Traditions in setting standards of good administration

Alex Brenninkmeijer
National Ombudsman of the Netherlands

Summary
More and more ombudsman institutions make use of standards when assessing the actions of the public administration. The question arises in what way the development of these standards has a shared basis among the institutions. Are there standards that can be found in all institutions? In other words, are there criteria that many ombudsman apply in their work? This question is of importance as it can strengthen the overall impact the ombudsman work has. Furthermore it could improve the knowledge and experience of all institutions as they would share a common ground.

Introduction
The National Ombudsman Act became law in the Netherlands thirty years ago. Since then, the institute has experienced many changes: starting as an organisation that operated formally via written reports, it has become an office that aims primarily to find immediate, tailor-made solutions to meet the needs of citizens. The criteria used to assess the actions of public authorities have played an important role in this process of change and have contributed greatly to the success of the institute. This year, these criteria have been updated and presented to the government, which has embraced them as standards and officially committed itself to adhere to them.

Not all ombudsman institutions make use of such standards. Many use the law as their point of departure and assess the actions of public authorities on the basis of legal prescriptions.[1] So why these two different approaches and what are the consequences of each of them? In this presentation I will examine the tradition of using standards in various countries and see what it means for the ombudsman institutes concerned. As examples, I will discuss the practices of the UK Parliamentary and Health Service Ombudsman, the European Ombudsman, the Austrian Ombudsman, the Danish Ombudsman and my own office in the Netherlands.

Similarities
The work of any ombudsman is normally based on a law establishing a complaint handling procedure. The job of the ombudsman is to conduct an investigation and hear evidence from both sides. The investigation can end in a report of many pages, but its result may equally be a letter to the complainant and public authority simply telling them the ombudsman's decision. A complaint can also be dealt with in an informal way that produces a quick and effective solution. The choice of method depends on the circumstances. A certain consistency in decisions is important, since it provides guidance for public authorities and makes citizens aware of what they have a right to expect of them.

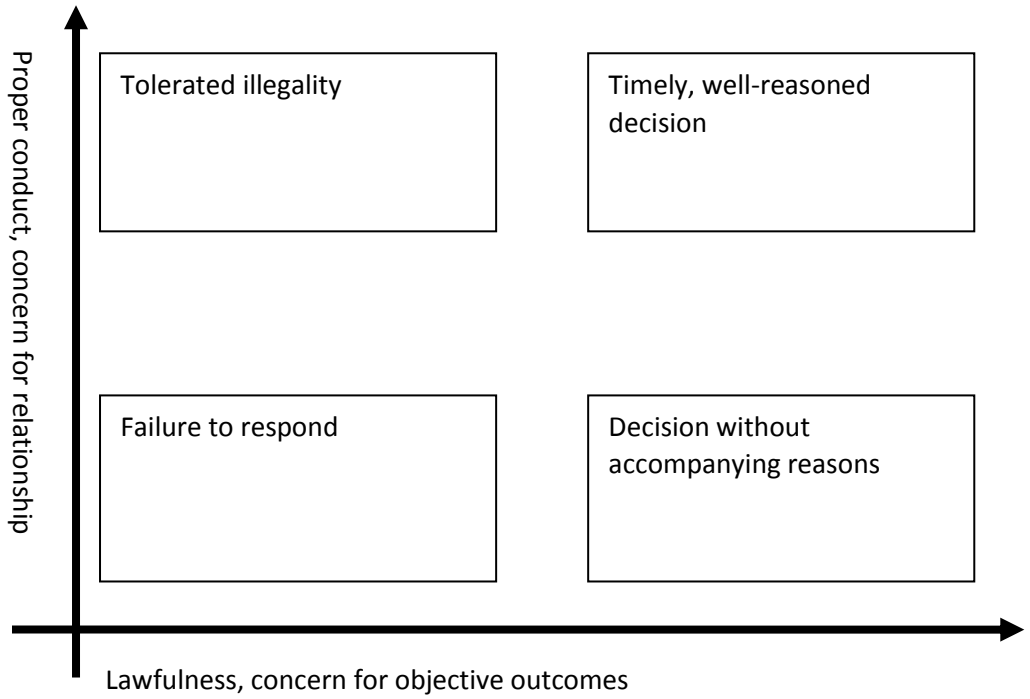
Consistency can be guaranteed by referring to laws or court decisions, but can also be provided by the decisions of the ombudsman himself. More and more, recognition of the monopolistic role of the public administration in the field of administrative action has given rise to sets of requirements that the administration is expected to meet in all its actions. This framework of norms that citizens are entitled to expect is what I call standards. Their existence means that there is no need to judge the actions of the public administration on the basis of any law or act.

