



**OMBUDSMAN**

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## **FINAL REPORT**

(Article 21 sub 1 National Ordinance Ombudsman)

### **Complainant**

**Date complaint filed:** 22 January 2018

**Complaint no.:** 2018/

### **Ministry of General Affairs**

#### **Summary of Complaint**

Complainant claims to have been working in the function of Policy Advisor at the “*Stafbuuro*” of the Ministry of General Affairs from 1 March 2017 until 14 January 2018. According to Complainant an advice regarding said position was drafted by the Secretary General of the Ministry of General Affairs and allegedly signed by same and the Secretary General of the Ministry of Finance. However, Complainant never received a National Decree accordingly. By email dated 2 January 2018 addressed to the Secretary General of the Ministry of General Affairs, Complainant indicated that there was no follow up by the Department of Personnel and Organization (P&O) on the matter.

To date of filing Complainant’s complaint with the Ombudsman on 22 January 2018, this matter was not resolved.

#### **Conclusion**

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.

***The main question for consideration is:*** Did the Ministry of General Affairs observe propriety in providing Complainant with a National Decree?

Complainant was allegedly employed on 1 March 2017 in the function of Policy Advisor at the “*Stafbuuro*” of the Ministry of General Affairs until December 2017, which continued into January 2018. Notwithstanding said placement Complainant’s status remained “*bovenformatief*”.



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After addressing the Governor and the Ombudsman regarding the formalities surrounding the legal status of the position as a civil servant, and the consequences of same in assuming a position as a Minister, the Complainant formally addressed the Secretary General of the Ministry of General Affairs by letter dated 2 January 2018, expressing disappointment in the manner which the situation pertaining to Complainant's National Decree was handled, stating; *"(...) The organization failed me and did not address the issue. No civil servant should go through this process. P&O under your leadership should have advised further and a firm stance should have been taken. But they did not as you did not make a firm stance hence their negligence to the matter. (.....) No person should be hired without having a national decree in their hands. If this is the norm then it speaks wonders to the functioning of the organization. This practice must be immediately halted. (...) It is my intention to wait for your clear written instructions on how to further proceed before returning to the stafburo. Perhaps I might be sworn in as a minister within short but this does not change the situation of finalizing a pending process. The situation at hand is still relevant and needs closure (...)"*.

### **General observations**

The Ombudsman observes that the grievances brought forward by the Complainant and the findings in this case warrant to first elaborate on the relation Minister versus the government administration; a situation the Ombudsman repeatedly requested keen attention for since the establishment of the Ombudsman institution on Sint Maarten. The response of the Secretary General of the Ministry of General Affairs dated 1 June 2018 in reaction to the Preliminary Findings Report (PFR) underscores the importance of the following general observations.

#### *Relationship Minister versus government administration*

Ministers are political office holders, while civil servants are neutral and charged to guarantee continuity of Government as opposed to the periodic change and nature of political powers. The Ministers are politically responsible, and (should) therefore rely on the adequate organization of the Civil Service. This situation may at times cause tension. Hence the importance of objectively established standard procedures and policies in addition to legal regulations, as well as proper archiving - in particular by



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the Ministry of General Affairs - to support and enhance good cooperation between politics and government administration.

The “*Landsverordening inrichting en organisatie landsoverheid*” (LIOL) is the basis for the relationship between the political powers and the Civil Service.

A **Ministry** is the administrative organization of government, charged with the execution of policies. The **Minister** carries the responsibility for a Ministry, which composes various (sub) divisions, mentioned in art.1 sub 2 of the LIOL. Each Ministry has a **Cabinet** charged with the political support of a Minister; the Minister is ultimately responsible for the direction of the daily operations of the Cabinet. **The Secretary General** (SG) is pursuant art. 3 of the LIOL ultimately responsible for the direction of the daily operations of the administrative organization of a Ministry, he/she is responsible for both the operation and the results of the Departments within the Ministry, as well as the daily direction of the “*stafbureau*”.

Within this relational environment the standards of propriety are applicable. This requires clear and transparent delineation of authority and tasks of all parties pursuant to the LIOL, to guarantee promptness, stability and continuity in serving the public, including the interest of civil servants. Proper agreements between the Minister, the Cabinet and the Secretary General, supported by delegation or mandated authority are required, to guarantee good governance and continuation of same. Within the scope of its authority and responsibility for the direction of the government administration, a Secretary General is expected to advise a Minister in reaching his/her political objectives.

### *Archiving*

Considering the field of tension and the lack of transparency observed regarding delineation of competence, tasks and authority within government, the Ombudsman repeatedly expressed concern, and advised government by means of “*zorgbrieven*” to consecutive Prime Ministers, to take a closer look at the organization of government, and act where required to enhance transparency and efficiency.

Reference is made among others to the letters dated 28 February 2011, 25 July 2011, 17 December 2015, 17 March 2016, and 9 June 2016, as well as the paper “*Bottlenecks and solutions,*” a document compiled by the Ombudsman as a result of workshops with civil servants in 2016.



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Administrative accuracy requires that all incoming documents, including mentioned letters to the various Prime Ministers, are properly archived, and important content distributed within the Civil Service. More so, as art. 13 LIOL charges the Ministry of General Affairs with the task of supporting all Ministries in the area of:

- a. personnel and organization;
- b. information- and communication technology;
- c. facility affairs and purchasing;
- d. documentation and archives;
- e. external and internal communication.

