

LEGAL SERVICES

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MEMORANDUM

March 4, 2014

SUBJECT: Ombudsman Jurisdiction in Comparison to Legislative Budget and Audit Division's Audit Jurisdiction Regarding Private State Contractors (Work Order No. 28-LS1559)

TO: Representative Wes Keller
Attn: Jim Pound

FROM: Doug Gardner
Director

You asked for an opinion that explains the authority of the Legislative Budget and Audit Division in comparison to the Ombudsman, to investigate private state contractors. The focus of your request is whether the two entities have similar authority, or whether the focus of the Ombudsman's investigative jurisdiction "wrongdoing," is in contrast to the legislative budget and audit division's focus on "money."

Ombudsman's Jurisdiction

The Ombudsman's jurisdiction is set out in AS 24.55.100:

Sec. 24.55.100. Jurisdiction.

(a) The ombudsman has jurisdiction to investigate the *administrative acts of agencies*.

(b) The ombudsman may exercise the ombudsman's powers without regard to the finality of an administrative act.

As you know from the hearings on HB 127, the Ombudsman is currently limited to investigating administrative acts of agencies. "Agencies" are defined in AS 24.55.330(2) as follows:

(2) "agency" includes a department, office, institution, corporation, authority, organization, commission, committee, council, or board of a municipality or in the executive, legislative, or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, council, or board of a municipality or of the state government independent of the executive, legislative, and judicial branches; it also includes an officer, employee, or member of an "agency" acting or purporting to act in the exercise of

official duties, but does not include the governor, the lieutenant governor, a member of the legislature, the victims' advocate, the staff of the office of victims' rights, a justice of the supreme court, a judge of the court of appeals, a superior court judge, a district court judge, a magistrate, a member of a city council or borough assembly, an elected city or borough mayor, or a member of an elected school board;

As you can see, the Ombudsman is limited to the acts of state agencies, and those municipalities and school districts that, in accordance with AS 24.55.320, elect to become subject to the jurisdiction of the Ombudsman. Currently, the Ombudsman has no jurisdiction over private contractors. HB 127 proposes to include, within the definition of "agency," certain private contractors. If that effort is successful, the ombudsman's jurisdiction over a private contractor would be extensive, as set forth in AS 24.55.150:

Sec. 24.55.150. Appropriate subjects for investigation.

(a) An appropriate subject for investigation by the ombudsman is an administrative act of an agency that the ombudsman has reason to believe might be

- (1) contrary to law;
- (2) unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law;
- (3) based on a mistake of fact;
- (4) based on improper or irrelevant grounds;
- (5) unsupported by an adequate statement of reasons;
- (6) performed in an inefficient or discourteous manner; or
- (7) otherwise erroneous.

(b) The ombudsman may investigate to find an appropriate remedy.

With regard to your specific question about whether the Ombudsman is focused on "wrongdoing" more than on financial issues, you may want to contact the Ombudsman or review the Ombudsman's website of archived investigations to determine whether the Ombudsman has addressed significant audit or financial issues in the past. I would note that the Ombudsman clearly has the statutory authority necessary to address financial/audit issues, in addition to other types of agency acts which I think you are referring to as "wrongdoing," as you can see from AS 24.55.150 set out above. However, the Ombudsman may also decline to address a complaint that alleges a matter where the Ombudsman's resources are insufficient to adequately conduct an investigation, or where other remedies, such as a fraud investigation by law enforcement, for example, are available. AS 24.55.110.

My understanding from speaking with you and Jim Pound on your staff, is that you are considering extending Ombudsman jurisdiction to any state contractor. The policy

considerations we discussed briefly on the phone related to an expansive increase in Ombudsman jurisdiction. The committee may want to discuss the following issues:

- Can the Ombudsman handle such a massive increase in potential workload;
- Will the Ombudsman's jurisdiction, in some cases, deter capable entities from bidding on or accepting state contracts;
- Would such an increase in Ombudsman jurisdiction result in overlap of oversight where the entity subject to Ombudsman jurisdiction is already highly regulated, and if so, would this overlap result in the Ombudsman declining to exercise jurisdiction in a growing number of cases and is this acceptable as a policy consideration;
- If the Ombudsman did investigate a private contractor, does the legislature intend that the Ombudsman would have the same scope of investigative power and access to "agency" records regarding a private contractor that the Ombudsman has over the records of state agencies and participating municipalities and school boards?¹

