

Report Highlights

Why DLA Performed This Audit

An audit was requested due to concerns that LAW's spending on outside counsel for matters relating to *Janus* violated state law.

What the Legislative Auditor Recommends

1. The legislature should consider whether judicial review and/or ratification is necessary.

A Special Audit of the Department of Law, Spending on Contracts Related to *Janus*

May 19, 2023

Audit Control Number 03-30101-23

REPORT CONCLUSIONS

The audit's opinions on whether the legislature's restrictive Civil Division appropriations were legally constructed and whether the Department of Law's (LAW) expenditures on matters related to *Janus v. AFSCME (Janus)* were allowable per state law are based on an evaluation of opposing legal arguments made by the Alaska Legislative Affairs Division of Legal and Research Services (Legislative Legal) and the attorney general. The basis for the audit's opinions is included in this report; however, it is important to recognize that a final legal determination can only be made by the appropriate court.

The audit concluded that the legislature, through constructing LAW's FY 21 and FY 22 Civil Division appropriations with specific limitations, effectively restricted LAW's ability to contract with outside counsel for *Janus* related matters. The attorney general interpreted the restrictions to be a violation of the Alaska Constitution's confinement clause and an improper encroachment of the powers of a separate branch of government. Based on the attorney general's opinion, LAW disregarded the legislative restrictions and spent a total of \$315,034 during FY 21 and FY 22 for outside counsel services related to the *Janus* decision. The services included assisting the department with cases involving the *Janus* decision in which the State of Alaska, or an executive of the State, was named as defendant, and filing amicus briefs in support of the State's position.

The attorney general, Legislative Legal, and an attorney hired by the legislative auditor analyzed the legality of the Civil Division's restrictive appropriations. The audit's review of these legal analyses

concluded that a court would likely find that the appropriations did not violate the confinement clause or the doctrine of separation of powers since the appropriation language did not prevent the attorney general from fulfilling statutory duties with in-house attorneys.

The audit also concluded that limiting expenditures for specific legal cases was perceived by some as a legislative attempt to inappropriately influence the attorney general's actions, which increased the risk of litigation.

The audit further concluded that LAW's decision to pay outside counsel for services related to *Janus* from an appropriation that expressly prohibited the expenditures likely violated AS 37.07.080(a) and Article IX, section 13 of the Alaska Constitution.

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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July 17, 2023

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24, we have reviewed the Department of Law's spending on contracts relating to *Janus* and the attached report is submitted for your review.

DEPARTMENT OF LAW SPENDING ON CONTRACTS RELATED TO *JANUS*

May 19, 2023

Audit Control Number
03-30101-23

The audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Fieldwork procedures utilized in the course of developing the findings and recommendations presented in this report are discussed in the Objectives, Scope, and Methodology.

A handwritten signature in blue ink, appearing to read "Kris Curtis".

Kris Curtis, CPA, CISA
Legislative Auditor

ABBREVIATIONS

AFSCME	American Federation of State, County, and Municipal Employees, Council 31
AS	Alaska Statute
ASEA	Alaska State Employees Association
CISA	Certified Information Systems Auditor
Consovoy	Consovoy McCarthy PLLC
CPA	Certified Public Accountant
DLA	Division of Legislative Audit
FY	Fiscal Year
<i>Janus</i>	<i>Janus v. AFSCME</i>
LAW	Department of Law
Legislative Legal	Alaska Legislative Affairs Division of Legal and Research Services
SLA	Session Laws of Alaska
SSSLA	Second Special Session Laws of Alaska

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ORGANIZATION AND FUNCTION

Department of Law (LAW)

LAW serves as the legal advisor for the governor and other State officers, prosecutes all violations of state criminal law, and enforces the consumer protection and unfair trade practices laws. The department is organized into three divisions: Civil, Criminal, and Administrative Services. The Civil Division provides legal counsel to the executive branch of government, which includes review of legislation before it is acted upon by the governor, and review of regulations prepared by executive agencies. The Civil Division also defends and prosecutes civil litigation to which the State is a party.

