bodies and the citizens. In general, an individual is more willing to accept a situation when there is an explanation, or the outcome of a request is motivated. To ensure a high level of credibility in public bodies, transparency is essential. Being open and clear in providing adequate information regarding changes to notarial deeds, that affect the interest of the citizen is a requirement for enhancing the credibility of public bodies. K&H did not provide clarity to Complainant regarding the changes made to the registration of Complainant’s property. No documentation to substantiate said changes were provided.

Hence the complaint filed at the Ombudsman was justified. The standard of Active and adequate information provision is applicable in this case. The Ombudsman established that notwithstanding the recommendations provided in the report “*Rechtszekerheid en betrouwbaarheid gegevens Kadaster en Openbare registers*” dated 27 June 2012, the standard of adequate organization of services has been violated.

Furthermore, administrative bodies are required to organize their administration and operation in a manner which guarantees proper service to the public. Proper service refers to the principle of meticulousness in the administration. Proper service also includes organizing the administration in a manner that is lawful, effective, transparent, accessible, equipped to provide prompt service

and information. Continuity should be guaranteed; proper registration and archiving are essential in achieving and guaranteeing continuity in the administration.

After numerous reminders, postponements and requests from the Ombudsman during the course of this investigation, it was finally revealed that changes to the official registers were made without obvious reasons and or supporting documents to justify same. The Ombudsman again concluded that the internal control of the registrations, changes and additions to the public registers are inadequate and the law not properly followed, or at least the work processes concerning the registration in the public registers are faulty and not transparent.

Actions taken by private administrative bodies charged with public authority (ZBO’s) should also be carried by facts and logic communicated to the citizen. Proper reasons, motives and grounds should be provided and explained to the citizen with all decisions made. Proper motivation is required in individual cases. A standard motivation is in general not sufficient to be used in a specific case. The Ombudsman observes that a public body has to ensure that the interests of the citizen are duly taken into account. Hence, every change in the public registers of K&H has to be accompanied by the appropriate documents, and queries from the public should be thoroughly motivated.

To date of this FR Complainant had not been provided clarity regarding the changes to the registration of his property.

Judgment:

-The complaint is founded. The standards of Active and Adequate Information Provision, Adequate Organization of Services, Correct Treatment and Reasons have been violated.

-Kadaster en Hypotheekwezen acted improper with regard to the complaint.

Considering the investigation and findings in the case, the Ombudsman recommended as follows.

Recommendation:

-Provide Complainant, within seven (7) days of the FR, clarity regarding the changes made to the registration of his property, supported by proper reasons and documentation and provide the Ombudsman with a copy of same;

-In the event clarity, supported by the pertinent documentation cannot be provided, provisions should be discussed and made to handle, settle and possibly remedy any discrepancies and or shortcomings as a result of the findings of the internal research by the Registrar/ Director of K&H;

-Implement a system to address the shortcomings identified throughout this report concerning the registration and maintenance of the public registers, accompanied by the relevant documents, including the procedure descriptions and internal control thereof;

-Thoroughly review the report “*Rechtszekerheid en betrouwbaarheid gegevens Kadaster en Openbare registers*” and follow recommendations issued.

3.1.2 Department of Labor Affairs & Social Services (VSA)

Summary of Complaint:

Complainant alleged that the Department of Labor Affairs & Social Services refused to provide her with a medical card, since Complainant’s request for renewal on 27 January 2016. By letter dated 16 May 2016 from the Department Head of Labor Affairs & Social Services, Complainant was requested to submit substantial evidence to the Department, proving that she actually resides on the Dutch side of Sint Maarten in order to provide her with the medical card.

While filing the complaint with the Ombudsman on 4 April 2018, Complainant claimed that on numerous occasions she has provided the Division Head of Labor Affairs & Social Services with her valid Dutch identification card, however no follow up was given to Complainant’s request for her medical card.

Conclusion:

The main question for consideration in this case was: Did the Department of Labor Affairs and Social Services observe propriety in applying the procedures and policies used to provide medical aid?

By letter dated 16 May 2016 from the Department Head of Labor Affairs & Social Services Complainant was informed that she was no longer eligible for medical aid and was requested to submit substantial evidence to the Department, proving that she actually resides on the Dutch side of Sint Maarten in order to provide her with the medical aid.

Upon the advice of the Ombudsman, Complainant provided the Department an excerpt of registration from the Civil Registry, which was rejected by the Department as evidence that Complainant actually lives on the Dutch side of Sint Maarten.

As a result of the complaint filed, the Ombudsman subsequently proposed that the Division Head resubmit a letter to Complainant with clear instructions and the steps required to obtain Complainant’s medical card.

On 17 May 2018 a copy of a letter dated 14 May 2018 addressed to Complainant was provided to the Ombudsman, stating that Complainant must provide substantial evidence to the Department proving that Complainant actually resides on the Dutch side of Sint Maarten in order to have the matter rectified in her favor. The Department alleged that the census registration form is not considered the only proof of residence according to the current legislation governing medical aid.

In the general interest of the public, by letter dated 18 May 2018 an investigation was started by the Ombudsman to obtain clarity regarding the policy and procedures to establish ‘actual

residency’ of persons requiring medical aid. By letter dated 29 June 2018 a response was provided by the Division Head of Labor Affairs and Social Services to the NOC stating that regular house visits are conducted in order to ensure that fraudulent and unrightful access to medical aid is not being practiced.

The Department indicated that the outcome of the house visits used to determine residency concluded that Complainant did not actually reside at her registered address.

Considering that the Complainant was persistent that she actual resides on the pertinent address, as well as apparent inconsistency regarding the interpretations of ‘residency’ by various departments, on 20 September 2018 a Hearing was convened by the Ombudsman to be informed about procedures and policies to determine the residency of a person/applicant (pursuant to the law). As a result of the information provided at the Hearing by both parties, it was agreed that the Department of Labor Affairs and Social Services would provide Complainant with a new letter so she could file an objection to the Objection Committee in order to have her application for medical aid re-evaluated. It was further established that the Department of Labor Affairs and Social Services would review the procedures followed to determine whether an individual is factually residing at a location, as well as the bottlenecks being encountered due to the various methods that are used across departments to determine residency.