¹ I would note that if the legislature chooses to broaden the power to of the Ombudsman to investigate a private contractor, an issue may arise regarding privacy interests where there is a legitimate privacy expectation or a state or federal law protecting information that the Ombudsman may be seeking. Alaska's guarantee of privacy is broader than the federal constitution's. See *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 245 (Alaska 2006), quoting *Anchorage Police Dep't. Employees Ass'n. v. Anchorage*, 24 P.3d 547, 550 (Alaska 2001). The State of Alaska applies a three-part test to determine whether a person's privacy rights have been violated:

(1) whether a party seeking protection has a legitimate expectation that materials or information will not be disclosed; (2) whether disclosure is nonetheless required to serve a compelling state interest; and (3) if so, whether disclosure will occur in the least-intrusive manner with respect to the right of privacy.

Lawson v. Lawson, 108 P.3d 883, 887 (Alaska 2005), citing *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976, 980 (Alaska 1997).

It is possible that ombudsman's investigation of a private entity such as a nursing home, where patient records are evaluated, will result in litigation, and depending on the facts, could result in a court finding that a performance audit of a private entity violated either federally or state protected privacy interests. In the case of the legislative auditor, where the auditor is limited to a financial audit of a private contractor's records while conducting a special audit under AS 24.20.281, the same concerns are implicated, but perhaps to a lesser degree, where the auditor is limited to an accounting audit. In contrast, the Ombudsman's investigatory powers over a private contractor, at least as they are currently proposed in HB 127, and as you may be considering expanding them, could

The Legislative Budget and Audit Division

As you are aware, the legislative budget and audit division, lead by the legislative auditor established in art. IX, sec. 14 of the Alaska State Constitution, is generally limited to performing audit functions regarding state entities, including boards, commissions, and custodians of public funds and disbursing officers of the state, as provided in AS 24.20.271:

Sec. 24.20.271. Powers and duties.

The legislative audit division shall

(1) conduct a performance post-audit of boards and commissions designated in AS 44.66.010 and make the audit, together with a written report, available to the legislature not later than the first day of the regular session of the legislature convening in each year set out with reference to boards and commissions whose activities are subject to termination as prescribed in AS 44.66; the division shall notify the legislature that the audit and report are available;

(2) conduct a performance review of the agencies listed in AS 44.66.020(a) and make the final review report available to the legislature not later than the first day of the regular session convening in the year after the year designated for each agency performance review in AS 44.66.020(a);

(3) audit at least once every three years the books and accounts of all custodians of public funds and all disbursing officers of the state;

(4) at the direction of the Legislative Budget and Audit Committee, conduct performance post-audits on any agency of state government;

(5) cooperate with state agencies by offering advice and assistance as requested in establishing or improving the accounting systems used by state agencies;

(6) require the assistance and cooperation of all state officials and other state employees in the inspection, examination, and audit of state agency books and accounts;

(7) have access at all times to the books, accounts, reports, or other records, whether confidential or not, of every state agency;

(8) ascertain, as necessary for audit verification, the amount of agency funds on deposit in any bank as shown on the books of the bank; no bank may be held liable for making information required under this paragraph available to the legislative audit division;

(9) complete studies and prepare reports, memoranda, or other

pose significant privacy concerns given the breadth and depth of records the Ombudsman would have legal access to.

materials as directed by the Legislative Budget and Audit Committee;

(10) have direct access to any information related to the management of the University of Alaska and have the same right of access as exists with respect to every other state agency;

(11) conduct an audit every two years of information found in the annual reports required under AS 42.05.211 and AS 42.06.220 regarding compliance by the Regulatory Commission of Alaska with the requirements of AS 42.05.175(a) - (e) and of the timeline extensions made by the commission under AS 42.05.175(f), and of other performance measures adopted by the commission;

(12) conduct audits of the Alaska film production incentive program (AS 44.25.100 - 44.25.190) and make the audits available to the legislature on the first day of the regular session of the legislature in 2015, 2017, and 2021.