The attorney general is appointed by the governor and is the principal executive officer of the department. The duties and powers of the attorney general are outlined in AS 44.23.020.

Alaska Legislature

The legislature is the branch of state government that has the power to enact law and appropriate. The term “appropriation” is defined in AS 37.07.120(3) as a maximum amount available for expenditure by a state agency for a stated purpose set out in an appropriation act.

The Alaska Legislature is divided into two chambers: the 40-member Alaska House of Representatives and the 20-member Alaska Senate.

State of Alaska Governor

The State of Alaska governor is elected to a four-year term through a general election. Per Article III, section 16 of the Alaska Constitution, the governor is responsible for the faithful execution of laws. The governor has veto authority over legislative appropriations as noted in Article II, section 15 of the Alaska Constitution, which states the governor may veto bills passed by the legislature by striking or reducing items in appropriation bills.

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BACKGROUND INFORMATION

The audit examines the actions taken by the attorney general in response to the US Supreme Court's 2018 decision regarding labor union fees. The audit also examines legislative attempts to restrain the attorney general's spending on such actions.

Janus v. American Federation of State, County, and Municipal Employees, Council 31 (AFSCME)

Janus v. AFSCME (Janus) is a US Supreme Court 2018 decision¹ on US labor law concerning the power of labor unions to collect fees from non-union members. The Supreme Court ruled that such union fees in the public sector violate the First Amendment right to free speech, overturning the 1977 decision in *Abood v. Detroit Board of Education* that previously allowed such fees.

State of Alaska Actions Taken in Response to the *Janus* Decision

After the Supreme Court's decision in *Janus*, Alaska's attorney general under Governor Bill Walker issued a memo dated September 7, 2018, that provided guidance to executive branch departments regarding the rights and duties of public employees and public employers post-*Janus*. The memo, in part, addressed whether the *Janus* decision provided that a public employer may not continue to honor existing union membership dues authorizations. In answer to that question, the attorney general concluded that existing union members were not required to take any action, and that existing membership cards and payroll deduction authorizations by union members should continue to be honored.

After a change in administration, incoming governor Michael Dunleavy asked for a legal opinion from the newly appointed attorney general regarding proposed changes to the State's process for deducting union related dues and fees from employee paychecks in light of *Janus*. On August 27, 2019, the attorney general's opinion concluded, in part, that:

1. The US Supreme Court's decision in *Janus v. AFSCME* significantly limits the manner by which the State can deduct union dues and fees from its employees' wages.

¹ Decided by the Supreme Court on June 27, 2018, in a 5-4 decision.

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2. The *Janus* decision prohibits a public employer from deducting union dues or fees from a public employee's wages unless the employer has "clear and compelling evidence" that the employee has freely waived his or her First Amendment rights against compelled speech.
 3. The State's existing system for payroll deductions of union dues and fees does not ensure "clear and compelling evidence" that every employee has "freely given" consent to the State to withhold those funds.
 - a. For an employee's consent to be valid, it must be reasonably contemporaneous, free from coercion, and be accompanied by a clear explanation of the rights an employee is waiving.
 - b. The State's current payroll deduction system fails to satisfy constitutional standards.
 4. The State must implement a new process for ensuring that an employee's consent to payroll deductions for union dues and fees is knowing, intelligent, and voluntary.

Subsequently, Governor Dunleavy issued Administrative Order 312 on September 26, 2019, to establish procedures to "ensure that the State of Alaska honored the First Amendment free speech rights of state employees to choose whether or not to pay union dues and fees through payroll deduction." The new procedures included, in part, "opt-in" and "opt-out" dues authorization forms, which were to be collected by the State to prevent undue union influence. The opt-in forms were to contain specific language clearly informing employees that they were waiving their First Amendment right to not pay union dues or fees and thereby not to associate with the union's speech. The opt-in and opt-out forms under the administrative order could be submitted at any time.