The Ombudsman observes that actions taken by government should be carried by facts and logic, communicated to the citizen. Proper reasons, motives and grounds should be provided and explained to the citizen with all decisions made by government. The actual facts surrounding the living conditions of the Complainant were not properly considered through the house visits. Considering the diverse legislation regarding residency and how they are implemented in practice across the various departments, proper motivation of policies and procedures is required in individual cases. A standard motivation is in general not sufficient to be used in a specific case.

It was decided at the Hearing that Complainant would inform the Ombudsman no later than 27 September 2018 whether she would accept and sign for the letter and proceed to object the decision as provided for by law. During a telephone conversation dated 28 September 2018, Complainant informed the Bureau Ombudsman that she will follow the advice provided by the Ombudsman at the Hearing. As such the Bureau Ombudsman promptly informed the Division Head of Labor Affairs and Social Services of Complainant’s decision. The Department confirmed that a new letter would be reprinted so that Complainant can file an objection.

By letter dated 23 October 2018 a Preliminary Findings Report (PFR) was sent to the Minister of VSA with the request to respond to the recommendations and findings of the said report.

On 16 November 2018 the Division Head of Labor Affairs and Social Services provided a reaction to the PFR, stating that the department agreed with the content of the PFR and that it accurately reflected the discussions and the hearing/ procedures that were conducted.

The Division Head of Labor Affairs and Social Services further stated that the department is in agreement with the recommendations issued and gave notice that the recommendations would have to be executed by the Department of Social Development (policy arm of the execution agency as such). The Division Head of Labor Affairs and Social Services concluded by stating that the SG of VSA has been copied in the reaction provided to the Ombudsman, so that the Ministry of VSA can follow up to ensure that the recommendations of the Bureau Ombudsman are duly followed by the Policy Department.

Considering that an understanding was reached between the Department and the Complainant through the intervention of the Ombudsman, whereby the Department of Labor Affairs and Social Services provided Complainant with a new letter in order to have her application for medical aid re-evaluated, as well as a commitment by the Department of Labor Affairs and Social Services to follow the recommendations issued in the PFR, the Ombudsman refrained from further investigation of the complaint, and the file was closed.

Considering the investigation and findings, the Ombudsman recommended as follows:

Recommendation(s):

-Application and execution of legislation regarding residency and internal procedures used to conclude whether someone is factually living in a location needs to be reviewed.

-Review bottlenecks being encountered due to various methods used across departments to determine residency.

IV. Systemic Investigations

The core task of the Ombudsman is the investigation of *Propriety* applied by government bodies and government agencies in their relationship and dealings with the public. The scope of *Propriety* goes beyond the law; it reflects the norms expected from government in executing the laws, policies and established procedures. Government is expected to be open and clear, respectful, involved and result oriented, honest and trustworthy. Pursuant to the National Ordinance Ombudsman the Ombudsman is authorized to initiate an investigation on its own initiative when there are indications or suspicion that certain administrative tasks are structurally hampered, or for whatever reason not properly executed.

4.1 Dismissal Advisory Committee (DAC)

Summary of Concerns

- Employees or former-employees of an employer requesting permission to layoff one of its employees should not be allowed to take part in the dismissal process as members of the Dismissal Advisory Committee (DAC), as such may be biased and leads to unbalanced and biased decisions;
- The decision of the Secretary General should at all times be sufficiently motivated regarding the advice received from the Committee.

The main questions for consideration are:

- Are the rules and regulations regarding the operations of the DAC: properly followed by the Ministry of VSA, adequate and sufficiently transparent to avoid bias in providing an advice to the SG regarding a request to dismiss an employee?
- Is the decision-making process of the SG regarding a request to dismiss an employee transparent, efficient and adequate to provide a properly motivated decision on a petition submitted by an employer?
- Do the standard formats of the National Decree, AB 2016 no. 17 (appendix VII and VIII) and the practice applied in the decision-making process of the SG regarding a request to dismiss an employee provide (for) a properly motivated decision for the dismissal of an employee, or not?

Considering that:

- By National Decree a Committee is appointed, tasked with providing the Secretary General with an advice on every request submitted for termination of a labour agreement (Article 3 sub 1 National Ordinance Termination of Labour Agreements (AB 2013, GT no. 750)).
- There is no policy regarding the term and subsequent extension for a person to be appointed to serve on DAC. (See art. 2 sub 2 , 2016 National): “*benoeming voor 3 jaar, daarna direct hernoembaar*”).
- After extensive investigation and research in Government archives, as well as approaching current and past members of the DAC, the Minister of VSA has not been able to locate appointment decrees of DAC members. As a result of this and in order to facilitate a Decree installing an entirely new DAC, all current members have been requested to make their positions available.
- The Ombudsman was informed that the Decree installing the new DAC members was being finalized, and would be submitted to the Governor's office shortly. No follow up information was provided by the Minister of VSA on the status of same.
- The SG has six weeks to formally decide on a dismissal request, with legal consequences.
- Pursuant to article 3 of the aforementioned National Ordinance, the DAC has to provide the SG with an advice on every request submitted to terminate a labor agreement. If an advice from DAC is rendered too late or without consensus, the SG can request the advice of the Head of the Labor department (article 14 and 15 National Decree). As such the SG can take a decision independently from the DAC after DAC's advice has been sought, and subsequently the Head of the Labor Department consulted to ensure a properly motivated decision.
- The decision of the SG is considered to be not rendered in time when (i) the regular six week period has been exceeded, without an extension being granted, and (ii) when the advice is not rendered within the extended timeframe of an additional 6 weeks (Article 4 sub 3 National Ordinance).
- The Rules of procedures outline the administrative procedures of the assembling DAC.



