Frequently Asked Questions for House Bill 127

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Overview of HB 127

Why is the ombudsman requesting this legislation?

The Ombudsman Act, AS 24.55.010 – 24.55.340, was enacted in 1975. The Legislature made substantive changes to the statute in 1990. The ombudsman requested revisions to the statute after the first 10 years of operation, and legislation enacting those revisions passed in 1990. After another 20 years of ombudsman work, a number of issues have accumulated and our office is asking that the Legislature consider amendments that would allow the ombudsman's office to function more efficiently.

What are the "housekeeping" provisions in this legislation?

HB 127 makes changes in the Ombudsman Act in the areas of confidentiality; procurement; procedure for investigative reports; and the hiring of retired state employees on contract with the ombudsman's office. It also unfreezes the ombudsman's salary to allow step increases.

The changes in the area of confidentiality do represent policy choices for the Legislature, as the ombudsman is asking that certain executive branch documents be exempted from the Public Records Act, and the ombudsman is asking for a provision specifically to protect state agencies that share attorney-client privileged material with the ombudsman's office.

What policy decisions regarding the ombudsman's jurisdiction does HB 127 contain?

The ombudsman asks the Legislature to consider two jurisdictional issues for our office. The first issue is whether the Office of the Ombudsman has jurisdiction to investigate administrative actions of the Alaska Bar Association. The history of this jurisdictional problem is described in detail in the appendix to the sectional analysis. Basically, the ombudsman believes the definition of "agency" in AS 24.55.330 encompasses the Alaska Bar Association, while the Bar Association has, both historically and currently, maintained that it is not a state agency for purposes of the Ombudsman Act. Analysis of the multi-factor test used by the Alaska Supreme Court to determine whether an entity is a state agency show that the factors are roughly split, providing support for the arguments of both the Office of the Ombudsman and the Alaska Bar Association. The ombudsman respectfully requests that the Legislature settle this issue one way or the other.

The second jurisdictional issue is a proposal to extend the ombudsman's jurisdiction to encompass certain types of contractors providing services on behalf of a state agency. The ombudsman is particularly concerned about contract providers of prisons and halfway houses, as these entities exercise great discretionary power in carrying out the functions of the Department of Corrections, but currently do not receive the same ombudsman oversight as does the Department of Corrections.

Alaska Bar Association (§ 1)

Why is the ombudsman specifically asking for jurisdiction over the Alaska Bar Association?

Because the Bar Association maintains that it is not subject to the ombudsman's jurisdiction, our office will eventually be obliged to settle this dispute through either litigation or legislation. Litigation is not an efficient use of the ombudsman's resources. In the meantime, however, we do not have a clear answer to offer individuals who contact our office with complaints against the Bar Association. If the Legislature wishes the ombudsman to investigate complaints regarding administrative actions of the Bar Association, then expressly including the Bar Association within our jurisdiction will allow us to respond to those complainants' concerns. If the Legislature does not consider the Bar Association an appropriate subject for the ombudsman's investigations, then having the issue resolved definitively will allow us to at least respond with a clear "no" to requests for investigation of the Bar Association.

Our office's primary interest is in settling this jurisdictional question. HB 127 presents the issue affirmatively, by providing for inclusion of the Bar Association within our jurisdiction, but our office is asking the Legislature to make this policy decision rather than lobbying for a particular result.

Ombudsman's salary (§ 2)

The ombudsman is requesting that the ombudsman's statutory salary be amended to allow for step increases. What is the history of the "freeze" on the ombudsman's compensation?