***Janus* Related Alaska Court Cases**

The Alaska State Employees Association (ASEA), representing over 8,000 state and municipal employees, objected to the governor's administrative order and sued claiming executive overreach. Two additional federal lawsuits were filed against ASEA concerning dues authorization forms. The three lawsuits are described below.

1. *ASEA v. State of Alaska* (3AN-19-09971CI) – The complaint contended the 2019 attorney general opinion and subsequent Administrative Order 312 were an overreach of *Janus* and have no basis. The Alaska Superior Court found in ASEA's favor and issued an injunction against the State. On May 26, 2023, the Alaska Supreme Court upheld and confirmed the Superior Court's injunction.
2. *Creed and Riberio v. ASEA, Commissioner Tshibaka* (20-35743) – This lawsuit was brought by the named employees of the State of Alaska. It asserted, in part, that union dues checkoff authorizations signed by government employees in Alaska before *Janus* cannot constitute affirmative consent by those employees to waive their First Amendment right to not pay union dues or fees. Union members who signed such agreements could not have freely waived their right to not join or pay a union because the Alaska Supreme Court had not yet recognized that right. The courts found in favor of ASEA, and a petition for the US Supreme Court to hear this case under appeal was denied.
3. *Woods v. ASEA, AFL-CIO, et al.* (20-35954) – This lawsuit asserted, in part, that the claimant's First Amendment rights were violated by only allowing them to revoke their dues deduction authorization during one 10-day period each year. Additionally, dues were being collected without clear and compelling evidence First Amendment rights to free speech and association had been waived. The courts found in favor of ASEA, and a petition for the US Supreme Court to hear this case under appeal was denied.

LAW Hired Outside Counsel to Assist with Related *Janus* Cases

To help assist with the cases identified above, the Department of Law (LAW) contracted with the law firm of Consovoy McCarthy PLLC (Consovoy). A contract was first entered into August 2019 for an amount “not to exceed \$50,000” for legal advice “regarding possible constitutional issues concerning dues and agency fees in a bargaining unit agreement.” The contract was amended October 2019 to “not to exceed \$100,000”. In January 2020, a second contract with Consovoy was entered into for an amount “not to exceed \$600,000” to represent the State in its litigation efforts to defend the attorney general’s opinion concerning interpretation of the *Janus v. AFSCME* decision and the governor’s administrative order implementing the decision.

Legislative Restrictions on *Janus* Related Outside Counsel Contracts

During consideration of LAW’s FY 21 proposed operating budget, members of the Alaska Legislature House Finance Subcommittee expressed concerns regarding LAW’s spending on expensive outside counsel. Of specific concern was spending on the Consovoy contract that allowed for rates up to \$600 per hour. The finance subcommittee proposed limiting LAW spending on contracts for outside counsel related to the *Janus* decision by separating the FY 21 authorization² for LAW’s Civil Division into two appropriations:

1. Civil Division Except Contracts Relating to Interpretation of *Janus v AFSCME* (\$48,036,200)
2. Legal Contracts Relating to Interpretation of *Janus v AFSCME* Decision (\$20,000)

After debate regarding fiscal responsibility and the appropriateness of limiting funding for outside counsel, the new appropriation structure was approved by the House Finance Subcommittee and, subsequently, approved by the House Finance Committee and the legislature. The same restrictions were applied to LAW’s FY 22 Civil Division authorization.³

² House Bill 205 – Chapter 8 SLA 2020.

³ House Bill 69 – Chapter 1 SSSLA 2021.