### *The Ombudsman*

The Ombudsman is charged by law to promote good governance through investigating the behavior of government bodies in relation to natural and corporate persons, including civil servants. As such the task of the Ombudsman is among others to assist government to identify weaknesses in the organization, and issue recommendations to improve propriety and the service to the public.

In the absence of transparency regarding a clear delineation of authority, tasks and responsibility as provided for by the LIOL, but more so for reason of efficiency to acquire results through investigations, it has been established from the onset of the institute that interventions by the Ombudsman, pursuant to art. 15 and 16 of the National Ordinance Ombudsman, would be initiated at the level of the government division against which grievances are expressed by a Complainant. Government is expected to be open and clear, involved and result oriented, which includes proper archiving, distribution and sharing of important information throughout the entire Civil Service. The Ministry of General Affairs is charged by the LIOL to provide this support to all Ministries.

### *The Complaint*

By email dated 2 January 2018 addressed to the Secretary General of the Ministry of General Affairs, Complainant indicated that there was no follow up by the Department of Personnel and Organization (P&O) on the matter at hand (see Summary of Complaint page 1). To date of filing Complainant's grievances with the Ombudsman, the matter was not resolved.



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Pursuant to the standard procedures of the Bureau Ombudsman, and agreement with Government as described above, the investigation of the Complaint started at the P&O Department. By email of 25 January 2018 the Ombudsman proposed to the Department of P&O to proceed forthwith to ensure that the procedure to provide the Complainant with a written appointment is finalized. Considering the urgency of the situation as Complainant had been appointed in the meantime to be the Minister of General Affairs/Prime Minister, the organization should have known that administratively it would not be proper for the present Minister of General Affairs/Complainant to sign their own National Decree. As such proper procedures to finalize the pertinent National Decree should have included, presenting the National Decree for signing to the Acting Minister of General Affairs.

Failure to respond to the Intervention proposal provided by the Ombudsman, or providing the Ombudsman with a status update of this process, resulted in a full investigation of the Complaint. Notwithstanding the importance of the matter, it took several reminders from the Bureau Ombudsman to receive a response from the Secretary General of the Ministry of General Affairs regarding the matter.

### *Conclusions*

The Ombudsman observes that the standard of *Promptness* requires a public body to be dynamic and as such be decisive and swift in its decision-making. Hence, providing a response or decision within the legal time frame, or at least within a reasonable time is required. Notwithstanding alleged knowledge of the status of Complainant's position through conversations with the Secretary General of the Ministry of General Affairs, a written response to a formal request was required. More so considering the obvious urgency for clarity and transparency of the request. Complainant has allegedly been in the function as Policy advisor since 1 March 2017, and to date of filing the Complaint in January 2018, Complainant had not received a National Decree pursuant to article 11 of the "*Landsverordening Materieel Ambtenarenrecht*" (LMA). As such the standard of *Promptness* has not been observed by the Ministry of General Affairs, and is applicable in this case.

Based on the standard of *Adequate Organization of Services*, administrative bodies are required to organize their administration and operation in a manner which guarantees proper service to the public, including internal services to civil servants. 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



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provide prompt service and information. Continuity should be guaranteed; proper registration and archiving are essential to guarantee continuity in the administration.

Clear and adequate procedures to support decision-making within Government are required. While the Minister is the competent authority (*'bevoegd gezag'*) to appoint civil servants not in a political capacity, but in his capacity as the employer, the Secretary General is responsible for the proper application of procedures, propriety. The process to provide a National Decree pursuant to art. 11 LMA should be a standard procedure; the Ministry of General Affairs is charged by law to provide this support to all Ministries. Art. 11 LMA states: "*De ambtenaar ontvangt zo spoedig mogelijk een schriftelijke aanstelling (...)*". Standard procedures, including a reasonable timeline based on the general experience, prevents appointments being unduly influenced by alternative agendas, and provide transparency in tracking the paperwork during the process.

The status of Complainant's National Decree was unclear. It was not clear whether the National Decree to place Complainant in the function held since March 2017 was sent and signed by the Governor; and if so, why the National Decree was not (co) signed by the Minister. Though it is understandable that the Complainant had not seen the advice regarding the placement, the standard of *Adequate Organization of Services* requires that standard procedures and policies are properly and promptly followed. Furthermore, verbal communication and instructions should be documented for clarity and transparency to avoid misunderstandings. More so when explicitly requested by the persons involved, in this case the Complainant. *Adequate Organization of Services* requires that procedures to establish a National Decree to appoint civil servants should be uniform and clear. Standard procedures, including a timeline should be established and adhered to for transparency.

The Secretary General reports that advices of P&O concerning appointments are first approved by the Secretary General, and then sent to the Minister(s) for approval. After the approval of the Minister(s) the draft National Decree is sent to the Governor. When signed by the Governor, the decree is sent to the Minister for cosigning and the (procedure) appointment is finished. No mention is made of whose responsibility it is to send/ present the draft National Decree to the Governor, nor to finalize the appointment by presenting the signed document to the Minister and providing same to the civil servant after co-signing. A scenario description ("*draaiboek*") of standard procedures including provisions for emergencies or deviating scenarios creates clarity, transparency and continuity of government operations, and can prevent conflicts of interests as ultimately presented in this situation. Good governance requires anticipating the application of propriety in diverse situations.