- The criteria applied by DAC to reach a decision is guided by the (not yet published), “*Richtlijnen bij de toepassing van de Landsverordening beëindiging arbeidsovereenkomsten en het Landsbesluit procedure beëindiging arbeidsovereenkomsten (Maart 2018)*”; Chapter 2 gives a description of the dismissal procedures and chapter 3 outlines the dismissal policy (the criteria for dismissal, testing the reasons for dismissal, etc.).
- A training program for the new DAC membership is planned to ensure the awareness of, and familiarity with all rules and regulations governing the Committee.
- With regard to the grounds, the reasons for an employer to file a request for dismissal, reference is made to book 7A of the Civil Code and art 16 sub 2 of the National Decree.
- The response dated 18 September 2018 from the Minister VSA agreeing to the findings established in the Preliminary Findings Report (PFR) and follow up on the recommendations.

The Ombudsman observed that according to the Minister there has been no functioning DAC since January 2018, however the SG is required to decide on all requests submitted by employers to terminate labour agreements as prescribed by the National Decree.

The Minister stated that this decision can be taken independently, in agreement with or against DAC's advice (article 16 sub 1 National Decree). However, on the basis of article 3 of the National Ordinance, the Secretary General is obliged to ask the Committee for advice when a request for termination of a labour agreement is submitted. This could not be complied with since January 2018.

The Minister indicated that the DAC does not conduct hearings with the respective parties. According to the Minister the advice to the SG is based on the National Ordinance, which provides the procedure to be followed when deciding on a request to terminate a labour agreement. The National Ordinance regulates the timeframe to render a final decision on the request, and highlights the procedural framework to be followed through the use of articles 7 through 17 of the National Decree containing general measures.

The Ombudsman considered it rather questionable if the information gathered by the SG through the designated forms is adequate and sufficient to provide a motivated decision. More so considering the non-functioning DAC since January 2018 and the strict deadlines set for the employer and the employee to state their point of view in writing.

The Ombudsman further noted that according to the Minister all DAC members are expected to execute their tasks in a professional manner; there are no specific procedures in place regarding the prevention of bias by the members. A training program which is to be held for all DAC members is aimed at covering matters of ethics and professional execution of the members' tasks. It is stated that since the voting members (employers' and employees' representatives) are attending meetings in a rotating system, there will be an alternative available in case an individual member would feel unable to render an objective advice.



The Ombudsman observes that while professionalism of the DAC members should be assumed, establishing a policy that prevents current (and past) employees, of an employer whose petition to terminate a labor agreement is being handled, from participating in the dismissal process should be pursued. This will enhance professionalism in handling the petition and prevent any semblance of bias in the advices of DAC.

The training program for the new DAC membership will consist of two main themes: an introduction to the applicable legal framework and the importance of integrity, procedures, guidelines and policy. It should be noted however that the application of the policy to determine and test the reasons for dismissal provided for in the “*Richtlijnen*” is paramount to objectively advise the SG on the merits of a request for dismissal, while this policy is not yet formally published.

It is noted that no criteria are established by which the Head of Labour Affairs renders an advice to the SG. According to the Minister, Labour Affairs is responsible for a proper intake procedure and will also organize a workshop for the respective civil servants about the procedures regarding the rendering of the advice to the SG. It is not clear whether application of the policy in determining and testing the reasons for dismissal will also be part of the training; the “*Richtlijnen*” (chapter 2 and 3) provides an essential tool for the of advice to the SG.

The intention of the legislator is to protect the most vulnerable party, the employee, against unreasonable, unfair and socially unacceptable termination of his/her employment. As such the objectives and criteria followed by the Secretary General in following the advices from DAC, or the Head of Labour Affairs, is to protect the employee against unreasonable, unfair and socially unacceptable termination of his/her employment. The Secretary General has to prevent an employee being dismissed arbitrarily, and has to decide whether the request to terminate the employment contract(s) meets the pertinent criteria. The Ombudsman notes that the decision of the SG must be substantiated accordingly.

Review of the procedures and decision taken in the case which prompted the systemic investigation:

- On 30 January 2017 GEBE requested the Ministry of VSA to obtain permission, provided for in article 4 of the National Ordinance Termination of labor Agreements to terminate the labor agreement entered into with an employee.
- After hearing the employer’s legal representative and the employee, an advice of the Dismissal Advisory Committee dated 14 March 2017 was sent to the SG, advising not to grant permission for the termination of the employee, considering:
 - GEBE knew all the while concerning certain staff members not wanting to be part of any CLA within the company and should have made an attempt to adjust their policy long ago instead of waiting until staff members reached the age of 60 where they can request permission to have them terminated based on their CLA.
 - Employee has written her employer on wanting to retire at age 60 and employer had ample time to react to her request but refused to answer until her legal counsel sent a letter.

- Because the employee is not a member of the Union, she is not bound to the collective agreement, and is not in any other way bound to the CAO by policy acceptance.
- By decision dated 23 March 2017 (DAZ-05/2017) the Secretary General of the Ministry of VSA informed the representative of GEBE (erroneously referring to the advice dated 22 March 2017 of the DAC), considering:
 - that the employee has been in the employ with the company since December 1, 2012
 - that the employer did not submit sufficient evidence to support the request for termination of the labour agreement with said employee
 - that the employee indicated willingness to continue working at the company despite the pensionable age and the dismissal request from the employer
 - the advice of the DAC, with which the SG agrees;

Resolves: To deny the employer permission to terminate the labour agreement entered into with the employee.

The Ombudsman observed that while the term of six (6) weeks for the SG to come to a decision pursuant to article 4 of the National Ordinance has not been adhered to, the decision of the SG in the case of GEBE, which gave rise for this systemic investigation, indeed gives reason for concern. In addition to the fact that the applicable regulation (“*Reglement van Orde Ontslagadviescommissie 2016*”) and policy (“*Richtlijnen*”) governing the advice procedure are not published, an apparent lack of clarity regarding procedures followed by the DAC is noted. While the Minister indicated that no hearings are held, but the law is followed accordingly, the DAC reports in the pertinent case that hearings were held with both parties.