LAW Objected to the Civil Division Appropriation Structure

LAW management questioned the legality of separating the Civil Division's funding into two appropriations. Specifically, LAW's bill review of the FY 21 operating budget noted:

The Department of Law has historically been comprised of a civil division and criminal division and not organizationally separated by particular legal matters. An effort to restrict the spending authority of the Department of Law in such a manner raises issues under the confinement clause of the Alaska Constitution which as set forth above has been interpreted to prohibit an appropriations bill from administering a program of expenditures. The Department of Law carries out the state's legal business and the Alaska Supreme Court has held that in carrying out those functions the Attorney General has the powers and duties ascribed to that position under the common law which includes the authority to bring actions that the Attorney General considers to be in the public interest. See, *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975). Accordingly, language in an appropriations bill that attempts to restrict the Attorney General from entering into contracts regarding particular legal matters, which could range from outside counsel to needed experts for a case, raises significant legal issues and could impede the Attorney General's ability to fulfill his statutory duties as head legal advisor and litigator for the state.

Further, an additional problem with an appropriation structure of this nature is that under Article III sec. 16 of the Alaska Constitution the governor may initiate court action to enforce "any constitutional or legislative mandate." The *Janus v. AFSCME* decision concerned core First Amendment issues and subsequent litigation in relation to that case involves the application of the First Amendment. Thus, the appropriation structure for civil division raises additional significant legal

questions in relation to the governor's authority under Article III, sec. 16.

Governor Dunleavy vetoed the FY 21 and FY 22 appropriations that specifically allowed spending for contracts relating to *Janus*.

REPORT

CONCLUSIONS

An audit was requested of the Department of Law's (LAW) spending on outside counsel for matters relating to *Janus v. AFSCME (Janus)* due to concerns that such spending violated state law. Audit objectives include identifying new contracts entered into after FY 20 for related outside counsel, reporting on the services provided by outside counsel, and determining whether related expenditures violated the Alaska Constitution and/or other state law.

The audit's opinions on whether the legislature's restrictive Civil Division appropriations were legally constructed and whether LAW's expenditures on matters related to *Janus* were allowable per state law are based on an evaluation of opposing legal arguments made by the Alaska Legislative Affairs Division of Legal and Research Services (Legislative Legal) and the attorney general. The basis for the audit's opinions is included in this report; however, it is important to recognize that a final legal determination can only be made by the appropriate court.

The audit concluded that the legislature, through constructing LAW's FY 21 and FY 22 Civil Division appropriations with specific limitations, effectively restricted LAW's ability to contract with outside counsel for *Janus* related matters. The attorney general interpreted the restrictions to be a violation of the Alaska Constitution's confinement clause and an improper encroachment of the powers of a separate branch of government. Based on the attorney general's opinion, LAW disregarded the legislative restrictions and spent a total of \$315,034 during FY 21 and FY 22 for outside counsel services related to the *Janus* decision. The services included assisting the department with cases involving the *Janus* decision in which the State of Alaska, or an executive of the State, was named as defendant, and filing amicus briefs in support of the State's position.

The attorney general, Legislative Legal, and an attorney hired by the legislative auditor analyzed the legality of the Civil Division's restrictive appropriations. The audit's review of these legal analyses concluded that a court would likely find that the appropriations

did not violate the confinement clause or the doctrine of separation of powers since the appropriation language did not prevent the attorney general from fulfilling statutory duties with in-house attorneys.

The audit also concluded that limiting expenditures for specific legal cases was perceived by some as a legislative attempt to inappropriately influence the attorney general's actions, which increased the risk of litigation.

The audit further concluded that LAW's decision to pay outside counsel for services related to *Janus* from an appropriation that expressly prohibited the expenditures likely violated AS 37.07.080(a) and Article IX, section 13 of the Alaska Constitution. (See Recommendation 1)

Detailed conclusions are presented below.

LAW contracted with outside counsel for *Janus* related services.

An objective of the audit was to identify all *Janus* related contracts active from FY 21 through FY 22 and report the amount expended. The audit request also directed auditors to determine how the State financially supported amicus briefs filed on behalf of the State related to *Janus*, including the case *Belgau v. Inslee*.