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The Secretary General of the Ministry of General Affairs notes that the Complaint is concerning a draft National Decree which was not signed, and concludes that it is obvious that this cannot be remedied by the organization, as it directly involves the Minister. As such it is alleged that the Complaint should have been directed to the Minister of General Affairs. However, the Ombudsman established that the main grievances in the letter dated 2 January 2018 from the Complainant are regarding the non-response by the Secretary General of the Ministry of General Affairs, and no follow up by the Department of P&O on the matter. The Ombudsman observes that the description provided by the Secretary General regarding the procedure to establish a National Decree of appointment, is not detailed to the finalization of same. As such not transparent nor easily trackable for the civil servant.

Transparency requires that a Secretary General, as the highest and ultimate responsible civil servant for the government administration, uses his/her independent authority to clearly inform a civil servant regarding the reasons for a delay in her/his appointment, no matter what the reason may be.

As a follow up to the responses of the Secretary General of the Ministry of General Affairs to the Notification of Complaint (NOC), Complainant reacted by informing Minister Emil Lee, acting Minister of General Affairs, that Complainant is not able to sign their own “*Landsbesluit*,” and requested that this be executed by the acting Minister of General Affairs. Complainant further stated: “*(...) I have copied Cassandra in this email so that she is aware of the SG answers to the Ombudsman and can provide the documentation for you as I have not seen the said document (...).*”

Regarding the request posed by the Secretary General of the Ministry of General Affairs to provide further elucidation on the Complaint versus article 15 of the National Ordinance Ombudsman for clarity to the organization how to address similar situations in the future, the Ombudsman notes as follows. Article 15 sub 1 National Ordinance Ombudsman provides: “*Everyone has a right to submit a complaint to the ombudsman. The ombudsman shall ascertain whether the complainant has notified the body and, if applicable, the civil servant of the complaint and has given it/him an opportunity to respond to this*”. “*Body*” as provided for by law refers to the public body, which is formally the Minister. The Ombudsman however agreed with the Council of Ministers, and repeated same on numerous occasions in “*zorgbrieven*” to various Prime Ministers (see “*Archiving*” page 3), that investigations will in general start at the Department level within the pertinent Ministries. Considering the Complaint as filed, and no indications of the status of the Complaint within the Ministry, the investigation started at the level of the P&O Department. Proper archiving



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of documents and distribution of general information applicable to all Ministries is of utmost importance and required; and a task of the Ministry of General Affairs. As such the standard agreement made with the Council of Ministers should be a given, considering the letters to the various Prime Ministers referred to above.

Complainant filed a complaint on 22 January 2018 by completing the Complaint form of the Ombudsman. A copy of an email dated 2 January 2018 with Complainant's grievances sent by Complainant to the Secretary General, was included. Complainant alleged that there was an advice signed by the Secretaries General of General Affairs and Finance regarding Complainant's position at the *Stafburo*, however Complainant did not receive the National Decree, while Complainant had been working in said position for months. Pursuant to art. 11 LMA Complainant was entitled to a National Decree certifying Complainant's position. As such the Ombudsman proposed by way of intervention, that P&O proceeds forthwith to ensure that the procedure to provide the National Decree is finalized. As no response was received to the intervention proposal, the Ombudsman initiated a full investigation. A comprehensive outline of the procedures (followed) to establish a National Decree was not provided by the Ministry.

The standard of *Legal Certainty* provides that justified expectations should be honored. Complainant could reasonably think that the required National Decree would be finalized promptly, more so in light of the evident urgency of the matter.

By email dated 27 May 2018 Complainant informed the Bureau Ombudsman that Complainant's advice was approved in order for Complainant to proceed with the screening and formalizing of Complainant's new position as Minister of General Affairs. By email dated 29 May 2018 Complainant provided the Bureau Ombudsman with a copy of the National Decree (LB-18/0174) dated 3 April 2018.

Considering that the Complainant received the National Decree, the Complaint has been resolved and handled through the intervention of the Ombudsman. However, the Ombudsman concludes that the standards of *Promptness*, *Adequate Organization of Services* and *Legal Certainty* have not been observed and violated by the Minister/Ministry of General Affairs.

### **Judgment**

The complaint is founded; the standards of proper conduct *Promptness*, *Adequate organization of services* and *Legal Certainty* have been violated. The Minister/Ministry of General Affairs acted improper with regard to the Complaint.





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### **Recommendation**

Considering that pursuant to art 13 of the LIOL the Ministry of General Affairs (P&O) provides personnel support to all Ministries, the Ombudsman recommends as follows: To ensure that a proper and transparent system is in place to establish National Decrees for placement of civil servants, including a timeline and appropriate measures for exceptional and or matters of urgency, where required.

The Ombudsman requests a status report on the recommendation within three (3) months from the date of this report.

### **Elucidation**

#### **Intervention**

Considering that Complainant's status remained "*bovenformatief*", notwithstanding placement in the function of Policy Advisor at the "*stafburo*" of the Ministry of General Affairs, the Ombudsman proposed by email dated 25 January 2018 that the Department of Personnel and Organization (P&O) proceeds forthwith to ensure that the procedure to provide the Complainant's written appointment (National Decree) is finalized. P&O was requested to provide the Ombudsman with a status update on the progress made by 1 February 2018.