Differences
It seems to me that ombudsman institutions using standards as the basis for their decisions operate in a different way from those that mainly use the law as their point of departure. It could be argued that

[1] With legal prescriptions I mean law or other rules, not drafted by the ombudsman institutions themselves.

the latter also have standards, which are embodied in legal principles like *équité* and *Billigkeit*. In my view, however, there is a difference between standards of good administration on the one hand and principles of *équité* and *Billigkeit* on the other. This difference is noted by Kucsko-Stadlmeyer in her extensive study on ombudsman institutions in Europe. *Equité* and *Billigkeit* as guiding principles in ombudsman decisions remain within the system of legal reasoning by always taking the law as their starting point. By contrast, standards of good administration are rooted in previous decisions of the ombudsman, which are much more focused on the relationship between the public administration and the citizen. To invoke them, the existence of a particular law may not even be necessary. On the contrary, such principles may even be at variance with legal rules. I would like to illustrate this point by referring to the 'Ombudsquadrant' that I have developed for my own institute.

The Ombudsquadrant



The horizontal axis represents lawfulness or concern for objective outcomes, while the vertical axis represents proper conduct or concern for the relationship. An authority that attaches little importance either to lawfulness or to proper conduct may, for instance, fail to respond and may remain silent in situations in which an individual has a right to a decision. There are many examples of this attitude on the part of public authorities.

If an administrative authority strives to achieve lawfulness but disregards proper conduct (the bottom right quadrant), the result may be, for example, a lawful decision delivered without accompanying reasons and therefore perceived by the citizen as improper. If the authority later provides a statement of the reasons for its decision, this may bring it into compliance with the law but will not change the fact that the citizen feels that he has not been treated properly.

Situations can also occur in which government acts in a more than usually proper manner, but not lawfully. In 2006, the National Ombudsman of the Netherlands dealt with a memorable case of this kind (report 2006/247) concerning the use of flexible baton rounds (often called 'beanbags') by a police arrest team making a particular arrest. A beanbag packs an enormous punch which briefly renders a person immobile. The problem was that flexible baton rounds were not listed among the weapons that the police could legally employ. The use of the beanbag was therefore unlawful. We received a complaint about it and had to decide whether it had been proper for the police to use the

beanbag to make this particular arrest. At the end of the day, we decided that its use, although unlawful, was proper. We reasoned that the lawful alternative facing the police was to shoot the person being arrested. The person concerned would then have been wounded or even killed. Therefore the use of the beanbag was proportionate, even though unlawful. It followed from this report that the law should be amended on this point.

I will now discuss the practice of other ombudsman institutions and give you an insight into the standards they have developed in their practice.

Principles of Good Administration of the UK Parliamentary and Health Service Ombudsman

Like some other institutions before it, the UK Ombudsman has developed its own set of principles of good administration. The principles were drafted following public consultation in 2006. Their purpose is both to tell the public what it has a right to expect from public authorities and to make it clear to public bodies what criteria the Ombudsman will use to judge their actions. The principles endorse legality, transparency, fairness and accountability. The Ombudsman regards these as the necessary ingredients of good administration. The six principles are:

- Getting it right
- Being customer focused
- Being open and accountable
- Acting fairly and proportionately
- Putting things right
- Seeking continuous improvement.

Each of the principles has a broad interpretation, which is explained in a brochure. For example, *being customer focused* means that services should be easily accessible and that action should be clear and accurate. The six principles are applied in three areas:

- Good Administration
- Good Complaint Handling
- Remedy

In the case of complaint handling, the principle of *Being customer focused* means that the complaints procedure should be clear and simple but when the same principle is used in the context of Remedy it means that the public body should promptly identify and acknowledge maladministration and poor service, and apologise for them.

These principles offer citizens and public bodies a wealth of information that helps them to maintain good services. The principles concerned with good administration are, of course, especially important since they apply to the everyday experience of citizens in contact with public bodies. The latter should be aware of the content of the principles and make sure that they are applied.