However, AS 24.20.281 authorizes the division, to "complete studies and prepare reports, memoranda, or other materials as directed by the legislative budget and audit committee:

Sec. 24.20.281. Special audit.

A member of the legislature may, in writing and with at least six days notice, request that the budget and audit committee direct a special audit of any state agency or *determine the propriety of any expenditure of state funds received by any political subdivision or other entity obtaining state funds*. Should a majority of the committee vote to approve the request, the legislative audit division shall make the audit. (Emphasis added.)

The scope of an audit, or "special audit," as the process has been described under AS 24.20.281, has not been the subject of litigation or interpretation by a court, so I don't have any reported cases to support the following discussion of the scope of the audit division's powers under this specific provision related to private contractors. However, the plain language of AS 24.20.281, italicized in bold above, focuses on accounting for example, and would not provide for the division conducting an audit and broader performance review of a private contractor. There is further support in the constitutional convention minutes regarding the scope of a special audit under AS 24.20.281 in the following exchange regarding art. IX, sec. 14, Constitution of the State of Alaska between President Egan, Mr. Nolan, and Mr. McCutcheon:

PRESIDENT EGAN: Mr. Nolan.

NOLAN: Mr. President, he [post auditor] is actually responsible to the legislature because the committee is your speaker of the house, chairman of the ways and means committee, chairman of the senate finance committee, and the president of the senate. The reason to report to the

governor is just for information purposes for the governor, that's all. The committee itself is prescribed, the duties as prescribed by the legislature of this committee has complete control. It's just merely a matter of information that the report is given to the governor so that he knows what is going on in all the departments of the Territory, all the fiscal proceedings of the Territory have been reported to the governor, that's all.

PRESIDENT EGAN: Mr. McCutcheon.

MCCUTCHEON: Mr. president, is it the intention of the Committee, or has there been any thought given to the fact that *the post auditor shall follow down the accounts of the new state, even to municipal level, and other levels wherever there is any state money expended in matching funds or any other fashion*; that the post auditor is directly answerable to the legislature, and he shall go right on down to the financial disposition of those funds. [Emphasis added.]

NOLAN: That is the procedure. *Any place where the state has expended or appropriated any money, will come under his audit.* [Emphasis added.]

3 Alaska Constitutional Convention Proceedings, 2351 - 2353 (1956).

The language of AS 24.20.281, the constitutional convention minutes, and framers' intent to provide the "post auditor" with broad audit powers to follow state funds "wherever there is any state money expended," support the view that the legislature intended AS 24.20.281 to provide the division with the authority, at the direction of the committee, to audit a private entity receiving state funds, *and also limited such an audit to an accounting of the propriety of expenditures of the entity related to expenditure of state funds.* I note that the attorney general in his 1982 opinion (Opinion of the Attorney General, 1982 Op. (Inf.) May 20, 1982), does not agree, and contends that the legislative auditor does not have the jurisdiction to audit a private contractor. However, in that opinion, the attorney general failed to include consideration of AS 24.20.281, or the constitutional convention minutes briefly discussed above. Given that the 1982 opinion focuses exclusively on an analysis of AS 24.20.271 alone, a court would likely find that the attorney general's opinion is incomplete and distinguishable. I believe that AS 24.20.281 provides the division, at the direction of the committee, with the authority to audit a private entity. However, I take the position that AS 24.20.281 provides the legislative auditor with authority to audit a private entity receiving state funds, limited to a financial audit of state funds as discussed above.

Conclusion

The Ombudsman, created by statute, has broad jurisdiction and investigatory powers beyond investigating a matter involving accounting or finances. However, the Ombudsman currently does not have jurisdiction to investigate the acts of private

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contractors that have contracts with a state entity. By contrast, the legislative budget and audit division, lead by the legislative auditor established by art. IX, sec. 14 of the Alaska State Constitution and otherwise provided by law, has broad audit powers over financial matters related to state entities. In addition, where authorized by the legislative budget and audit committee, the division has the authority to perform an audit over any entity, including a private contractor, receiving state funds. However, the division's audit authority over a private contractors is likely limited to a financial audit, rather than an audit and a broader performance review.

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