



## **Ombudsman's Comments for the Subcommittee Work Session on HB 127, February 7, 2014**

### ***Delete Section 4 of HB 127.***

Section 4 would have amended AS 24.55.160(b) to remove communications between an agency and the ombudsman during an investigation from the scope of public records requests. This would be similar to the existing confidentiality provision for the ombudsman's preliminary report provided to an agency, and the amendment was intended to encourage candor in communication with the ombudsman. However, the ombudsman has concluded that this section is unnecessary for the following reasons:

- The ombudsman can use its own regulations to allow designation of more correspondence as preliminary opinions or recommendations subject to AS 24.55.180; thus the communications containing critical opinions, even when informally stated in e-mail, will be confidential until the agency has had a chance to respond.
- The ombudsman's records, including communications received from an agency during an investigation, will be expressly protected by the proposed amendment to AS 24.55.260 (ombudsman's privilege not to testify) in Section 10 of HB 127.
- Although some communications between the ombudsman and an agency may eventually be released pursuant to a public records request made to the agency in question, the ombudsman has concluded that creating a new exception to the Alaska Public Records Act, particularly for the executive branch agencies that comprise most of the ombudsman's investigative work, is likely to create delays and confusion in agency responses to legitimate public requests, without providing a benefit that outweighs those costs.

### ***Delete Sections 6 – 9 of HB 127***

These sections proposed a new category of informal report for ombudsman complaints that required investigation and resulted in suggestions to the agency, but that did not merit the resources usually committed to the typical ombudsman's reports published under AS 24.55.190. Section 7 of the bill proposed a new section (proposed AS 24.55.185) creating the category of informal report, and Section 6, 8, and 9 were amendments necessary to harmonize AS 24.55.180 and AS 24.55.190 with the proposed new section.

A report under AS 24.55.190, and a public report under AS 24.55.200, can only be issued by the ombudsman, which inevitably creates a bottleneck. Further, the investigative reports issued by the ombudsman under AS 24.55.190 have become detailed and formal, which means that the office's resources only allow for a dozen or so such reports per year. That is a tiny fraction of the jurisdictional complaints actually investigated by the ombudsman's staff. Since the 1980's, the office has had a practice closing these smaller investigations as "assists" or "discontinued," often featuring an assistant ombudsman sending a closing letter with suggestions to an agency. This practice is expedient, but it has problems. First, the closing letter is not confidential, no matter how pointed the "suggestion," because the closing letter is neither a preliminary finding, which would be confidential under AS 24.55.180, nor a "report" issued personally by the ombudsman, which would be confidential under AS 24.55.190. Further, unlike reports made by the ombudsman under AS 24.55.190, there is no clear statutory path to allow the ombudsman to publish the results, which makes it more difficult for the ombudsman to illustrate what the office has done. In short, the staff closing letters – although they often contain detailed investigation and criticisms – do not have the protections offered by AS 24.55.180 and AS 24.55.190, nor the route to eventual publication provided by AS 24.55.200.

The ombudsman believes that the proposed legislation is one way to bring office practice out of a statutory grey area. However, section 7 of the bill is admittedly cumbersome. The ombudsman instead proposes withdrawing Sections 6-9 and adopting new regulations that will serve the same purpose:

- When the ombudsman's staff offers an agency criticism and suggestions, these will no longer be offered in closing letters. Instead, such content will be categorized as a consultation or preliminary opinion issued pursuant to AS 24.55.180, and the agency will be offered a set time to respond.
- After the agency has responded, or failed to do so, the ombudsman's staff will submit to the ombudsman a summary of the investigation and any response by the agency. The ombudsman will issue a summary to the agency under AS 24.55.190, and may publish the summary under AS 24.55.200. These summaries will still require the ombudsman's personal approval, but should proceed more quickly than the full-scale, highly formalized reports that are the usual work product under AS 24.55.190.

### *Update Section 11 of HB 127 to account for statutory change in 2013*

This section amends AS 24.55.275 (Contract procedures). The Legislature updated and renumbered much of the state procurement code last year, including a change to AS 24.55.275 that took place after HB 127 was introduced. As a result, HB 127 now refers to a non-existent provision. The last sentence of the section currently reads:

However, **competitive principles in the procurement procedures adopted by the legislative council under AS 36.30.020 do** [THE PROCEDURE FOR REQUEST FOR

PROSPOSALS DOES] not apply to contracts for investigations under AS 24.55.100, and the office of the ombudsman shall comply with AS 36.30.170(b).