After no response to the Intervention was received, the Ombudsman initiated an investigation.

#### **Investigation**

**By letter dated 7 February 2018** a Notification of complaint (NOC) was sent to the Department of P&O with the request to respond to questions posed by 15 February 2018.

**By email of 26 February 2018** the Secretary General of the Ombudsman sent a reminder to the Secretary General of the Ministry of General Affairs as no response was received to the NOC. The Secretary General of General Affairs was informed that the Department of P&O was afforded additional time until 5 March 2018 to provide a response.

**By letter dated 2 March 2018** from the Secretary General of the Ministry of General Affairs (received by email on 5 March 2018) a response to the NOC was received, stating the following, "*(...) With reference to your letter dated February 26, 2018 with the abovementioned, please your attention for the following. The complaint as received by letter of February 7, 2018, (and email dated January 25, 2018) was*



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*discussed between head P&O and undersigned. I apologize for the delay. Attached you will find the answers to the questions posed. However, I also need to request your attention for the following. The content of the email send by complainant, on January 2, 2018, creates a different picture than the actual situation. First of all, it must be noted, that complainant has been informed at all times on the status of the advice, and the situation as presented. Alternatives were also discussed, while it was made clear that complainant should continue carrying out tasks as policy advisor at the staff bureau, until a (written) decision was taken by the Minister of General Affairs. Therefore the request of complainant for clear written instructions, in the email of January 2, 2018, is surprising. At least twice a week complainant and the Secretary General met to discuss the assignments of complainant. In addition it should be mentioned that this changed in the period after the hurricane Irma hit Sint Maarten. Therefore, the impression created that complainant was left in a limbo, and blaming the Secretary General and the department of P&O not to take a firm stance, or failing complainant, is not accurate. Furthermore, the complaint is not clear. If the complaint is that the national decree has not been signed, it should be obvious that the complaint cannot be directed to the organization. The Department P&O nor the Secretary General, have the authority to sign a national decree. Only a minister can cosign a national decree. Therefore the complaint had to be directed to the Minister of General Affairs. However, if the above is not the right interpretation, the Ombudsman is hereby respectfully requested to provide further elucidation on this complaint versus article 15 of the national ordinance on the Ombudsman, with the main objective to clarify for the organization how to address similar situations in the future (...)."*

Attached to the email was the following response to the NOC questions:

**1. Are you familiar with the complaint?**

*Answer: It is not clear what the complaint is. Assuming the complaint is that the draft national decree is not signed, then the answer is yes, I am aware of that.*

**2. What is your response to the complaint?(notwithstanding your answer to question 1)**

*Answer: The draft national decree is to be approved and signed by the governor and the minister. It is a surprise that the complaint is addressed to the organization while it is clear that the organization did what it had to do. On numerous occasions this subject was discussed with the complainant and it was clear over and over again that action needs to be taken by the minister and not the organization.*

**3. Do you see a possibility to resolve this issue on a short term through intervention by the Ombudsman or otherwise?**



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*Answer : According to me the only way to resolve this issue is by signing the national decree. Now that complainant is the responsible Minister, this can be considered a challenge to have this issue resolved.*

**4. Explain the procedure followed and the status of the national Decree to be provided to Complainant.**

*Answer: Advices of P&O concerning appointments, are first approved by the Secretary General, and then sent to the Minister for approval. After the approval of the minister(s), the draft national decree is sent to the Governor . When signed by the Governor, the decree is sent to the Minister for cosigning and the (procedure) appointment is finished.*

*The status. The advice, including the draft national decree was still by the minister of general affairs, until he left the office. After he left and the deputy was appointed minister of general affairs, a meeting was held between the Secretary General and him, and a copy of the advice including the draft national decree was handed to him. I have not seen proof that he approved the advice and presented it to the governor, although I have requested his attention for this a few times.*

**5. Are the procedures followed in this case deviating from the requirements provided for in article 11 LMA? If yes, explain the reason why?**

*Answer : It is obvious that the final steps were not taken by the minister, and therefore the procedure was not finalized. As a consequence, the complainant did not receive the written appointment with the information as mentioned in article 11 of the LMA.*

**6. When can Complainant expect to receive the national decree pertaining to the alleged position?**

*Answer: The organization cannot answer that question. The organization has done whatever it had to do, and the complainant was informed of that. The next step is the approval of the advice and sending to the governor for the signing of the draft national decree. The organization (department of P&O and or the secretary general) cannot send the draft national decree to the governor and cannot cosign, therefore I cannot say when complainant will receive the signed national decree.*

*Concerning the request for the relevant document, the following can be mentioned. It is considered that the advice regarding the placement of complainant would be the most relevant document. However, the question is if this internal document (forming part of a process which is not finalized yet) can be shared with a third party. This is in our interpretation different than for example a request for a permit or license. Therefore in this phase of the investigation, we will not provide the Ombudsman with a copy of the advice, but we can guarantee that the advice dated February 23, 2017, and approved by the*



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*Secretary General on March 2, 2017, was submitted to the Minister of General Affairs.*

**By email dated 5 March 2018** Complainant was requested by Bureau Ombudsman to respond to the NOC answer of the Secretary General of the Ministry of General Affairs by 12 March 2018.