As enacted in 1975, the Ombudsman Act set the ombudsman's salary as equal to that of a superior court judge. In 1987, the statute, AS 24.55.060, was amended to set the ombudsman's compensation as "an annual salary equal to Step A, Range 26 on the salary schedule set out in AS 39.27.011(a) for Juneau." This provision appeared in HCS SB 139(Fin). SB 139 dealt generally with legislative employees, and the reduction in the ombudsman's pay was added to the bill in the House Finance Committee. Review of the committee minutes does not provide an explanation for the change, other than it occurred during a period when the Legislature was cutting salaries for most legislative branch employees, as well as eliminating positions. The ombudsman's salary could be reduced only by a specific amendment to AS 24.55.060, and we speculate that the change to AS 24.55.060 was part of a pattern of reductions in personnel costs accomplished through both pay cuts and layoffs. *See* House Finance Committee Minutes, April 24, 1987, and May 2, 1987. That said, there is insufficient material available to be sure of the motivations behind the change.

When the Legislature created the Office of Victims' Rights (OVR) in 2001, the head of the OVR, the Victims' Advocate, was provided with the same compensation as the ombudsman, i.e.

Step A, Range 26. However, in 2012, the Legislature amended the OVR statute, AS 24.65.060, to allow the victims' advocate to receive step increases within Range 26. (The current victims' advocate is recently appointed, and has not implemented a step increase yet.)

How does the ombudsman's statutory compensation compare to compensation for other heads of legislative agencies?

The ombudsman appears to be the only remaining head of a legislative agency whose salary is capped at a specific step on the pay scale.

The most similar legislative agency is the OVR. Under AS 24.65.060, the salary of the Victims' Advocate was set at Step A of Range 26; however, in 2012 the Legislature removed the reference to "Step A," making step increases available to the victims' advocate. That legislation, SB 135, was discussed in House Finance on April 12, 2012, including the following excerpt from the minutes of the House Finance Committee:

> Co-Chair Stoltze requested Vice-Chair Fairclough to share her contributions to the measure. Vice-Chair Fairclough replied that the Office of Victims' Rights (OVR) was reviewed and it was discovered that its pay scale was frozen at Step A. She related that it was difficult for someone to stay in an office and be stuck at a particular pay level, while other staff was advancing. She had proposed to Senator French's and Co-Chair Stoltze's offices that the restrictions on that particular level be lifted; the level would stay at a pay grade 26, but the change would allow OVR, based on the employee's number of years of service, to move across the states pay scale.
>
> Co-Chair Stoltze inquired if the changes to OVR arose from discussions by the Victims Advocate Selection Committee. Vice-Chair Fairclough responded that she had brought the suggestion to his attention.
>
> Co-Chair Stoltze observed that the discussions regarding OVR were conducted in executive sessions and that there probably was an issue with confidentiality regarding the specifics of the discussion. Vice-Chair Fairclough responded that earlier in the day, she had discussed the change to OVR with Senator French, who also had served on the Victims Advocate Selection Committee.
>
> Co-Chair Stoltze clarified for the record that the process to change the OVR pay scale did not arise arbitrarily, but that it had come from discussions during the selection process.

In other words, the Legislature recently made a policy choice to "unfreeze" the salary of the victims' advocate.

Our office also reviewed the statutory compensation provisions for the Executive Director of the Legislative Affairs Agency and the Fiscal Analyst heading the Legislative Finance Division. Under AS 24.20.250, the salary of the executive director of the Legislative Affairs Agency is set by the Legislative Council. There is no statutory cap on the salary. Similarly, under AS 24.20.221, the Fiscal Analyst's salary is determined by the Legislative Budget and Audit Committee; again, there is no cap on the salary.

In the Legislative Audit Division, the Legislative Auditor serves at the pleasure of the Legislature, and the statute does not define the auditor's compensation. *See* AS 24.20.251.

What is the fiscal impact of allowing step increases for the ombudsman?

For the upcoming fiscal year, the ombudsman does not propose any step increase, as the FY14 budget already disallows merit increases for the ombudsman's staff. If budgetary constraints allow, the ombudsman would probably propose a step increase (from Step A, Range 26, to Step B, Range 26) in the office's budget for FY15. This would add approximately $4,000 to the personnel costs for the Office of the Ombudsman for that year. A similar increase could be expected each year that the ombudsman received a step increase; however, such increases would be subject to funding constraints in each year's budget. The current ombudsman's final five-year term ends during FY18, and a new ombudsman's salary would return to Step A, unless the Legislature decided otherwise during the appointment process.