Due to changes to the procurement code made by SB 12 in 2013 (effective June 27, 2013), HB 127 needs to be updated to be consistent with current organization of the procurement code.

However, **competitive principles in the procurement procedures adopted by the legislative council under AS 36.30.020 do** [THE PROCEDURE FOR REQUEST FOR PROSPOSALS DOES] not apply to contracts for investigations under AS 24.55.100, and the office of the ombudsman shall comply with [AS 36.30.170(b)] **the five percent preference under AS 36.30.321(a)**.

*Considering Section 12 of HB 127: changes to jurisdiction over certain state contractors*

Please note that there is already a proposed committee amendment to this section (28-LS0088\R.1 (3/20/13)), which provides that service providers are included regardless of whether they provide the specified services pursuant to a grant or a contract. For Section 12 to function as intended, the inclusion of grantees is necessary, at least for service providers working with the Department of Health and Social Services.

Roughly speaking, the section covers three types of service providers:

- adult halfway houses and private-sector prisons;
- residential facilities (other than individual foster homes) with placement of juveniles in state custody, especially those adjudicated and placed in the custody of the Division of Juvenile Justice;
- “gatekeeper” services whose staff determine eligibility for a state program/benefit.

Of these three categories, the ombudsman considers the first the most important, because inmates (even in a halfway house) are very much in the state’s power, but oversight appears to be limited to the Department of Corrections and the contractor’s own management. Short of a potentially costly lawsuit, we have found little oversight external to DOC.

There has already been considerable opposition to including juvenile facilities within the ombudsman’s jurisdiction. The ombudsman believes that juveniles held by the Division of Juvenile Justice in institutions paid for by the Division of Juvenile Justice, and their parents, should be able to access the ombudsman no less than adult inmates. However, the Department of Health and Social Services has offered evidence of existing oversight mechanisms that are more extensive than those for adult facilities. Hopefully, this list of involved entities corresponds to a lesser need for the ombudsman’s jurisdiction. The ombudsman is therefore willing to discuss dropping this category, if necessary to allow the rest of the bill to proceed.

***Edit Section 13 of HB 127***

Change “contract between the state and a person providing a service in AS 24.55.330(2)” to “contract between the state and a person providing a service **listed** in AS 24.55.330(2). . . .”

***Additional Comments***

There was some discussion of adding to the grounds for an ombudsman’s investigation, which are listed in AS 24.55.150. As grounds for investigation of an administrative act already include broad terms such as unreasonable, unfair, oppressive, abuse of discretion, and otherwise erroneous, the ombudsman believes that the existing ombudsman standards for investigation provide a sufficient umbrella to cover complaints that are jurisdictional for ombudsman review under AS 24.55.

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There was also discussion of deleting Section 1 of HB 127, relating to the Alaska Bar Association, but accomplishing the same goal by adding “instrumentality” to the list of state or municipal bodies included in the ombudsman’s jurisdiction. AS 24.55.330(2) (definition of “agency” for purposes of the ombudsman’s jurisdiction) would be amended as follows:

(2) "agency" includes a department, office, institution, corporation, authority, organization, commission, committee, **instrumentality**, 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, **instrumentality**, 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, lieutenant governor, a member of the legislature, justice of the supreme court, judge of the court of appeals, a superior court judge, district court judge, magistrate, member of a city council or borough assembly, elected city or borough mayor, or a member of an elected school board;

The ombudsman does not oppose the change. At this point, the ombudsman is unaware of any instrumentalities of the state, other than the Alaska Bar Association, that dispute the ombudsman’s jurisdiction.

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Representative Keller has suggested changes to the Ombudsman Act that would require the ombudsman to make quarterly reports to the Legislature giving specific information on both closed and pending complaints. In the interests of making it clear that the ombudsman may provide the legislature with reports on the office’s activities more often than the annual report

specified in AS 24.55.230, the ombudsman suggests amending AS 24.55.230 by adding a new subsection:

(b) The ombudsman may submit supplemental reports as the ombudsman finds necessary to inform the public, the executive branch, or the legislature of the ombudsman's activities under this chapter. Supplemental reports may include the number, description, and disposition of closed complaints, distribution of complaints by geographic region or election districts, and the number of complaints filed against individual agencies. No supplemental report will include a complainant's identifying information, unless the complainant expressly agrees to the inclusion. If the ombudsman reasonably believes that the description of a complaint or its geographic origin will lead to identification of a complainant, the ombudsman will redact the report as necessary to protect the complainant's confidentiality, unless the complainant waives confidentiality for purposes of the ombudsman's report.

Ombudsman Comments for Work Session 02/06/14