The audit concluded that the only *Janus* related contract from FY 21 through FY 22 was with Consovoy McCarthy PLLC (Consovoy). LAW contracted with Consovoy to provide services "for matters related to the *Janus* decision." Services included representing the State in its litigation efforts to defend the attorney general's opinion concerning interpretation of the *Janus* decision and the governor's administrative order implementing the decision. In addition, LAW

utilized Consovoy to draft and file amicus briefs⁴ on three separate occasions.

The attorney general stated that filing amicus briefs in *Janus* related federal cases was important and necessary because the cases impact “the constitutional rights of Alaska state employees.” The amicus filings were outsourced to Consovoy, a firm with relevant expertise that LAW already had under contract. The attorney general estimated Consovoy’s total costs for preparing one amicus brief to be under \$6,000, which he expected to be less than the cost to prepare using in-house attorneys.

Exhibit 1

LAW Expenditures for <i>Janus</i> Related Outside Counsel FY 21 through FY 22	
Case	Amount
<i>State of Alaska v. ASEA</i>	\$263,959
<i>Creed v. ASEA</i>	7,350
<i>Woods v. ASEA</i>	23,400
<i>Belgau v. Inslee</i> (amicus briefs)	12,412
<i>Troesch v. Chicago Teachers Union</i> (amicus brief)	7,913
Total	\$315,034

⁴ According to the Public Health Law Center at Mitchell Hamlin School of Law, amicus curiae (amicus) or “friend-of-the-court” briefs are filed by someone with a strong interest in the subject matter of a lawsuit, but who is not a party to, nor directly involved with, the litigation. Amicus briefs serve multiple purposes, including to: address policy issues; provide a more sympathetic advocate; supplement or bolster a party’s brief; provide historical perspective or technical assistance; endorse a party; or seek to mitigate or expand the effects of a potentially important prior court opinion, depending on whether the opinion is damaging or helpful. Amicus briefs may be filed by a person or an organization, or by a group of people or organizations.

LAW paid a total of \$315,034 for *Janus* related outside contracts during FY 21 and FY 22.

LAW paid \$301,845 during FY 21 and \$13,189 during FY 22 to Consovoy for tasks related to *Janus*. Most of the payments were for legal assistance associated with Alaska *Janus* related cases; however, a total of \$20,325 was paid to Consovoy for drafting three amicus briefs. Exhibit 1 on page 11 summarizes expenditures by related case.

Legislative limits on expenditures for specific cases were perceived by some as an inappropriate attempt to influence executive branch legal actions.

As described in the Background Information section of this report, the FY 21 Civil Division appropriation was split into two separate appropriations. The main appropriation was titled “Civil Division Except Contracts Relating to Interpretation of *Janus v AFSCME*” and included almost all of the division’s expenditure authority, approximately \$48 million. The secondary appropriation was titled “Legal Contracts Relating to Interpretation of *Janus v AFSCME* Decision” and provided \$20,000 of expenditure authority.

During consideration of LAW’s FY 21 budget by the House Finance Committee, some committee members raised concerns that the restrictions were an inappropriate attempt to manage LAW’s decision process by reducing funding for a specific issue that members did not agree with. Other members claimed that the purpose of the amendments was to restrain the use of costly outside counsel, which members considered unjustified and fiscally imprudent. House Finance Committee members in favor of the restrictions highlighted the need for fiscal restraint due to the high cost of outside counsel that had hourly fees up to \$600 per hour. The restrictions were ultimately retained by the Committee and included in the FY 21 operating budget. The restrictions were also incorporated into the FY 22 budget. The attorney general strongly opposed the decision.

As discussed in detail below, the audit concluded that the appropriations were likely legally constructed. Regardless of the legality, which can only be determined by the courts, several House Finance Committee members and the attorney general, perceived appropriation language as an inappropriate attempt to influence executive branch legal actions. Appropriation verbiage

The attorney general and LAW management disregarded legislative restrictions.

that is interpreted differently between the legislative and executive branches increases the risk of litigation.