Neither is it clear how the consideration established by the DAC that the employee has written her employer on wanting to retire at age 60 and the employer allegedly having had ample time to react to her request, but refused to answer until her legal counsel sent a letter, relates to the advice provided to the SG not to grant permission for the termination of the employee.

Comparing the considerations established by the DAC in its advice to the SG (document dated 14 March 2017) with the ones stated by the SG to resolve to deny the employer permission to terminate the labor agreement entered into with the employee (document 23 March 2017), the link between the advice and decision of the SG remains obscure. Not clear is how the decision of the SG is related to DAC’s advice, nor is this motivated. Agreeing with the advice without elaboration, more so when the advice in itself lacks proper motivation, is contrary to the standards of propriety.

The SG stated that the employer did not submit sufficient evidence to support the request for dismissal, however no specifics, further clarity and or criteria were given substantiating the insufficient evidence to support the dismissal request.

Based on the standard of *Reasons* a public body cannot act on the basis of its own discretion nor can it act randomly. Every decision and action of a public body has to be properly motivated. A public body has to motivate its decision in regard to a request submitted, however also in regard to change in legislation, decrees and policies. Motivation is considered to be proper when the following elements can be found in the reasoning:

- Relevant rules and regulations;
- Relevant facts and interest;
- Well thought out, thorough and sound reasoning.

The standard of Reasons

Proper motivation is required in individual cases. A standard motivation is in general not sufficient to be used in a specific case. In case of a change in policy (legislation and or decrees) the public body has to ensure that the interests of the citizens are taken into account. Hence, every change in policy (legislation and or decrees) has to be accompanied by a thorough motivation, unless in all reasonableness it can be assumed that a motivation is redundant. Only after publication of a policy this becomes binding and can in fact be formally established whether a decision is properly motivated.

The Ombudsman observes that the Rules of Order and the ‘*Richtlijnen*’ have not been published, even though they form a crucial part of the decision-making process in case of a dismissal request.

Even so it is observed from scrutinizing the GEBE case for application of the pertinent procedures and policy by DAC, and subsequent decision making by the SG, that the relevant regulations are not substantially followed. The available forms provided for by the law seem not to be (sufficiently) thorough or optimally utilized to provide an adequately motivated decision on a request for dismissal. The standard forms pursuant to article 16 of the National Decree do not provide an designated area for the specific criteria applied for a dismissal.

Considering that the relevant facts and interests considered by the DAC in the above stated case of GEBE are not sufficiently substantiated and or linked to the decision of the SG, a well thought out, thorough and sound reasoning could not be found in the decision dated 23 March 2017. As such the decision can be considered not properly motivated.

Based on the above, the standard of *Reasons* has not been observed in this case.

Right of both sides to a hearing (“hoor en weder hoor”)

In preparation of a decision an administrative body must offer all stakeholders the opportunity to be heard. The public must be allowed to defend their interests in the case of a (primary) decision of an administrative body, or regarding an objection or appeal procedure.

In the event the point of view of one party leads to new perceptions or requires clarification of the point of view of the other party, both parties must be offered the possibility of responding to each other’s point of view.

The intention of the legislator is to protect the most vulnerable party in case of dismissal of an employee, against unreasonable, unfair and socially unacceptable termination of his/her employment. The Secretary General has to prevent an employee being dismissed arbitrarily, and has to decide whether the request to terminate the employment contract (s) meets these criteria. As such the advice of DAC is crucial as both the employer and employee are represented in said Committee. The arguments brought forward by both employer and employee should be considered, weighed and properly reflected in the advice of DAC. A decision issued by the SG without DAC’s advice can therefore be considered as rendered without the representation of both the employer and employee. As such the standard of *Right of both sides to a hearing (“hoor en wederhoor”)* is applicable in the proceedings. Failure to appoint the members of the DAC and

properly instructing the members regarding the procedures (Rules of Order) and policy (“*Richtlijnen*”) to provide an advice pursuant to the law is a breach of the standards of propriety required to promote good governance.

The standard of Adequate organization of services

The Ombudsman further observed that *the standard of Adequate organization of services* requires administrative bodies to organize their administration and operation in a manner which guarantees proper service to the public.

Proper service refers to the principle of meticulousness in the administration. Proper service also includes organizing the administration in a manner that is lawful, effective, transparent, accessible, equipped to provide prompt service and information. Pursuant to article 4 sub 3 of the National Ordinance, the timeline to provide a decision on a request for dismissal is six weeks. In the case of GEBE, the advice of DAC was given 6 weeks after the request for dismissal. No information was provided, indicating that an extension of six weeks was communicated to the petitioner by the SG.

The Minister of VSA stated that DAC did not function since January 2018, though the SG is required to decide on all requests submitted by employers to terminate labour agreements as prescribed by law. According to the Minister this decision can be taken independently, in agreement with or against DAC’s advice.

Pursuant to article 3 of the National Ordinance, the DAC has to provide the SG with an advice on every request submitted to terminate a labor agreement. If an advice from DAC is rendered too late or without consensus, the SG can request the advice of the Head of the Labor department (Article 14 and 15 National Decree). As such the SG can only take a decision independently after DAC’s advice has been sought, and subsequently the Head of the Labor Department consulted to ensure a properly motivated decision. Though the Labor department is charged with the proper intake of dismissal requests, the procedure does not guarantee that both parties are adequately heard. The SG should make sure that all relevant facts and interests of both the employee and employer are registered and taken into consideration in the decision making process. Thorough and sound reasoning based on facts and interests is required.