Contract employees (§ 3)

Section three of HB 127 deals with contract employees of the ombudsman; what concern is being addressed by this amendment?

The Office of the Ombudsman currently hires individuals, such as retired former ombudsman staff, under personal services contracts. The ombudsman has received an opinion from the legislative personnel office that this practice is permissible for the Office of the Ombudsman. However, the existing statutes are somewhat ambiguous, or at least difficult to interpret, and the ombudsman would like any doubt on this subject removed.

AS 24.10.060(f), as enacted in 1998, provides the legislative branch with flexibility in hiring:

> An employee of the legislative branch of state government who is employed under a personal services contract is not entitled to membership in the public employees' retirement system (AS 39.35) for employment under the contract. The employee shall be compensated under the state salary schedule set out in

> AS 39.27.011(a). The employee is entitled to receive leave benefits and employee health coverage unless the personal services contract provides to the contrary.

The legislative history of AS 24.10.060(f) indicates that one of the major motivations for the bill was the Legislature's interest in hiring a retired law enforcement officer as the chief of legislative security, a seasonal position. Under the existing statutes, particularly AS 39.35.680(39), the Legislature could not retain the retiree as a temporary employee – the position was automatically deemed seasonal, and that categorization made it difficult for the retiree to accept the position without interfering with his receipt of retirement benefits. In 1998, the sponsor statement for the legislation (HB 467) stated in part:

> In the past we utilized "professional services" contracts to hire individuals for certain jobs to avoid the retirement problem. However, this solution has become less and less of an option because of IRS rules on contractor vs. employee relationships. Under the IRS guidelines the duties and responsibilities of the Chief of Security as well as our tour guides and laborers make them clearly an employee. Using a "personal services" contract clearly classifies the individuals as an employee in order to satisfy IRS requirements, and this bill eliminates the conflict with PERS requirements.

AS 24.10.060(f) allows employment under a personal services contract for any "employee of the legislative branch of state government." On its face, there is no apparent reason that the ombudsman should not utilize this provision. However, a portion of the ombudsman's statutes, dating from 1987, provides:

> The ombudsman and the staff appointed by the ombudsman are in the exempt service under AS 39.25.110 *and are not subject to the employment policies under AS 24.10 or AS 24.20*. [Italics added.]

In 1998, when the Legislature enacted AS 24.10.060(f), it left it unclear whether the Office of the Ombudsman could benefit from the new law, depending on whether "not subject to the employment policies under AS 24.10" is read as excluding the Office of the Ombudsman from all provisions of AS 24.10 or as merely a partial exclusion removing the ombudsman's staff from provisions such as AS 24.10.060(d) (employees of the Legislature on call for duty every day of the session).

This ambiguity also exists in the enabling statutes for the Office of Victims' Rights (OVR). The OVR statute, AS 24.65 borrowed heavily from the Ombudsman Act (AS 24.55), and AS 24.65.070(c) uses identical language: "The victims' advocate and the staff appointed by the victims' advocate are in the exempt service under AS 39.25.110 *and are not subject to the employment policies under AS 24.10 or AS 24.20*." (Italics added).

Since 1998, the Office of the Ombudsman and OVR have assumed that AS 24.10.060(f) includes them, as both offices are part of the legislative branch of state government. The legislative personnel office has concurred in this practice. The OVR has had two employees hired under personal services contracts, one of whom was the first Victims' Advocate, and the second of

whom is currently an investigator for the OVR. The Office of the Ombudsman has hired three retirees using a personal services contract under AS 24.10.060(f); two of whom still work for the ombudsman.

HB 127 clarifies that the ombudsman may use the personal services contracts allowed under AS 24.10.060(f), and enjoy the same flexibility in hiring retirees as other legislative branch agencies. Because this issue also affects the OVR, the Legislature may wish to consider amending the OVR's statute, AS 24.65.060, in the same way.