Following on from these principles, the UK Ombudsman makes it clear that, when a complaint is received, his main consideration will be the situation the complainant as a human being. The South Australian Ombudsman seem to echo this when he writes in his 2004 – 2005 annual report that, unless the complaint is obviously misconceived, he will proceed on the basis of a slight presumption in favour of the complainant. The underlying assumption, I think, is that the citizen is at the mercy of the public authority and, as an individual, has little ability to influence its actions.

Loss of personal data[2]

[2] http://www.ombudsman.org.uk/improving-public-service/reports-and-consultations/reports/parliamentary/the-ombudsmans-assessment-of-the-loss-of-personal-data-by-a-home-office-contractor

The use of the principles becomes clear from the case concerning the loss of personal data by a home office contractor. In 2009 the Parliamentary and Health Ombudsman of the United Kingdom received a lot of complaints from prisoners about the divulgence of sensitive personal data. A contractor working for the home office lost a memory stick which contained the personal data of about 48,000 prisoners. Several principles were used by the ombudsman to assess the unfortunate loss. On the basis of the principle "being open and accountable" the public bodies should handle personal data in an appropriate way. In this case the fact that a contractor was able to copy personal data unhindered, was in contravention of this principle. The Home Office was the responsible public body and should have conducted regular checks on compliance with the security arrangement.

The European Code of Good Administrative Behaviour

An institution that developed standards very early on is the European Ombudsman. The standards it developed were based on the experience of many other institutions. The mandate of the European Ombudsman is to investigate complaints about the institutions and bodies of the European Union. In the view of the European Ombudsman, the raison d'être of the institute is to promote good administration and an administrative culture of service. Any act not in accordance with these principles will result in maladministration. The European Ombudsman states that maladministration occurs "*when a public body fails to act in accordance with a rule or principle which is binding upon it*" (Annual Report 1997).

Such principles are:

1) a legal rule or principle,
2) a principle of good administration or
3) human or fundamental rights.

These three sets of principles are fundamental to the work of all ombudsman institutions but it is not always clear what they mean in practice. For this reason, European Ombudsman Nikiforos Diamandouros devised a more substantial code. This was based on consultation with the Member States of the European Union on their best practices and also on an examination of the case law of the EU courts and the European Court of Human Rights. In September 2001, the European Parliament adopted the Code in a Resolution and it has since become known as the *"European Code of Good Administrative Behaviour"*.

The importance of the European Code is quite clear, as it is referred to in Article 41 of the Charter of Fundamental Rights of the European Union, which establishes the right to good administration. The first paragraph reads:

Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.

Interestingly, paragraph 3 states that:

Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

This right is not mentioned as such in the Code but can be found in other ombudsman codes.

The elements of the Code include lawfulness, equality, non-discrimination, proportionality, the right to be heard and the duty to state the grounds of decisions. The Code also refers to efficient, fair, service-minded and citizen-friendly administration. Of course, lawfulness is one of the core criteria in all areas

of ombudsman work, but for the European Ombudsman this does not simply mean that the administration should comply with the law. In his words, maladministration is broader that legality; as he phrases it, "*There is life beyond legality*". In this respect, the work of the ombudsman is notably different from that of the courts.

Courtesy
A Bulgarian national had applied for the job as a short-term observer for the EU Elections Observation Mission in the Republic of Sudan. After a time he was informed that the selection had taken place but that he had not been chosen. The complainant then send an e-mail to the European Commission asking them to provide the criteria on the basis of which people were chosen. He also stated that the selection procedure was not transparent and that no contact point had been provided. The ensuing escalating e-mail correspondence ended with an e-mail from a staff member of the European Commission simple stating: see you in court. In his assesment of the case the European Ombudsman stated that "in order to serve citizens well, the Commission and its staff need to be courteous. Officials are also required to be service-minded, correct, and accessible in their dealings with the public. The Ombudsman considers that, in order to build up and maintain trust between citizens and European public administration, it is crucial that these standards are complied with." [3]

The Austrian Ombudsman Board
As I have already pointed out, not all ombudsman institutions make use of formal standards. The Austrian Ombudsman Board is a case in point. This ombudsman institute uses the law as its main tool to assess the actions of public authorities. But it is not its only tool, since in some cases the Board applies the principle of *Billigkeit* in order to fine-tune the application of statute. This means that the application of a legal rule can be modified if, in a given situation, its strict application would be unfair. These adaptations are never *contra legem*. The law is always the starting point for the decision of the ombudsman: there is a legal rule that is applicable but its strict application would result in an unfair situation. *Billigkeit* is invoked to justify a different decision that does justice to the specific circumstances of the case. The principle of *Billigkeit* is not associated with a set of specific standards and is modified to suit the particular case.
In some cases handled by the Austrian Ombudsman Board, the outcome is argued on the basis of *Billigkeit* (or *Unbilligkeit*). As there is no set of rules to describe its application, I will give two examples of how the Board applies the principle.