**By email dated 6 March 2018** the Secretary General of the Bureau Ombudsman informed the Secretary General of the Ministry of General Affairs regarding his question/remark pertaining to addressing the Minister of General Affairs instead of the Department of Personnel & Organization (P&O): “(...) *the Ombudsman notes that an investigation is initiated at the Department level, unless the complaint (letter/request) directly involves the Minister. Complainant is an employee at the Ministry of General affairs, as such complainant’s complaint was sent to the Department of P&O, which is charged and responsible to answer queries by the Ombudsman in the investigation. The Secretary General is copied in the procedure. The Ombudsman further notes that as per standard agreement with the Council of Ministers, a copy of an advice can be provided to the Ombudsman under embargo. However, the OBM will accept the information provided by the Secretary General in this case as an exception (...)*”.

**By email dated 7 March 2018** Complainant informed and requested Minister Emil Lee, acting Minister of General Affairs; “(...) *I am not able to sign my own Landsbesluit and therefore requesting that this be done by the acting Minister of General Affairs. I have copied Cassandra in this email so that she is aware of the SG answers to the Ombudsman and can provide the documentation for you as I have not seen the said document (...)*.”

**By email dated 7 March 2018** the Secretary General of the Ministry of General Affairs requested the Secretary General of the Ombudsman to give an elucidation on the relevance of article 15 versus the complaint.

A Preliminary Findings Report (PFR) **dated 23 May 2018** was drafted by the Ombudsman and presented to parties for comments.

**By email dated 27 May 2018** Complainant informed the Bureau Ombudsman that Complainant’s advice was approved, in order for Complainant to proceed with the screening and formalize her position. The email reads as follows: “(...) *This email serves as an update on the situation. Please note I got the advice approved as it was needed in order for me to*



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*proceed with the screening, and to formalize my position. Please let me know if I need to provide you proof of this (...)"*

**By email dated 29 May 2018** Complainant provided the Bureau Ombudsman with a copy of her National Decree.

On 1 June 2018 a reaction **dated 31 May 2018** to the PFR signed by the Secretary General was received stating: *"(...) With reference to the abovementioned, I want to inform you that I do not agree with the preliminary findings as presented in the (draft)report. I want to confirm that I agree that a civil servant cannot remain in insecurity concerning his or her legal position. I also want you to acknowledge that the Ministry of General Affairs, namely the Department of Personnel and Organization and the Secretary General motivated the complainant to accept the position of policy advisor in the staffburo of the Secretary General, and did all what they had to do in appointing her in that position. Therefore, there should be no doubt of the intentions of the Ministry. However, despite providing the relevant information to the Ombudsman, the (conclusions of the) report does not reflect the efforts done by the Ministry.*

*Concerning the report itself, the report does not back up the procedures as explained by the ombudsman, and the compliant is not clear. The conclusions reached in the report, and more specifically the way the articles 15 and 16 of the national ordinance ombudsman are applied in this case, have as consequence that liability for the organization (the Ministry) is established for actions of a minister.*

*Procedures.*

*My understanding of the procedures of the Ombudsman is that the complaint as received by the Ombudsman will first be send to the civil servant or department to which the complaint is directed to, and if no solution is reached on that level, the Ombudsman will escalated the request to a department head, Secretary General and finally the Minister. Based on article 15 and 16 however, the Ombudsman has to ascertain whether the complainant has notified the body before sending out the complaint.*

*In this case, by email dated January 25, 2018, among others, the following is mentioned: "(..) to date Complainant has not received her National Decree. By email dated 2 January 2018 addressed to the Secretary General of the Ministry of General Affairs, Complainant indicated that there was no follow up by the Department of Personnel and Organization (P&O) on the matter".*

*The Ombudsman than propose, "(..) that the Department of Personnel and Organization (P&O), proceeds forthwith to ensure that the procedure to provide the National Decree is finalized"*



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*However, if the conclusion of the Ombudsman is that the complaint is concerning the signing of a national decree, it should be obvious that the complaint had to be sent to the Minister. So not only is the complaint not correct, but also the proposal to the department of personnel and organization has no value.*

*Therefore, the "normal" procedure to send the complaint to the organization obviously would not have resulted in the national decree being signed.*

*The complaint.*

*Notwithstanding the above, the complaint can also be considered not to be clear. In the email, complainant refers to the fact that the SG left her "hanging". In the email of the Ombudsman, reference is made to the fact of the non-response of the SG. However, in that same email, the Ombudsman concludes that the national decree is not signed. A complaint concerning not signing of a national decree, of course is a different complaint and needs to be addressed to the right body. It is obvious that the signing of the national decree is not the authority of the organization.*

*Therefore, to formulate the main question, if the **Ministry** has observed propriety in providing the complainant with her national decree, the Ombudsman is establishing liability by the organization for actions of a minister.*

*Articles 15 and 16.*

*The SG in an email dated March 7, requested clarity on the application of article 15 of the national ordinance ombudsman. As a reaction to that request, the Ombudsman confirms that formally the body is the minister.*