Confidentiality of communications with state agencies (§4)

Why is the ombudsman requesting confidentiality for communications with other agencies?

Under the current Ombudsman Act provisions, AS 24.55.180 makes the ombudsman's preliminary investigative report sent to a state agency confidential:

> The ombudsman may make a preliminary opinion or recommendation available to the agency or person for review, but the preliminary opinion or recommendation is *confidential and may not be disclosed to the public by the agency or person*.

The ombudsman also issues a final confidential investigative report to the agency under AS 24.55.190; again, the report is "confidential and may not be disclosed to the public by the agency." These confidentiality provisions were added to the Ombudsman Act in 1990, and legislative history indicates that they were designed to allow state agencies – usually executive branch offices – to receive and respond to criticism without premature public embarrassment. Publicity was intended to be the final step, taken only after the agency had been offered an opportunity to rebut the findings, and to remediate problems.

These provisions for confidentiality are relatively pointless if the correspondence between the agency and ombudsman, leading up to the investigative report, is a matter of public record. During investigation of a complaint, the ombudsman's staff communicates with agency personnel, often by email or letter. This correspondence frequently contains questions and responses that reveal the ombudsman's line of thought and eventual criticism of the agency. Such correspondence is retained by both the Office of the Ombudsman and the executive branch agency; however, while the records in the ombudsman's office are confidential pursuant to AS 24.55.160(b), there is no such protection of the same correspondence in the executive branch files.

Basically, it is not very useful to assure an agency that the ombudsman's preliminary findings will be confidential if all the correspondence leading up to those findings is available to be part of a blog on the Internet or an article in the daily newspaper. The ombudsman is therefore requesting an exception to the Public Records Act for an agency's communications with the ombudsman for purposes of investigation of a complaint.

How will executive branch agencies handle a public records request when the requested records include communications with the ombudsman?

First, any information that was already confidential under another provision of law, such as child protective services records, remains confidential. The agency from which the records have been requested is still responsible for maintaining confidentiality of such information, whether it is referenced in a communication to the ombudsman or not.

Second, an agency asked for public records is expected to have a process to redact confidential material prior to public disclosure; an agency can screen records for correspondence labeled "Ombudsman Complaint ###."

Third, HB 127 is permissive. It does not prevent an agency from releasing its communications with the ombudsman. It allows the agency to maintain the communications in confidence, but it does not penalize an agency for choosing to release the communications. (Of course, if the communication references records made confidential under another law, the agency is still responsible for redacting information that is confidential under that law).

Finally, this provision does not create a privilege in litigation. It removes the agency's communications with the ombudsman from casual disclosure, but it does not prevent appropriate discovery in litigation.

Protection of state agencies' attorney-client privileged communications and attorney work product (§5)

What is the purpose of the provision in HB 127 related to attorney-client privilege?

The ombudsman has access to most confidential records of state agencies, but attorney-client privileged communications and attorney work product are specifically excluded. (The definition of "record" in AS 24.55.330 for purposes of the Ombudsman Act excludes these materials). However, agency officials have occasionally provided the ombudsman with attorney-client communications during the ombudsman's investigation of a complaint, usually to support the reasonableness of the agency's position on an issue. So far, this has not created problems for the state agencies that have shared this information, as the ombudsman maintains the confidentiality of the information. A review of case law on attorney-client privilege, however, raises the possibility of an inadvertent general waiver of privilege. For example, in the decision *In re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012), a private entity provided attorney-client privileged material to the U.S. Attorney pursuant to a confidentiality agreement, but the Ninth Circuit ruled that the privilege was generally waived and required discovery of the previously privileged material in a lawsuit between the entity and another business.