The governor vetoed the FY 21 and FY 22 appropriations that specifically allowed up to \$20,000 to be spent each year on contracts related to interpretation of the *Janus* decision. Ostensibly, vetoing the only appropriations that allowed payments for *Janus* related contracts would bar LAW from making any payments to Consovoy. However, LAW proceeded to spend \$315,034 on *Janus* related outside counsel using the Civil Division's appropriation⁵ that specifically prohibited funds from being spent on outside counsel for *Janus* related services.⁶

As justification for the unauthorized expenditures, the attorney general stated that the restrictive appropriation language violated the confinement clause by including language which, in effect, amended general law by impeding the attorney general's ability to fulfill statutory duties as the State's head legal advisor and litigator. Under that premise, the attorney general argued that the purported appropriations were not appropriations at all, but instead were improper efforts to utilize an appropriations bill to administer a state program in violation of the confinement clause of the Alaska Constitution.

The attorney general also argued that the appropriations' structure attempted to restrict the governor's ability to initiate court action to enforce "any constitutional or legislative mandate", which is a violation of Article III, section 16 of the Alaska Constitution. As such, the attorney general regarded the appropriations as an improper encroachment on the powers of the executive branch of government.

⁵ The FY 21 appropriation was \$48,036,200; the FY 22 appropriation was \$49,930,400.

⁶ The appropriation was worded the same in both FY 21 and FY 22.

Legal analyses support that *Janus* related appropriation restrictions likely did not violate the Alaska Constitution’s confinement clause.

Article II, section 13 of the Alaska Constitution is referred to as the “confinement clause” and governs the formation of legislation. It states that “Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations...” In other words, the legislature, through an appropriation bill, cannot add substantive language to an appropriation that is not germane to the subject of appropriation. To do so may have the effect of altering existing law. Prior court cases have interpreted the confinement clause as prohibiting the legislature from using an appropriation bill to *administer a program*. Administering programs is an executive branch responsibility.

Legal analyses regarding whether or not the FY 21 and FY 22 Civil Division appropriations violated the confinement clause are included as appendices to this report. Legislative Legal analyses are enclosed as Appendices A and F. Attorney general analyses are included as Appendices B through E. The Legislative Audit outside counsel analysis is included as Appendix G. All the analyses included references to state law and prior court cases as support for the respective arguments and conclusions.

As discussed above, prior case law has interpreted the confinement clause as prohibiting an appropriation bill from administering a program of expenditures. This audit evaluated the legal arguments as to whether the restrictions within the Civil Division’s appropriations equated to administering LAW’s programs by limiting it from carrying out its responsibilities or duties. The attorney general contended that “appropriation language that attempts to restrict the Attorney General from entering into contracts related to a particular legal matter – which would include not only contracts with outside counsel, but also with necessary legal experts – raises significant legal issues and impedes the Attorney General’s ability to fulfill statutory duties as head legal advisor and litigator for the state.” The attorney general also contended “Any attempt to constrain the discretion of the Attorney General through an appropriation bill

violates the confinement clause of the Alaska Constitution and represents an improper encroachment on the powers of a separate branch of government.”

The audit found the attorney general’s argument less persuasive than the counter-argument presented by Legislative Legal. Legislative Legal contended that restrictions did not equate to a programmatic change because the restrictions did not prevent the attorney general from fulfilling statutory duties with in-house attorneys. Especially convincing was Legislative Legal’s reference to the case *Alaska Legislative Council v. Knowles*, in which the Alaska Supreme Court analyzed the constitutionality of contingency language for various appropriations in an appropriations bill. Key aspects of Legislative Legal’s analysis concluded that the Civil Division’s appropriation language does not attempt to administer a program because it only specifies how the appropriation is to be spent, no more and no less. Legislative Legal further concluded that the appropriations did not violate the confinement clause because nothing in the appropriations prevented LAW from pursuing litigation or the attorney general from fulfilling his duties as the State’s head legal advisor and litigator using in-house resources.

Legal analysis supports that *Janus* related appropriation restrictions likely did not violate the separation of powers doctrine.