Repayment of benefit
A handicapped woman resident in an assisted living community was frequently unable to work but constantly sought ways to earn a living. Finally she was able to qualify work as an assistant to elderly people. Her mother managed her financial affairs on her behalf. In 2010 the mother discovered that her daughter was required to repay € 12,300 that she had wrongly received in benefits over a period five years. Apparently the daughter had earned too much during that period to qualify for this benefit money. This seemed very strange, since the mother had always kept the authorities duly informed of her daughter's income. The mistake obviously lay with the authorities. However, case law in Austria clearly establishes that, even when the authorities are notified of a change in income and fail to act upon the information, the benefit recipient can still be required to repay the sum concerned. Exceptions may be made on the basis of *Unbilligkeit* (unfairness). In this case, the Austrian Ombudsman Board felt that to reclaim this amount of money from someone who was struggling to achieve not only financial but personal independence was *Unrechtfertig* (unjust). The Board was able to have the demand for repayment waived.

Funeral Costs

[3] http://www.ombudsman.europa.eu/cases/decision.faces/en/10107/html.bookmark

In another case last year, a woman who had requested a tax deduction of € 7,300 for the total costs of her daughter's funeral was told she could deduct only € 1,800. However, three years later, the tax authorities informed her that she had claimed too much and demanded a repayment of € 365. Annoyed about the contradictory information she had received from the tax authorities, she appealed against the decision. The decision was upheld and the woman, who was living on a minimum income as she was unable to work, found this hard to accept. After she involved the Austrian Ombudsman Board, she was told that an exception would be made on the grounds of *Billigkeit* (fairness) and she would not have to repay the money. Later, this exception was turned into a legal rule with general effect. The Ombudsman Board thought that this was a good result, as there would no longer be any need for good-will solutions and legal certainty was increased.

Legal rule
These and other cases handled by the Austrian Ombudsman Board show that *Unbilligkeit* is a ground that prevents the occurrence of undesirable outcomes from a strict application of the law. However, the basis of all decisions of the Austrian Ombudsman Board remains the law and the legal rule. The basis for its decisions is never an independent principle, but always the legal rule and the exception to it, with the arguments for the exception being based on the merits of the case concerned. In any given case, the Board can look into the specific circumstances and see if the outcome is acceptable. While this approach gives the ombudsman institute a completely free hand in deciding whether or not a case is unfair, it does not necessarily provide clarity as to the grounds on which it is likely to reach decisions in future cases.

Denmark
The Danish Ombudsman has employed the principles of good administration for quite some time. In the light of this article, it is interesting to see that many of the principles discussed above have played a part in Danish ombudsman practice for over 40 years. At the time they were not identified as such but senior legal investigator Jens Olsen's extensive study of the case law of this long-standing institute reveals that they were in use almost from the beginning. A more explicit reference to principles was made in 1983, when the then Danish Ombudsman Lars Norkskov spoke in a lecture of 'The Citizens' Requirements of the Administration'. He referred to three categories of requirements:

- friendliness and consideration
- openness
- trust in the administration.

The first requirement applied both to letters from public authorities and to the behaviour of public officials. Olsen's study shows that, in practice, the requirements also implied ensuring maximum involvement of citizens in the decision making processes of the public administration. This was thought to result in greater trust in the authorities and the decisions they took. At the same time, public authorities were supposed to inform citizens of decisions, provide factual information and listen to the points of view of citizens involved in particular cases.

In his article, Jens Olsen describes many cases that can be categorised according to these requirements. In his conclusion, he states that the requirements were not meant to be absolute but were to be applied with a degree of flexibility. Some of them have found their way into legislation. For instance, the requirement of openness has resulted in the Access to Public Administration Files Act in 1993. Always a subject of great interest to the public and media, this law has enabled people to help create a more transparent and therefore accountable administration.