Alaska Rule of Evidence 503 codifies the attorney-client privilege, and Alaska Rule of Evidence 510 provides for waiver due to voluntary disclosure: [1]

> Rule 510. Waiver of Privilege by Voluntary Disclosure.
> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. *This rule does not apply if the disclosure is itself a privileged communication*. [Italics added]

The evidence rule leaves open the possibility of a statutory provision to preserve the privileged status of the material, and that is the intent of the proposed legislation. The ombudsman does not want the good faith cooperation it has received within state government to damage the state's ability to litigate or defend itself; therefore, the ombudsman has proposed this anti-waiver provision.

The type of provision proposed here has some precedent in the laws governing federal oversight of banks and other financial institutions. See 12 U.S.C. § 1785(j); 12 U.S.C. § 1828(x); 12 C.F.R. § 1070.48 (published in 77 Federal Register 39617-01, July 5, 2012).

There is a limit to the reach of this anti-waiver provision. In a federal court, federal evidence rules and federally-recognized privileges apply; a state statute regarding the scope of privilege is considered "procedural" and will not apply. See *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005) (fatality review report privileged by state statute not privileged in federal court; disclosure ordered). For example, a "constitutional tort" lawsuit brought under 42 U.S.C. § 1983 in federal district court could lead, at least in theory, to discovery of privileged communications previously disclosed to the ombudsman.

How will the ombudsman prevent release of privileged information?

The ombudsman is already required to protect confidential records received from a state agency, as AS 24.55.160(b) provides that "the ombudsman may not disclose a confidential record obtained from an agency." Attorney-client communications and attorney work product are plainly confidential under the existing statute and could not be included in a public ombudsman's report. However, if the proposed section is enacted, the ombudsman anticipates new regulations to clarify how our office will manage attorney-client privileged material and attorney work product. To some extent, this information is not any different than other confidential material received from agencies, which the ombudsman cannot disclose. However, if privileged material is relevant to a confidential investigative report or other communications to the agency, then the ombudsman will need regulations specifying how our office will label such material in the

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[1] *Cooper v. District Court*, 133 P.3d 692 (Alaska App. 2006), discusses waiver of privilege in the context of a failure to assert psychotherapist-patient privilege. More recently, in *Peterson v. State*, 280 P.3d 559 (Alaska 2012), the Alaska Supreme Court recognized a privilege for an employee's communications with union representatives representing the employee in a grievance; as a result, letters of the employee's attorney remained privileged despite having been shared with the union representatives.

report, to ensure that the agency is able to easily make redactions to preserve privilege if the report itself becomes subject to a subpoena.

Informal ombudsman reports (§§ 6-9)

Why is the ombudsman requesting an amendment providing for "informal" reports?

The Ombudsman Act, as written in 1975, provides that the ombudsman "shall investigate" and at the end of an investigation, the Ombudsman "shall report" findings under AS 24.55.190. The report under AS 24.55.190 is a non-delegable duty of the ombudsman, so the ombudsman must personally issue each report under AS 24.55.190. This apparently worked for the first few years of the office's existence; however, the idea of an ombudsman's report evolved from a simple two page letter (as documented in our office's archived files) to a large formal document preceded by an equally formal preliminary report. The office's regulations, dating from the 1980's, indicate a formalized process for the ombudsman's reports. These reports are resource-intensive, and the the ombudsman is unlikely to issue more than a dozen per year. In contrast, the ombudsman received 1151 complaints in calendar year 2012. While many of these were declined as premature or otherwise inappropriate for investigation, more than 300 complaints received substantial investigative work without proceeding all the way to a report issued pursuant to AS 24.55.190.

The ombudsman's annual report categorizes such complaints as "discontinued – resolved or closed as "assists." These complaints often involve considerable investigation by the ombudsman's staff; however, these cases do not receive the resources devoted to full-scale ombudsman reports. There are multiple reasons for this. First, when the agency is able and willing to remedy the complaint, the ombudsman's resources may be better used elsewhere. Second, in cases where the complaint brought to our office lacks merit, but the investigation reveals a tangential issue with systemic implications, an informal suggestion is often more appropriate and more likely to be received positively by the agency.