*Furthermore, article 15 paragraph 1 of the national ordinance prescribes that the Ombudsman shall ascertain whether the complainant has notified the body".*

*Article 16 of the national ordinance Ombudsman further stipulates that:*

- "1. The ombudsman shall investigate the complaints submitted.*
- 2. During the investigation, the ombudsman may make proposals for reaching a solution to the complaint to the complainant and the body.*

*The definition of "body" is clear. Article 2, of the national ordinance administrative justice ('landsverordening administratieve rechtspraak'), to which article is referred to, mentions "een **persoon** of een college met enig openbaar gezag bekleed".*

*Therefore, considering that the Ombudsman in the email of January 25, 2018, stated that the signing of the national decree has not taken place yet (by the minister or the Governor), based on article 15, the Ombudsman had to ascertain if the complainant has notified the minister. No reference is made of this exercise, and the results, in the report. Therefore, the conclusion that the **Ministry** has failed, or asking if the Ministry has observed propriety in providing the national decree, and for sure without even*



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*referring to the fact that the **Minister** of General Affairs, at that time, did not approve and sign the national decree, make the conclusion incomplete, and even inaccurate. In the report, there are also important information, which were provided by me, not included in the report.*

*For example, no reference is made to my request for a copy of the standard agreement between Government and the Ombudsman in providing (copies of) advices during investigation. This request is made in my email of March 7. The same email referred to in the report. Until now, I have not received such.*

*Furthermore, the information that a copy of mentioned advice was presented to the new Minister of General Affairs of the previous government, and his attention requested for this a few times, is also not taken into consideration in establishing the role and efforts of the ministry.*

*Surprisingly, the Ombudsman concludes that a comprehensive outline of the procedures (followed) to establish a national decree has not been provided.*

*However, no documentation was requested, and second, information was provided by answering question 4, as requested.*

*In conclusion, based on the above:*

*I consider it only correct to mention that the Ministry (SG and Department of Personnel), did not leave the complainant "hanging" and did all they had to do (hands on) in order to have the decree signed by the minister;*

*I also consider that the application of the standard of proper government to the organization and not to the minister, in this case, is inaccurate and is reason for concern.*

*Finally, I can inform you that I received copy of the signed national decree, dated April 3, 2018 (...)"*

### **Findings**

**By letter dated 24 November 2017** Complainant informed the Governor of Sint Maarten stating: “(...) Deze brief heeft betrekking op de rechtsgevolgen van mijn landsbesluit van 23 december 2014 inzake de Landsverordening Non-activiteitstelling politieke gezagdragers. Het gaat in het bijzonder om de feiten die in het landsbesluit in de artikelen 1 t/m 4 zijn opgenomen en de onzekerheid rondom mijn huidige rechtspositie. Op 10 oktober 2014 werd ik vanwege mijn lidmaatschap van de Staten van Sint Maarten op non-actief gesteld voor de duur van de termijn (artikel 1 ). Ik werd op non-actief gesteld zonder behoud van mijn inkomen en inbegrip van eventuele toelagen (artikel 2). Tevens werd ik ontheven van de waarneming van mijn ambt tot op de dag van mijn weder in activiteit stelling (artikel 3). Dat bij de non-activiteit geen bepaling wordt verbonden en dat er geen garantie wordt gegeven



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*op terugkeer in de oude functie bij weder activiteitstelling (artikel 4 ). Excellentie, aan de hier bovengenoemde artikelen heb ik zonder enig bezwaar meegewerkt. Na de verkiezingen van 2016 werd ik niet herkozen naar de Staten van Sint Maarten. Op eigen initiatief heb ik bij de afdeling Personeelszaken geïnformeerd naar een beschikbare functie, om mijn bijdrage aan het land via de ambtenarij te hervatten. De Secretaris-Generaal (hierna SG) van het Ministerie van Algemene Zaken (hierna AZ), benaderde mij om de functie van Beleidsadviseur te vervullen bij het stafbureau van Ministerie van AZ. Sinds 1 maart 2017 ben ik werkzaam in de functie van beleidsadviseur bij het stafbureau AZ, mijn werkrelatie met de SG van AZ is goed. Ik verschijn dagelijks en op tijd op het werk. De aan mijn opgegeven opdrachten en instructies worden goed uit gevoerd. Het advies inzake mijn huidige functie werd op 23 februari jl. opgesteld en op 2 maart ondertekend door de SG AZ. Op 21 maart jl. werd mijn advies ondertekend door de SG van het Ministerie van Financiën (hierna Min Fin). Na 21 maart is mijn advies ergens binnen de organisatie blijven liggen. De verantwoordelijke ministers (AZ en Fin) hebben het advies niet ondertekend ondanks de eerdere goedkeuring van beide SG's. Dit heeft tot gevolg dat mijn rechtspositie conform de Landsverordening materieel ambtenarenwet niet is geregeld en dat ik tot heden geen landsbesluit heb ontvangen voor mijn huidige functie. Het landsbesluit is opgesteld maar nooit ondertekend door de Minister van Algemene Zaken/Minister President. Het ontbreken van mijn landsbesluit brengt mijn rechtspositie als ambtenaar in gevaar, officieel ben ik niet in dienst van het land. Tevens is het van belang dat mijn rechtspositie als ambtenaar wordt gewaarborgd, zodat ik teneinde van mijn toekomstige lidmaatschap aan de Ministerraad van Sint Maarten, terug kan keren in de ambtenarenapparaat met de correcte inkomen en eventuele toelagen. Ik verwijs u vriendelijk naar pagina 1 van het advies PO 5815117 met DIV nummer 6495 van 23 februari jl inzake de opbouw van mijn inkomen. Excellentie, ik verzoek u vriendelijk doch dringend rekening te houden met de hierboven genoemde feiten en omstandigheden, om enige misverstanden inzake mijn rechtspositie (salaris en pensioenopbouw) te voorkomen. Het feit dat mijn landsbesluit niet tijdig is ondertekend kan mij niet verweten worden. Het land en de verantwoordelijke ministers zijn hier debet aan. Tot slot wil ik benadrukken dat ik bereid ben om mijn huidige functie, mijn inkomen en eventuele toelagen neer te leggen, zodat er niets in de weg staat om mijn toekomstige functie als minister te aanvaarden. Vertrouwend u hiermee voldoende te hebben geïnformeerd, mocht u na het lezen van mijn brief nog vragen hebben, dan verneem ik die graag (...)"*