Continuity should be guaranteed; proper registration and archiving are essential to achieve and guarantee continuity in the administration. All DAC members had to resign in January 2018 in order to install a new DAC by Decree. The alleged Decree of 18 July 2005, no. 2 (no.786204/NA) appointing the DAC members could not be found in the government archives. At the time of drafting the PFR the Ombudsman had not been informed if the new DAC members were appointed by National Decree. As a result of this it was concluded that the SG has been handling the dismissal requests since January 2018 without the DAC’s advice. To date of the PFR the Ombudsman did not receive a copy of the signed Decree for the appointment of the new DAC members.

It is noted that the Rules of Order of February 2016 and the ‘*Richtlijnen*’ of March 2018 have still not been published, even though they form a crucial part of the decision-making process.

The Ombudsman concluded that the standard of *Adequate organization of services* is not being observed by the Ministry of VSA with regard to requests for dismissal.

The Ombudsman further notes that though the National Ordinance highlights the procedural framework, and subsequent regulation (articles 7 through 17 of the National Decree) and policy (“*Richtlijnen*”) available to guarantee transparency and fairness, the application of the pertinent procedures and policy in practice are not executed accordingly. The floorplan is laid, however compliance and the practical execution is lacking. This is underscored by the verdict of the Court dated 27 September 2017 in the follow up Court case instituted by GEBE in the case reviewed above, as well as a verdict dated 20 June 2018 in a case of the Marine workers as published in the media.

The Ombudsman concluded:

- Though there are no specific procedures in place regarding the prevention of bias by members of the DAC in their decision making, there are sufficient and adequate rules and regulations for the operation of the DAC in place. However, the formal implementation by publication of the Rules of Order and “*Richtlijnen*” has not yet been executed, nor are they properly followed or visible in the advice of the DAC. According to the Minister of VSA a rotating system to attend DAC meetings should provide an alternative in case an individual member would feel unable to render an objective advice in a particular case. Even so, the new members of the DAC are not yet appointed by Decree, and the training geared towards ensuring awareness of, and familiarity with all rules and regulations governing the Committee is still pending.
- The decision-making process of the SG regarding a request to dismiss an employee is considered not to be transparent, efficient and adequate to provide a properly motivated decision on a petition submitted by an employer, more so when taken independently. A proper link between the advice of the DAC and motivation of the decision taken by the SG remains obscure.
Pursuant to article 3 of the National Ordinance, the DAC has to provide the SG with an advice on every request submitted to terminate the labor agreement. If an advice from DAC is rendered too late or without consensus, the SG can request the advice of the Head of the Labor department (Article 14 and 15, National Decree). As such the SG can take a decision independently after DAC’s advice has been sought, or subsequently the Head of the Labor Department consulted to ensure a properly motivated decision (see also Article 16 National Decree).
- Pursuant to chapter 3 of the “*Richtlijnen*” the SG “*dient zich te beperken tot de beoordeling van de vraag of de aangevoerde ontslagredenen in relatie tot het verweer voldoende grond vormen voor het ontslag. De SG dient na te gaan of door de werkgever aannemelijk is gemaakt, dat (i) de aangevoerde grond in werkelijkheid bestaat, en dient hij te onderzoeken of (ii) de voorgenomen beëindiging redelijk en sociaal aanvaardbaar is*”. Considering that propriety provides that decisions taken by governing bodies should



be properly motivated, it may be assumed that the intention of the legislator to implement appendices for the dismissal process is to create uniformity of the procedure. A decision is considered properly motivated when the following elements can be found in the reasoning: relevant rules and regulations, relevant facts and interest, well thought out, thorough and sound reasoning. Proper motivation is required in individual cases. A standard motivation is in general not sufficient to be used in a specific case. The appendices VII and VIII provide for the relevant laws, facts and considerations, however the form does not provide a designated area to reflect a well thought out, thorough and sound reasoning for the conclusion and advice. The same goes for appendices V and VI applicable for the decision of the SG. However, when appropriately used an outline of the soundness of the grounds brought forward by the employer, covered by the reasons why a request for dismissal is considered reasonable and socially acceptable, should provide an acceptable motivation of the decision. Proper application of the appendices is required.

Judgment

Considering that the Minister agreed with the content and recommendations provided in the PFR, the findings are considered factual, and as such the concerns and considerations leading to this systemic investigation justified and founded. The Standards of *Reason, Right of both sides to a hearing* (“*hoor en wederhoor*”) and *Adequate organization of services* were not being observed and have been violated.

Recommendations

- Install the new DAC members as soon as possible by Decree as stipulated in article 3 National Ordinance and provide the Ombudsman with a copy of said Decree;
- Possibly revise appendix V, VI, VII VIII with a designated area to indicate the criteria for dismissal and (thorough and sound) reasoning for the conclusion in order to offer a transparent and motivated advice/decision;
- Include practical execution of the Laws, Regulation and Policy in the training program to be held for the DAC members and the staff of the Labor Department;
- In addition to a rotating system for the DAC members, establish a policy that prevents current (and past) employees of an employer requesting to terminate a labor agreement from participating in the pertinent deliberations;

4.2 Rent Tribunal

Summary of concerns

Following various complaints reaching the Ombudsman from citizens seeking a decision from the Rent Tribunal regarding housing disputes between tenant and landlord allegedly as a result of Hurricane Irma, preliminary investigations by the Ombudsman indicate an increase of visitors to the Rent Committee post-Hurricane Irma. However, the office of the Rent Tribunal is understaffed and ill-equipped to handle the increase of visitors. With poor infrastructure and no vehicle available to engage site visits in order to objectively and effectively execute its task, *the standard of proper conduct Fair play*, among others, is seriously under threat with regard to proper handling of requests filed with the Rent Tribunal post-Hurricane Irma.



The main question for consideration is:

- Is the Rental Tribunal (RT) as presently established sufficiently and consistently able to effectively execute its task pursuant to the National Ordinance Rent.