The Ombudsman Act does provide the ombudsman with great discretion to develop procedures for investigation of complaints. See AS 24.55.090 (Ombudsman to promulgate regulations for receiving and processing complaints, conducting investigations, reporting findings). Most other state ombudsman's offices dispose of nearly all complaints informally, with published reports being the exception rather than the rule. The Office of the Ombudsman's existing regulations reflect this practical reality, in that they provide for informal resolution of a complaint and set priorities for choosing which complaints to investigate. Since at least the 1980's, the ombudsman's practice has included a "gray area" of complaints that receive substantial investigative time and include consultations with agency personnel before the complaint is discontinued as informally resolved or as lacking priority for investigation. Although the existing statute provides the ombudsman with considerable procedural discretion, our office would prefer to bring these "gray area" complaints within an express statutory process that acknowledges the resources spent on attempting to resolve such complaints, even when a formal ombudsman's report does not result at the end of day.

What are examples of cases for which an informal report would be appropriate?

The following are examples of ombudsman complaints that the ombudsman's staff investigated, but which the ombudsman discontinued after the office provided suggestions to the involved state agencies. These are the types of cases for which a statutory provision for an informal report would be efficient.

Former employee encounters difficulties with COBRA coverage
(Ombudsman complaint J2007-0436)

The complainant, a former state employee, experienced difficulties with health benefits, due in part to a series of errors made by the AlaskaCare's third-party administrator. An assistant ombudsman investigated the events, and corresponded extensively with the Division of Retirement and Benefits (DRB). DRB found a solution that placed some of the cost of the mistake on the third-party provider, instead of entirely on the former state employee. Due to the agency's cooperation at that point, a more formal set of findings was unnecessary, and the office of the ombudsman discontinued investigation of this complaint without issuing a formal report. As a practical matter, however, the assistant ombudsman had informally consulted with the agency and offered an opinion that the agency needed to further consider the matter and that an administrative act needed to be modified (two of the grounds for issuing an ombudsman's report under AS 24.55.190(a)).

Office of Childrens' Services responds to concerns regarding supervision of cases and timeliness of case planning for parents (Ombudsman complaint A2009-0709)

A parent whose children had been in state custody complained about the Office of Children's Services (OCS). The ombudsman discontinued investigation of this complaint, primarily because the facts indicated that investigation could not provide any remedy for the complainant, whose parental rights were being terminated by the court. The ombudsman's staff did discover problems with the OCS caseworker's responsiveness – notably repeated failures to return phone calls within a reasonable time period, and a failure to update the parent's case plan, despite a request from the parent for an updated plan. The assistant ombudsman assigned to this case wrote to the region's Children's Services Manager, describing the problems in detail, and the regional manager responded acknowledging the problems and indicating steps the office was taking to improve supervision and monitoring of cases. The ombudsman did not believe that a more formal investigative report would accomplish any further improvement in administration of that office, and a formal report would not offer any remedy to the individual complainant. For these reasons, the Ombudsman closed the complaint so that the office's resources could be used elsewhere. Again, this is a situation where an assistant ombudsman essentially conducted an informal consultation with the agency regarding apparent problems, the agency responded, and additional production of a formal ombudsman's report under AS 24.55.190 would not have been an efficient use of our office's resources.

Procedural improvements for the Child Support Services Division
(Ombudsman complaint J2011-0317)

The complainant and the complainant's ex-partner had a child support case, and there was a factual dispute regarding which time periods they lived together (during which no support obligation would accrue). The complainant alleged that the Child Support Services Division had erred in concluding that her ex-partner had lived with her for a multi-year period. The ombudsman's staff pulled records from CSSD and corresponded extensively with CSSD's problem resolution manager. In this case, investigation did not result in any remedy for the complainant, because the facts, although murky, did not establish error on part of CSSD. However, the assistant ombudsman suggested an improvement in the process used by CSSD in resolving these disputes, and CSSD agreed to the suggestion.