It is interesting to see that the principle of good administration was apparent in the work of the Danish Ombudsman long before it was identified as such. This shows that such principles are inherent to the work of the ombudsman. The role of the institute alongside that of the courts can be regarded as one

of the more obvious reasons for the development of a new set of principles. People soon became aware that the trend in the decisions of the Danish Ombudsman implied the existence of a new set of rules that were not necessarily based on statute law or legal rules. They were something *sui generis* and produced a wholly different way of dealing with problems – an approach entirely focused on the relationship between public authorities and citizens.

Good administration[4]
In the English version of his Annual Report 2010 the Danish Ombudsman elaborates on the principles of good administration. In that same report a case is discussed concerning the rejection of a complaint. The case was about a local authority that had failed to make notes regarding the environmental effects of a planned roundabout close to complainants house. The regional state authority stated it did not have any competence over the local authorities on this matter as it only was a case of good administration, whether notes were made. The Danish Ombudsman decided that although this was not a case dealing with hard law, the administration may also have duty to make notes in cases which have " certain infringing and important effects for the citizen and where a requirement to make notes of important case processing steps is natural and desirable."

The Netherlands
In the Netherlands, the need for a system involving clear guidelines was first expressed in writing in 1988 by the then National Ombudsman, Marten Oosting. While legal certainty is one of the reasons for having formal standards in any country, this may be especially necessary in the Netherlands because all Dutch municipalities, provinces and water boards are required by law to establish external complaints procedures to back up their own internal ones. Each of these local bodies (numbering over 450 in all) can opt either to use the National Ombudsman as its external complaint handler or to establish an external complaint handling body of its own. The result is a large number of such ombudsman bodies. Clearly, it would not foster public confidence in them if the outcome in comparable cases were different. The formal standards are therefore important as a guideline for the complaint handling institutions. They are based on the experience of all the ombudsmen in the Netherlands (at both national and local level) and have been developed in close cooperation so that they are seen as a product of the entire system. The criteria are also applied by all. This practice has been laid down in the General Administrative Law Act which states that "if the Ombudsman decides that the action in question was not-proper, he shall specify in his report which of the standards of proper conduct was breached".

Last year a third, newly updated set of standards was drafted in cooperation with the local ombudsmen. The principles establish how the ombudsmen expect public authorities to act and at the same time form the basis for their opinions on authorities' past actions. Section 9:36, subsection 2 of the Dutch General Administrative Law Act of 1999 requires that "If the Ombudsman decides that the action in question was not-proper, he shall specify in his report which of the standards of proper conduct was breached." This rule applies to ombudsmen at both national and local level.

The 22 standards are divided into four categories. Action by public authorities is expected to be:

A. Open and clear
B. Respectful
C. Caring and solution focused
D. Fair and trustworthy

One of the standards that falls within the category of being 'Open and clear' is the requirement to 'Provide adequate information'. This means that public authorities should ensure that citizens receive

[4] Annual Report 2010, page 80-81, Case No. 2008-3903-114.

the information they need. The information should be clear, correct and complete. Moreover, authorities should provide it proactively, not just when citizens ask for it. The explanation of this standard is that public authorities have a duty to provide citizens with complete information about their actions and about decisions that may affect their individual interests. It should not be left to citizens to ask for such information. Authorities should adopt a service-oriented attitude in this respect and be proactive in providing relevant information at the appropriate moment.

Failing hospital
In 2007, the parents of premature triplets had major concerns about one of them. He had to be taken to a special hospital for an operation. To their shock, the parents discovered that something had gone seriously wrong during the operation. The baby had sustained severe brain damage, which had left him physically and mentally disabled. The hospital reported the incident to the Healthcare Inspectorate (IGZ). It is not until three years later that the Inspectorate completed its critical report. But to the astonishment of the parents, the IGZ withdrew the report in response to an angry letter from a lawyer representing the doctor involved and the hospital. New inspectors produced this report in which the conclusions had been toned down. The parents were at a loss to understand and asked the National Ombudsman to unearth all the facts for them. He launched an investigation and asked for all documents relating to the case. His statement was that it is important for hospitals and doctors to act openly and predictably so that patients know why certain medical procedures have been performed. This requires a culture of openness. The patient's confidence should be the hospital's key priority. The National Ombudsman regarded this as a serious case of improper conduct. The hospital should start by offering his parents an apology, and handing over to them all the information about the case. The Ombudsman has asked the Minister for Health and MPs to ensure that hospitals and doctors provide patients with much better information, particularly when something has gone wrong.