Considering:

(all articles and paragraphs cited, refer to the National Ordinance Rent)

- That by National Decree a Committee is appointed (Article 253), tasked with the adjudication of disputes between tenant and landlord (i.e. rental prices and evictions: paragraph 2 and 3);
- That the RT is provided with an annual budget for office operations (article 273), and the Committee members are compensated for their activities (article 256);
- That based on numerous correspondence from the RT addressed to the Prime Minister, the RT has expressed their need for additional (financial) resources in order to execute their duties pursuant to the law, as well as the importance of an increase in compensation for the Committee members;
- That until the start of this systemic investigation and follow up Hearing organized by the Ombudsman between the parties, the requests for additional resources and an increase of monetary compensation for the Committee members remain unresolved;
- That despite a Hearing having been convened on 20 September 2018 between representatives of the Prime Minister and the RT at the Bureau of the Ombudsman, during which clear resolutions were arrived at (see Synopsis Minutes Meeting/Hearing and “Investigation” stated above), to date of this Final Report no concrete decisions, short or long term, have been taken by government/the Council of Ministers to remedy the identified impediments of the RT, which hamper the proper functioning of the organization.

Though the systemic investigation assisted in bringing the serious challenges of the RT to adequately execute its task to the forefront, and understanding reached with steps to address and alleviate the most pressing matters on short term, the Ombudsman observes that this has not yet resulted in tangible decisions from the Council of Ministers and improvement of the critical situation.

The Ombudsman took note of the follow up by the RT pursuant to the resolutions taken at the Hearing of 20 September 2018, including a draft Rental Tribunal Process Handbook which will provide transparency regarding the organizational structure of the RT, its responsibilities and supporting services offered to the public, as well as the procedures to file a petition with the RT, the outcome of the procedure and subsequent options and rights of the persons involved. A meeting with the Secretariat of the Joined Court of Justice is an important step in the practical execution of its tasks. The Ombudsman recognizes that the revised structure, including the increase in staffing and the upgraded remuneration, needs to be established by National Decree.

An increase of the budget requires prompt decision-making from the Council of Ministers upon the advice of the Minister of General Affairs.

With no comments from the RT and government regarding the findings established in the Preliminary Findings Report dated 27 August 2018 and the Synopsis of the Hearing of 20 September 2018, the content of same is considered factual, and forms the basis for the judgement.

Considering the facts and findings the Ombudsman concludes that the impediments experienced by the RT contravene the standards of propriety *Fair play, Promptness, Adequate organization of Services and Cooperation*.

Judgement:

Devoid of adequate resources, the Rental Tribunal (RT) is not sufficiently and consistently able to effectively execute its task optimally pursuant to the National Ordinance Rent (“*Landsverordening huur*”, AB 2014, no. 8).

Recommendations:

- Government should establish the proposed and subsequently approved organizational structure of the RT, including realistic remunerations by National Decree;
- The RT along with government should establish an annual budget, which includes all resources necessary that will allow the RT to effectively and efficiently execute its task pursuant to the law;
- The Minister of General Affairs should promptly take the resolutions of the Hearing held on 20 September 2018 at the Bureau of the Ombudsman and subsequent follow up from the RT, to the Council of Ministers for decision-making;
- The RT should actively engage various stakeholders, including government, to discuss the identified changes, proposed based on their experiences and practical circumstances, to the National Ordinance Rent;
- The RT should continue periodical dialogue with the Joint Court of Justice to ensure that the relevant procedural matters between the two institutions remain in sync;
- The RT should formally establish and implement the draft Rent Tribunal Process Handbook, as well as a standardized form to facilitate the intake and outline of information pertaining to a Hearing.

4.3 Procurement process/Procurement Management Policy PJIAE N.V.

History

On 28 March 2018 a complaint was filed with the Ombudsman against the Princess Juliana International Airport Operating Company N.V. (PJIAE) regarding a request from a company to PJIAE for an explanation why the company was not awarded the contract for which it submitted a tender.

Upon invitation from PJIAE the company submitted an offer for (a) project(s) for which bids were requested by PJIAE. As a reputable longstanding service supplier to PJIAE disclosure of the criteria used to award the project was requested. In addition, a copy of the Procurement Management Policy used by PJIAE was requested in order for the Complainant to familiarize itself and get a better understanding of the selection process and requirements in the tendering of future projects. By email dated 1 May 2018 Complainant was however informed that the Procurement Management Policy (PMP) is a confidential and internal document, and could not be shared with the Complainant.

By email dated 22 June 2018 to the Chief Operating Officer (COO) of PJIAE, the Ombudsman attempted to resolve the Complaint via Intervention. After numerous correspondence between the Ombudsman, PJIAE and its legal representative, by letter dated 27 September 2018 the Ombudsman proceeded to refrain from further investigating the pertinent complaint, upon receipt of a rather vague response regarding allegedly the re-evaluation of the offers filed by the invited vendors against PJIAE’s procurement policy and procedures. The PMP was however not submitted to the Ombudsman as requested.

Considering the nature of Complainant’s request and transparency required from government owned or controlled private entities, the Ombudsman concludes that PJIAE is bound by the principles of propriety required from public bodies. The scope of propriety reflects the norms expected from (semi) government bodies in executing laws, policies and established procedures, among which are openness and transparency.

Summary of concerns

- After ample considerations and by mutual consent having identified and listed PJIAE as a private entity with public authority (‘ZBO’) in 2017, a sudden resistance occurred by the company to be investigated by the Ombudsman.
- The importance of transparency regarding the procurement policies and procedures of government bodies and entities directly or indirectly related to the government pursuant to the law; ministerial or functional responsibility.
- Good governance requires openness and accountability regarding procurement policies and procedures, which includes accessibility of the criteria and the selection procedures to the bidders, interested parties and the public in general.