**By letter dated 29 December 2017** addressed to the Ombudsman complainant stated, "(...) By means of this communication I would like to officially submit a complaint about the manner in which the handling or lack of handling of my return to the Ministry of General Affairs. As known, after the 2016 elections I did not obtain sufficient votes to be re-elected to the Parliament of Sint Maarten. On my own initiative, I immediately contacted the Human Resources Department and made myself available to resume my functioning and contribution as a civil servant. After





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*discussions with the Human Resources Department, The Secretary General (hereinafter referred to as SG) of the Ministry of General Affairs (hereinafter referred to as AZ), offered the position of policy advisor in the staffburo of Ministry of AZ. I left the discussions with both the SG and the HR department without reservation. The advice for my appointment was done on February 23rd 2017, and expecting an approval I started work as agreed upon on March 1, 2017. Since then until present, I have been working in that position. On numerous occasions, I have addressed my concerns to both the SG and the Personnel Consultant of the Ministry of AZ regarding working in a position without a national decree. Both assured me that this was not a problem on several occasions. In discussions with the SG, I was informed that the Minister of General Affairs refused to sign the advice and indicated he would sign the advice when he is ready. The former Minister of General Affairs has since resigned and a new Minister was appointed in his position, nevertheless my advice is still not signed. This is not in accordance with the law and goes against the principle of good governance. As a result I have been placed in a precarious situation. Questions such as; why does my salary slip read bovenformatief? Bovenformatief is not a position and the position I am currently fulfilling is available. I cannot obtain a loan in a position that is bovenformatief. Should I be allowed to attend work without a national decree (in Dutch LB)? Is this legal? Is this customary of government and is this the manner of conducting business in a legal manner? How will this affect my pension? These questions were verbally posed to the HR consultant of the Ministry of General Affairs. Most recently and as publicly known I have been asked to become a minister for the new incoming government and this same matter regarding my current position became an issue. See the attached the document to the Governor, his Excellency E. Holiday. I am hereby asking for the intervention of the Ombudsman as attempts to have the advice finalized were deemed futile. The SG of AZ has practically had a hands off approach in this matter, leaving me with no choice but to turn to the intervention of the Ombudsman. I look forward to your response, should you require any additional information after reading, please feel free to contact the undersigned at your earliest (...).”*

**By letter dated 2 January 2018** addressed to the Secretary General of the Ministry of General Affairs Complainant expressed disappointment in the manner in how Complainant’s situation pertaining to her National Decree was handled, the letter



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stated as follows; “(...) *It’s the beginning of a new year and I really couldn’t leave the year start without bringing closure to last year and expressing my disappointment in the manner in how my situation was handled. Let me first state my gratitude for ensuring that my advice was finalized and sent to the minister, however, the process should not have ended there. I am cognizant of the fact that an SG does not have an influence on when a minister signs an advice. I am also aware of the political sensitivity of the matter, but please recall I mentioned this to your person when I was being recruited and you stated that this is not a problem. However, leaving my person in limbo was still not the answer. I patiently awaited your instructions and guidance on how to further proceed but instead, you went silent and treated the matter in a nonchalant manner instead of really addressing it. As a matter of fact, you made jokes about a serious matter which really irritated me to the point that I just decided I am not going to continue in this manner. I expected you as my SG to sit with me and give guidance and or instruction on how to further proceed. A leader sets the tone of the organization. The organization failed me and did not address the issue. No civil servant should go through this process. P&O under your leadership should have advised further and a firm stance should have been taken. But they did not as you did not make a firm stance hence their negligence to the matter. The issue became more intense when I was going through the screening process, at that moment it was quite clear that the organization just went numb. No one knew what to do about the situation and just left me in a conundrum that was not caused by my person. It should have been addressed. No person should be hired without having a national decree in their hands. If this is the norm then it speaks wonders to the functioning of the organization. This practice must be immediately halted. I am grateful to the SG C. Janssen for giving clear instructions on how to handle the situation, however, that SG is not responsible for my person. I have sent an official complaint to the Ombudsman as this is not the manner in how the Ministry of AZ should function. It is my intention to wait for your clear written instructions on how to further proceed before returning to the stafburo. Perhaps I might be sworn in as a minister within short but this does not change the situation of finalizing a pending process. The situation at hand is still relevant and needs closure (...)*”.