The attorney general contended that “the Legislature, through the exercise of its appropriation power, sought to exact a monetary punishment on the Office of the Attorney General for the very performance of its duties under the law. This level of political coercion is exactly the issue that the separation of powers doctrine seeks to prevent.” The audit gave careful consideration to this claim, as it was clear that the restrictions were perceived by some as an attempt to inappropriately influence executive branch legal actions. Ultimately, the audit found the claim unconvincing given that the attorney general was never limited from pursuing *Janus* related matters using in-house resources, and legislative meeting minutes support that the restrictions were put in place to rein in costs and promote fiscal responsibility.

The attorney general’s decision to spend without authority appears to have violated state law.

Auditors were persuaded by legal analyses that found the attorney general’s claim that the legislature had no legal right to constrain his position from using outside counsel did not sufficiently recognize the legislature’s power of appropriation. Alaska Statute 37.07.080(a) provides that departments, when administering their programs, are limited by various things, including “appropriations by the legislature” and “other provisions of law.”⁷ Further, AS 44.23.020(d) provides that “the attorney general may, **subject to the power of the legislature to enact laws and make appropriations**, settle actions, cases and offenses...[emphasis added]” The audit was persuaded by legal analyses that concluded these statutes establish that the attorney general’s executive branch power is subject to the legislature’s power of appropriation.

The attorney general communicated in a February 14, 2020, letter to the co-chairs of the House Finance Committee that the Civil Division appropriation restrictions being contemplated by the committee would not have the intended effect and that the attorney general would continue to retain outside counsel as he deemed necessary. Under the attorney general’s guidance, LAW spent monies during FY 21 and FY 22 on outside counsel for *Janus* related services from an appropriation that specifically prohibited the expenditures. The decision appears to have violated AS 37.07.080(a), which states that departments, when administering their programs, are limited by various things including “appropriations by the legislature” and “other provisions of law”; and Article IX, section 13 of the Alaska Constitution, which states:

No money shall be withdrawn from the treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred

⁷ AS 37.07.080(a) provides:

Except as limited by executive decisions of the governor, the mission statements and desired results issued by the legislature, appropriations by the legislature, and other provisions of law, the several state agencies have full authority for administering their program service assignments and are responsible for their proper management.

except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

As shown above, the Alaska Constitution states that no expenditure may be made from the public treasury without a valid appropriation by the legislature. The attorney general disagreed and considered the restrictive appropriations to be null and void. The audit found the appropriations were likely legally constructed.

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FINDING AND RECOMMENDATION

Recommendation No. 1: The decision to pay outside counsel for services related to the interpretation of *Janus v. AFSCME (Janus)* from an appropriation that expressly prohibited the expenditures likely violated AS 37.07.080(a) and Article IX, section 13 of the Alaska Constitution.

The legislature should consider whether judicial review and/or ratification is necessary.

The attorney general contended that spending from the appropriation was lawful and justified because restrictive language in the Department of Law’s Civil Division appropriation violated the confinement clause of the Alaska Constitution. As such, the attorney general concluded the restrictive appropriations were an improper effort to utilize an appropriations bill to administer a state program. The attorney general also concluded that the restrictive appropriation language represented an improper encroachment on the powers of a separate branch of government.

In contrast, the Legislative Affairs Division of Legal and Research Services (Legislative Legal), and outside counsel hired by the legislative auditor, concluded that the Civil Division appropriations likely did not violate the confinement clause because the appropriations remained available to finance the litigation of cases or controversies related to *Janus* and nothing prevented the civil division from using its appropriation to pay for staff attorneys to provide the representation necessary to litigate disputes related to the *Janus* decision. The audit found this counter-argument was more convincing. Although the audit concludes that Legislative Legal arguments were more convincing, the issue has not yet been litigated and final determination rests with the courts. As such, the legislature should consider whether judicial review is warranted.