Considerations

- The core of the complaint filed is a matter of good governance and in the general interest of the public;
- Government entrusted PJIAE with several tasks and authorities that traditionally are the responsibility of the government.
- There is no transparency regarding the Procurement Management Policy and selection process for procurement activities at PJIAE;
- The importance of transparency of procurement procedures and policies of government and related companies in general, in particular for bidders and interested (third) parties;



- The lack of clarity and/or accessibility of the tender process applied by PJIAE, a government related entity by law;
- The principles of good faith, reasonableness and fairness in procurement and contracting as standard principles that government owned companies are bound to, and required to uphold;
- The limited cooperation received from PJIAE’s management and supervisory board, as well as the preliminary queries by the Ombudsman into the application of the procurement policy and procedures followed by PJIAE warrant a thorough investigation of the tender processes;
- Procurement processes by government owned companies in general require due attention, more so considering the administrative inquiry initiated by the Public Prosecutor into activities of the Port of Sint Maarten Group of Companies, a government related group of companies, reported in the media. Permission of the Joint Court was requested to investigate the tendering and contracting of Harbor projects;
- As a result of the passing of Hurricanes Irma and Maria in September 2017 the Princess Juliana International Airport reportedly sustained substantial damages of approximately US\$ 100 million, and is currently in a comprehensive rebuilding phase;
- Openness and transparency regarding PJIAE’s procurement procedures being critical in the rebuilding process, in particular considering according to media reports the Sint Maarten Airport Reconstruction Project is one of the projects under preparation for funding via the Sint Maarten Recovery, Reconstruction and Resilience Trust Fund;

As a result of the above stated considerations the Ombudsman resolved to conduct a systemic investigation regarding:

- 1) The Procurement Management Policy of PJIAE (PMP) and the application of same; transparency of the pertinent procedures and policies/tender processes and evaluation at the level of the functionally responsible government body for PJIAE.
- 2) The accessibility of the evaluation criteria used in the tendering and selection process to bidders, interested (third) parties and the public in general.

As a result of poor information supply from the Minister of TEATT, the investigation rolled over to 2019 for finalization.

V. Constitutional Court

Though there were no new cases presented by the Ombudsman to the Constitutional Court in 2018, it is noteworthy to observe that the decision of the Court dated 7 July 2016 (Case 2015/1), squashing the National Ordinance Integrity Chamber (AB 2015, no. 18), served government and Parliament well in response to one of the conditions established by the government of the Netherlands to provide Sint Maarten extraordinary funds for reconstruction and recovery in the



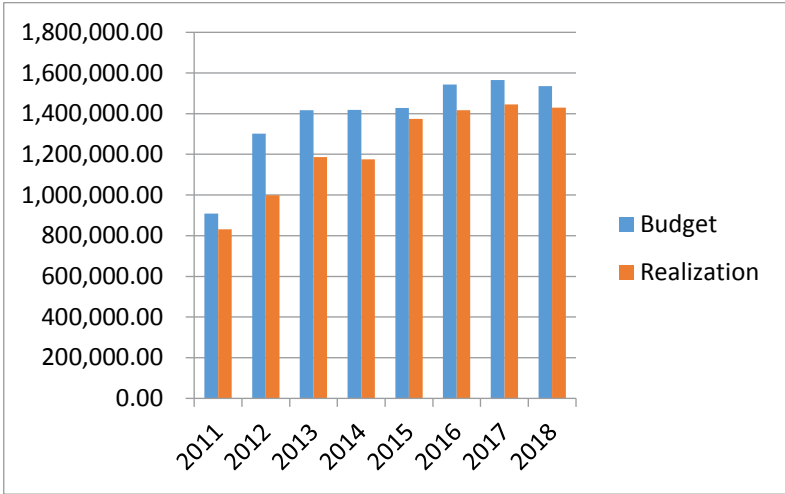
aftermath of the hurricanes in September 2017. Sint Maarten was required to cooperate in establishing an Integrity Chamber for which a new National Ordinance was required. The preconditions, noted obscurities and suggestions established in the mentioned decision of the Constitutional Court, provided government and Parliament a comprehensive guideline to produce an adequate Ordinance, protecting procedural rights of persons under investigation as well as third parties, guaranteeing fair play and safeguarding the fundamental human rights of persons involved. In the absence of a First Chamber on Sint Maarten to review new laws against the Constitution, as is the case in the Netherlands, the importance and impact of constitutional review by the Constitutional Court was once more underscored. A new National Ordinance Integrity Chamber could be drafted expeditiously, approved by Parliament and ratified. Considering the importance of the Ordinance in the process of reconstruction of the island, the Ombudsman informed the government, ahead of the expiration of the six weeks provided for by law to review a legal regulation, that the new law ratified on 18 December 2018 is considered to be in compliance with the Constitution. As such the National Ordinance (AB 2018 no.42) could take effect accordingly.

VI. Financial Reporting

The annual budget (general and capital ledger) of the Ombudsman for 2018 amounted to Nafl. 1.535.294,00.

Based on the unaudited financial report for the year 2018 a total of Nafl. 1.430.400,06 was spent from the budget of Sint Maarten (see appendices 1 and 2), which is, 93 % of the available budget to the Ombudsman.

The graph below provides an overview of the budget¹ realization percentages of the Bureau from 2011, the first full year of operation, through 2018.



¹ 2015 marked the first year that the operations of the Bureau were entirely financed from the budget of Sint Maarten. The operations of the preceding 4 years (2011- 2014), were partly financed via funding of the IVB program (“*Institutionele Versterking Bestuurskracht Programma*”), which ended on 31 December 2014.