After no response to an intervention proposal was received, on 7 February 2018 a Notification of Complaint (NOC) was sent to the Department of P&O with the request to



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respond by 15 February 2018 to questions posed. A standard request to enclose all information and documents relevant to the complaint was included. After some correspondence outlined above under “**Investigation**”, a response to the NOC dated 2 March 2018 was received from the Secretary General of the Ministry of General Affairs.

By email dated 7 March 2018 the Secretary General of the Ministry of General Affairs requested the Secretary General of the Ombudsman to give an elucidation on the relevance of article 15 versus complaint.

As a follow up to the NOC answer of the Secretary General of the Ministry of General Affairs, Complainant reacted by informing Minister Emil Lee, acting Minister of General Affairs, that Complainant is not able to sign their own *Landsbesluit* and therefore requested that this be done by the acting Minister of General Affairs. Complainant further stated: “(...) *I have copied Cassandra in this email so that she is aware of the SG answers to the Ombudsman and can provide the documentation for you as I have not seen the said document (...).*”

By email dated 27 May 2018 Complainant informed the Bureau Ombudsman that Complainant’s advice was approved, in order for Complainant to proceed with the screening and formalize Complainant’s position. Complainant followed up by providing the Bureau Ombudsman with a copy of the National Decree (LB-18/0174) dated 3 April 2018.

The content of the letter of the Secretary General dated 31 May 2018 in response to the PFR (see section “**Investigation**”, page 13) is considered in its totality in concluding regarding the grievances filed by the Complainant.

### **Legal Basis**

Pursuant to article 19 sub 1 of the National Ordinance Ombudsman, the Ombudsman is authorized to request from government bodies, civil servants, the complainant, civil servants as experts or witnesses, all information and or documents pertaining to the investigation. The persons mentioned in the aforementioned article are obliged to respond to the request within the time indicated by the Ombudsman, except in cases where the persons can appeal to legal grounds (“*verschoningsrecht*” - see article 19 sub 4).

*Landsverordening Materieel Ambtenarenrecht AB 2010, GT no.25*



*Artikel 11*

1. *De ambtenaar ontvangt zo spoedig mogelijk een schriftelijke aanstelling, welke het ambt alsmede zijn naam, voornamen en geboortedatum vermeldt.*
2. *De aanstelling vermeldt voorts:*
  - a. *of de ambtenaar in vaste of tijdelijke dienst wordt aangesteld. In het laatstbedoelde geval wordt tevens vermeld of de aanstelling voor een bepaalde tijd, voor een proeftijd, dan wel voor onbepaalde tijd geschiedt;*
  - b. *zo mogelijk de dag van ingang van de aanstelling;*
  - c. *de bezoldiging en de andere voordelen in geld, welke de ambtenaar worden toegekend;*
  - d. *in voorkomende gevallen, het feit dat artikel 6, eerste lid, van de Pensioenlandsverordening overheidsdienaren op hem van toepassing is alsmede de grond of gronden daarvan.*
3. *Alle wijzigingen, welke worden gebracht in de punten in het tweede lid vermeld, worden de ambtenaar schriftelijk medegedeeld.*

**Standard(s) of proper conduct:**

The Ombudsman investigates whether the behavior of public bodies towards citizens is correct. The applicable standards of proper conduct in this case are: *Promptness* and *Adequate organization of services* (administrative accuracy)

***Promptness***

A public body is expected to be dynamic and as such be decisive and swift in its decision-making. Hence, providing a response or decision within the legal time frame or at least within a reasonable time is required. When a public body expects citizens to adhere to deadlines, based on the principle of equality the public body should strive to adhere to deadlines provided by law. Not adhering to a legal time frame will undermine the authority of the public body as well as tarnish its credibility with the citizen. There are acceptable exceptions to the mentioned deadlines. A public body can miss a deadline in cases where more information is required to come to a decision. In such cases a public body is required to duly inform the citizen of the delay.

***Adequate organization of services*** (administrative accuracy)



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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 guarantee continuity in the administration.

External requirements are among others: accessibility of a Department (by phone, electronically and physically); waiting time for the citizen to be attended to should be minimized; efficiency in providing service. Internal provisions are among others: handling of incoming mail; registration systems should be accurate and up to date; privacy of documents and information; adequate supervision of operations; proper internal communication; proper registration and handling of complaints filed by citizens.

### ***Legal certainty***

Legal certainty is essential in any state of law; it requires compliance by government with decisions of the Court and that legitimate expectations are honored by government. The standard of *Legitimate expectations* provides that justified expectations should be honored. An expectation is justified if the citizen could reasonably think, or be under the impression that the public body or civil servant in the case is authorized. The circumstances of the case play an important role. A letter and or signed contract provokes higher expectation than word of mouth. In the end a legitimate expectation on the part of the citizen has to be honored by the public body. Legitimate expectations could be based on among others: promises made by a government body; general information provided to the public; provisions laid down in an agreement; justified expectations pertaining to the time a response or a decision from government can be expected.

Philipsburg, 18 June 2018

Dr. R. (Nilda) J.A. Arduin  
Ombudsman