Further similarities
By now it will be clear that these categories are not unique. They are easy to compare to the standards used elsewhere by other institutions. Moreover, they seem to address a field completely different from that covered by the courts. The increasingly widespread use of such principles reveals a change in ombudsman institutions. At first they were concerned about their independence and the formal side of their procedures. Now that these have been established in most countries, attention is focusing more on the content of the work and the essence or goal of the ombudsman institution. In this respect, most institutions seem to be concerned both to defend themselves against criticism that the office's powers are wholly uncertain and unpredictable in application and to emphasise that their aim is to assist public authorities in their work.[5] The standards allow for more predictable outcomes of ombudsman decisions and can pro-actively influence on the public administration.

Most of the criteria used in different countries are comparable but they are expressed in different ways. For example, the requirement of politeness can be found in the standards of the UK Ombudsman, the European Ombudsman, the Danish Ombudsman and in my own practice. The UK Ombudsman places it under the heading of 'Being customer focused', the European Ombudsman refers to Article 12 of the Code, the Danish Ombudsman sees it as part of the requirement that the administration should be 'friendly and considerate', and in my own practice it falls under 'Courtesy'. The same can be said of the requirement that public authorities should provide information to the public in a proactive way. For the UK Ombudsman this is part of 'Being open and accountable', for the European Ombudsman it comes under Article 22 of the Code, for the Danish Ombudsman it forms part of the requirement that the administration should be as open as possible, and in the Dutch standards it is summed up by the demand to provide adequate information.

[5] Trevor, Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice*, 2010, Ashgate Publishing Limited, Burlington.

Conclusion

The law, it seems, is not necessarily what improves the work of the public administration. It determines the limits of the administration's powers but how those powers are exercised is often left to the institutions themselves. It is no surprise, therefore, that ombudsman institutions are taking a key role in improving government services by assisting in the dialogue between monopolist public authorities and the citizens dependent on their actions. It is this important and fundamental task that ombudsmen now need to explore in more detail. Many of the principles we apply are comparable but, by developing the system of standards together, we can send public administrations an even better and clearer message on how we expect them to behave. At the same time we can improve the way we tell the public what they have a right to expect. Quite unintentionally, ombudsmen institutions around the world seem to have developed a common language that transcends national borders. Of course the dangers lies in the raising the principles and standards to works of law and apply them rigidly. The charm and quality lie in the flexible and adaptable characteristics of the standards, these should always be kept in mind.

Traditions in setting standards of good administration

Alex Brenninkmeijer
National Ombudsman of the Netherlands

KAFKA

PRAGUE

the fight against bureaucracy

Interface between citizen and ‘system’

- Personal contact (being heard)
- Proper conduct: Respectful treatment,
  Interests taken seriously
- Participation
  - *Standards of fairness*

Standards in the work of an Ombudsman
law and soft law?

Why standards?

- Legal certainty - citizens should know what to expect
- Consistency – in the same case giving the same decision
- Transparency – it is clear how you have come to a decision
- Guiding – public authorities know what is expected of them
- Commitment of public authorities

Standards anytime?

Are standards for all ombudsman institutes?

Yes but they can be different depending on culture and the actual context of the institution:

- A starting institute may well need more reference to law to establish authority
- In one country administrative courts play an important role, in others not

Standards ombudsman Netherlands

Open and clear

Respectfull

Caring and solution focused

Fair and trustworthy

Case I
Lost data:

A civil servant of a public agency is responsible for the personal data of approximately 48.000 prisoners from all over the country. He lost the memory stick with all this sensitive personal data of these 48.000 individuals.

Case II
See you in court:

An applicant for a job was not selected and wanted to know the reasons why he was not chosen. He was given a short dissatisfying answer. I an e-mail he made clear that he was discontent. The answer he got from the administration was simply: ‘SEE YOU IN COURT’.

Case III
Just pay back!

An handicapped woman living in an assisted community was able to work every now and then for her living. Most of the time however she was depended on social benefits. Her mother did her administration and kept always the authorities informed. After a year of working/not-working she received a decision: she should reimburse €+ 12.000 because the authorities had made a mistake.

The law stipulates that repayment is obliged even if based upon a mistake of the administration.

de Nationale ombudsman

Guidelines on proper conduct

Open and clear

Respectful

Caring and solution focused

Fair and reliable

The European Code of Good Administrative Behaviour

The European Ombudsman

en