VII. Appendices

- Appendix 1: Balance Sheet
- Appendix 2: Financial Report



APPENDIX 1

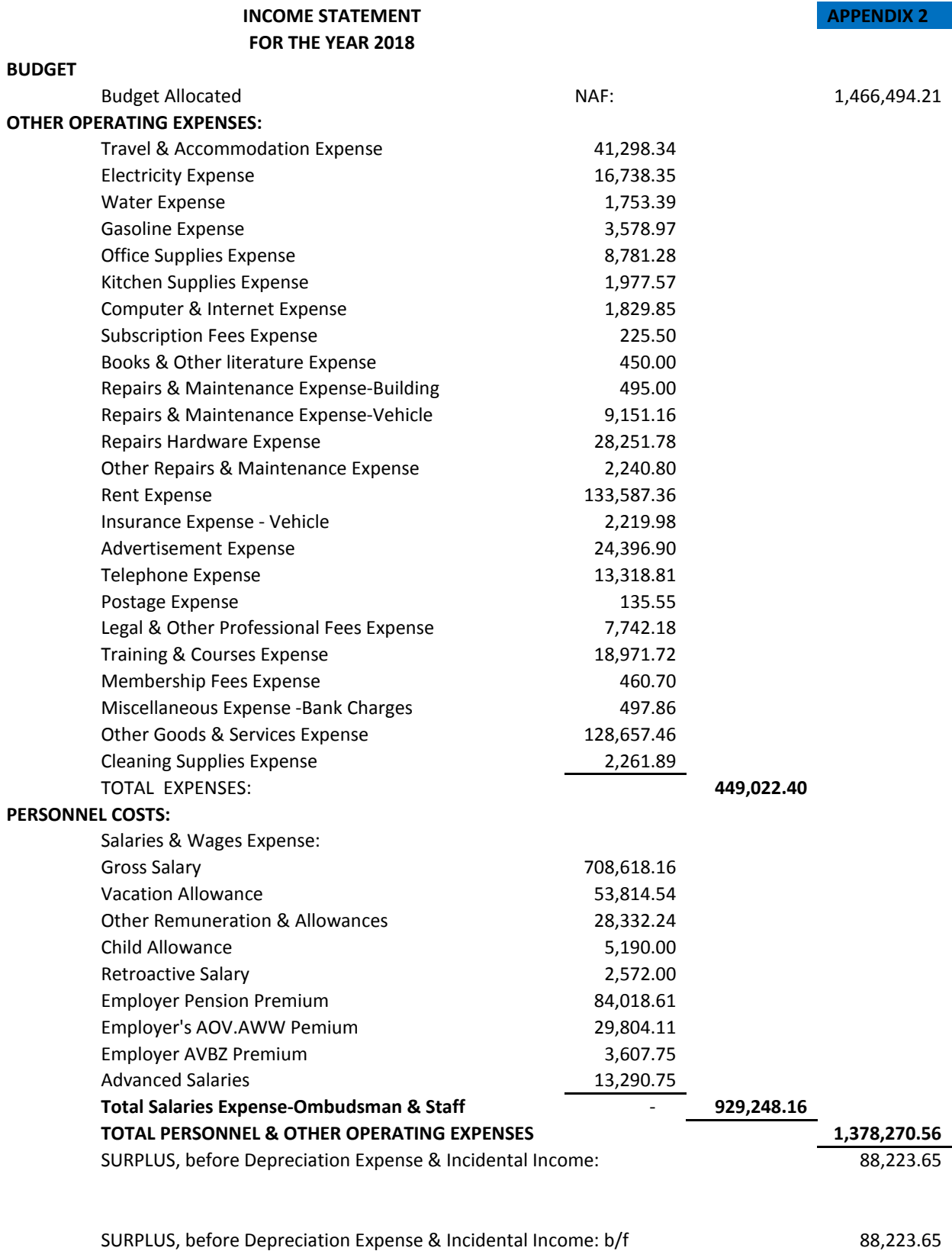
BALANCE SHEET
DECEMBER 31 2018

CURRENT ASSETS:			
Money Card WIB	2,231.30		
Petty Cash Account WIB (new)	3,464.03		
Cash on Hand	335.47		
Petty Cash WIB Naf Account (old)	117.00		
TOTAL CURRENT ASSETS:		6,147.80	
OTHER CURRENT ASSETS:			
Prepaid Expense	17,635.50		
Total Other Current Assets		17,635.50	
TOTAL CURRENT & OTHER ASSETS	NAF:		23,783.30
FIXED ASSETS:			
VEHICLES:			
Vehicles	110,551.00		
Acc.Depr'n 31/12/2018	-59,958.40		
Book-Value:	50,592.60	-	
OFFICE EQUIPMENT:			
Fotocopier Machine	15,894.90		
Acc.Depr'n 31/12/2018	-12,715.90		
Book-Value:	3,179.00		
ICT Equipment	247,933.86		
Acc.Depr'n 31/12/2018	-187,360.20		
Book-Value:	60,573.66		
Projector & Screen	2,034.20		
Acc.Depr'n to 31/12/2018	-2,034.20		
Book-Value:	0.00		
Televisions	3,118.80		
Acc.Depr'n 31/12/2018	-3,118.80		
Book-Value:	0.00		
Office Furniture	44,936.00		
Acc.Depr'n 31/12/2018	-21,569.40		
Book-Value:	23,366.60		
TOTAL FIXED ASSETS:			137,711.86
LEASEHOLD IMPROVEMENT:			
Archive Room	5,733.00		
Acc.Depr'n 31/12/2018	-1,866.50		
Book-Value	3,866.50		
Server Room	8,910.00		
Acc.Depr'n 31/12/2018	-5,167.80		
Book-Value	3,742.20		
Renovation Kitchen	8,736.00		
Afschrijving Renovatie Keuken	-3,568.00		

Book-Value:	5,168.00	
TOTAL LEASEHOLD IMPROVEMENTS:		12,776.70
TOTAL ASSETS IN NAF:		174,271.86

LIABILITIES:			
Current Liabilities		5,446.97	
Other Current Liabilities:			
AOV.AWW Payable	55,634.31		
FZOG Payable	14,172.36		
Pension Payable	114,176.06		
Sickness Premium Payable	8,857.75		
Total Other Current Liabilities:		192,840.48	
TOTAL LIABILITIES:			198,287.45
CAPITAL:			
Capital			(24,015.59)
TOTAL LIABILITIES & CAPITAL NAF:			174,271.86

This report has not been audited.



52,129.50

36,094.15

This report has not been audited.

NOTES

[illegible]



OMBUDSMAN

SINT MAARTEN