As provided in regulation, CSSD may delete support arrears (or recoup an overpayment) after the non-custodial parent provides CSSD with at least three notarized witness statements to show that the non-custodial parent was in fact living with the custodial parent (child support does not accrue when the parents are living together). CSSD then sends a notice to the custodial parent, requesting rebuttal evidence. CSSD, however, had not been providing the custodial parent with a copy of the evidence submitted by the non-custodial parent. The assistant ombudsman suggested that the custodial parent should see the evidence he or she was supposed to rebut. CSSD agreed to this change.

What are the similarities and differences between a formal and informal report?

Before issuing a report – whether formal or informal – the ombudsman must have reasonable grounds to conclude that one or more of the criteria listed in AS 24.55.190(a) applies to the situation, i.e. that

(1) a matter should be further considered by the agency;
(2) an administrative act should be modified or cancelled;
(3) a statute or regulation on which an administrative act is based should be altered;
(4) reasons should be given for an administrative act;
(5) any other action should be taken by the agency;
(6) there are no grounds for action by the agency; or
(7) the agency's act was arbitrary or capricious, constituted an abuse of discretion, or was otherwise erroneous or not in accordance with the law.

Section 6 of HB 127 provides that the Office of the Ombudsman will consult with an agency before giving a critical opinion or recommendation regardless of whether the opinion is formal or informal; however, HB 127 allows the consultation for an informal opinion to be verbal or done by email, and reserves the ombudsman's issuance of a "preliminary report" for a case in which the Ombudsman expects to issue a formal report under AS 24.55.190.

Section 7 of HB 127, in providing for an informal report, allows the ombudsman to delegate this function to the ombudsman's staff, subject to the ombudsman's supervision. A formal report

issued under AS 24.55.190 cannot be delegated, as it must be issued personally by the Ombudsman.

As outlined in section 7 of HB 127, an informal report – unlike the ombudsman's traditional formal reports – cannot be published in full. The legislation allows for disclosure of a summary of the investigation, after the agency has received notice of the planned disclosure with a copy of the summary. This provides the agency with an opportunity to object to the content of the summary before it is made public. The Office of the Ombudsman expects to promulgate regulations implementing these provisions, including a regulation indicating which agency personnel are to receive the summary, and stating the period of advance notice during which an agency may object to the content of the summary.

How will the ombudsman decide whether to issue a formal or informal report?

The Office of the Ombudsman expects to promulgate regulations formalizing the criteria for an informal report – essentially a suggestion to the involved agency – versus the criteria for a formal ombudsman's report issued under AS 24.55.190. The public comment period for the draft regulations will provide an opportunity for feedback from the state agencies most frequently subject to Ombudsman investigations.

Ombudsman's testimonial privilege and privilege not to produce documents (§ 10)

Why is the ombudsman requesting expansion of the existing testimonial privilege?

The Ombudsman Act, as enacted in 1975, provides the ombudsman with the privilege to not be called to testify in court except when doing so is necessary to carry out the ombudsman's duties:

> **AS 24.55.260**. **Ombudsman's privilege not to testify**. The ombudsman and the staff of the ombudsman may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter.

This provision is designed to keep the ombudsman and her staff on the job rather than being drawn into litigation peripheral to the office's mission. Further, knowledge acquired by the ombudsman during an investigation should be available to litigants from the primary sources – the complainant and/or the state agency personnel involved.

The current statute, however, is not explicit regarding protection of the ombudsman's records from subpoena – it states that the ombudsman "may not testify" but does not directly address a subpoena for production of documents. It also does not address whether the privilege applies to administrative hearings. HB 127 contains updated language clarifying that the ombudsman neither testifies nor produces documents to assist litigants, regardless of whether the proceedings are in court or before an administrative law judge. The revised language also makes clear that the

privilege applies regardless of whether the subpoena is for an actual appearance in court or for pretrial discovery.