The audit also concluded that the legislature should consider ratifying the FY 21 expenditures of \$301,845 and FY 22 expenditures of \$13,189. Ratification is advised given Legislative Legal concluded the expenditures were unauthorized.

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with Title 24 of the Alaska Statutes and a special request by the Legislative Budget and Audit Committee, we have conducted a performance audit of the Department of Law's (LAW) spending on contracts related to *Janus v. AFSCME (Janus)*.

Objectives

The objectives were to:

- Determine whether any funds were expended on *Janus* related contracts (concerning public employees' union membership, union dues, or related matters) since the beginning of FY 21 or whether any new contracts relating to *Janus* were entered into.
- Determine whether and how the State financially supported the work of Consovoy McCarthy PLLC's (Consovoy) filing of the October 2020 amicus brief on behalf of the State of Alaska in *Belgau v. Inslee*, or other filing in Alaska Superior Court, Alaska Federal District Court, or any other courts.
- Determine whether LAW, through expenditures on contracts related to *Janus*, violated AS 37.07.080(a), Article IX, section 13 of the Alaska Constitution or any other state law.
- Follow up on any other related concerns the legislative auditor identified during the audit.

Scope

The audit reviewed LAW open contracts and *Janus* related court cases from FY 21 through FY 22. The audit reviewed expenditures for *Janus* related outside counsel from FY 21 and FY 22.

Methodology

To address the objectives, auditors reviewed and evaluated the following:

- Applicable Alaska Statutes, regulations, and the Alaska Constitution to identify functions, responsibilities, and requirements of the legislature, governor, and LAW.
- House Finance Law Subcommittee and House Finance meeting minutes and audio files concerning restrictive language added to LAW's Civil Division FY 21 operating appropriation bill to learn the reason for the language.
- Legislation, including applicable governor's vetoes, as it relates to LAW's Civil Division budgets for FY 21 through FY 22, to learn about the executive branch's response to the restrictive appropriation language.
- Communications from the attorney general to legislators concerning *Janus* related activities of LAW to understand the executive branch's view of the restrictive appropriation language.
- Attorney general *Janus* related opinions and governor executive orders to identify the legal basis for LAW's actions.
- Newspaper articles, and internet and Westlaw searches, to identify *Janus* related cases where the State of Alaska was a defendant or filed an amicus brief.
- Open contracts for outside counsel between July 1, 2020 and April 30, 2022, to identify *Janus* related contracts by judgmentally selecting LAW contracts for further review.
- LAW listing of *Janus* related court cases or amicus briefs filed by LAW or LAW's outside counsel, which was matched for completeness against independently identified *Janus* related court cases or amicus briefs filed by LAW or LAW's outside counsel.

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- A listing of LAW FY 21 and FY 22 expenditures for *Janus* related outside counsel, to identify the amount and funding source for those expenditures.
 - Support for all FY 21 and FY 22 *Janus* related outside counsel expenditures, to confirm expenditures were properly supported and charged to the correct fiscal year, and to identify and schedule the associated *Janus* case.

The legality of LAW's *Janus* related outside counsel expenditures was analyzed by obtaining and reviewing:

- Legal analysis from Legislative Affairs Division of Legal and Research Services (Legislative Legal) concerning legality of LAW expenditures on *Janus* related contracts.
- LAW's response to Legislative Legal position on the legality of LAW expenditures on *Janus* related contracts.
- Analysis, from Legislative Legal, of LAW's arguments regarding limitation on LAW Civil Division appropriation language.
- Legal analysis obtained from a Legislative Audit contracted attorney regarding the strength of opposing arguments presented by Legislative Legal and LAW regarding validity of LAW expenditures.

Representation letters were obtained from the attorney general, deputy attorney general - Civil Division, and director of administrative services confirming complete and accurate information was supplied during the audit.

To gain an understanding of LAW procedures over contracting and posting of expenditures, interviews were conducted with LAW staff. No internal controls were tested as no controls were found significant to the audit objectives.

(Intentionally left blank)