It is worth noting that the 2001 statute for the Office of Victims' Rights (OVR) is based on the Ombudsman Act, but the OVR's testimonial privilege is considerably more detailed than the 1975 language used in the Ombudsman Act. The ombudsman is requesting updated language similar to that already provided for the OVR.

How does the language in the ombudsman's existing privilege and in HB 127 differ from the testimonial privilege in the OVR statute?

Below is a comparison of the testimonial privilege provisions for the Office of the Ombudsman and the Office of Victims' Rights:

Existing AS 24.55.260	*AS 24.55.260 as reenacted by HB 127*	*OVR's testimonial privilege, as enacted in 2001*
24.55.260. Ombudsman's privilege not to testify. The ombudsman and the staff of the ombudsman may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter. *History -* (Sec. 1 ch 32 SLA 1975)	**AS 24.55.260. Ombudsman's privilege not to testify or disclose documents**. (a) The ombudsman and staff of the ombudsman may not testify or be deposed in a judicial or administrative proceeding regarding matters coming to their attention in the exercise of their official duties, except as may be necessary to enforce the provisions of this chapter. (b) the records of the ombudsman and staff of the ombudsman, including notes, drafts, and records obtained from an individual or agency during intake, review, or investigation of a complaint, and any reports not released to the public in accordance with AS 24.55.200, are not subject to disclosure or production in response to a subpoena or discovery in a judicial or administrative proceeding, except as the ombudsman determines may be necessary to enforce the provisions of this chapter. Disclosure by the ombudsman is subject to the restrictions on disclosure in AS 24.55.160 – 24.55.190.	**24.65.200. Victims' advocate's privilege not to testify or produce documents or other evidence.** Except as may be necessary to enforce the provisions of this chapter, the determinations, conclusions, thought processes, discussions, records, reports, and recommendations of or information collected by the victims' advocate or staff of the victims' advocate are not admissible in a civil or criminal proceeding, and are not subject to questioning or disclosure by subpoena or discovery. *History -* (Sec. 19 ch 92 SLA 2001)

The proposed change to the ombudsman's testimonial privilege in AS 24.55.260 clarifies that the privilege not to testify or produce documents extends to administrative hearings as well as

proceedings in court. The office of the ombudsman is more likely than the OVR to investigate issues that could later be of interest to parties in an administrative adjudication, so protection from being subpoenaed for an administrative hearing is more relevant to the ombudsman than to the OVR.

Procurement by the ombudsman of services, supplies, office space (§ 11)

What is wrong with the current procurement statute (AS 24.55.275)?

The existing statute reads as follows:

> **AS 24.55.275**. Contract procedures. The ombudsman shall adopt by regulation procedures consistent with AS 36.30 to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals 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 first problem is that the statute authorizes procurement regulations only for "contracts for services," and begs the question of what the Office of the Ombudsman is supposed to do for any other type of procurement. Read literally, it requires that the ombudsman shall have regulations for procurement of services, but no regulations for any other type of procurement. The second problem is that the statute makes the Office of the Ombudsman the only legislative branch agency not following the legislative procurement policies. This is particularly bizarre when considering that many of the ombudsman's purchasing needs are already supplied through the Legislative Affairs Agency – this means that some of the purchases are done using the legislative procurement policies while others are done using an entirely separate set of regulations as mandated by the current AS 24.55.275.

The Office of the Ombudsman is an independent agency within the legislative branch, and not part of the Legislative Affairs Agency. The proposed legislation maintains the ombudsman's autonomy in procurement, while requiring published regulations governing that autonomy. However, HB 127 accomplishes two important goals for the Office of the Ombudsman: (1) it makes the regulations comprehensive instead of applying only to "contracts for services"; and (2) it aligns the ombudsman's procurement process with the rest of the legislative branch, as adapted to the specific needs of the ombudsman's office.

What procurements by the office of the ombudsman are affected?

The Office of the Ombudsman is a small agency, with 11 employees statewide. The following is a list of procurements relevant to the office:

- Office space lease for the Anchorage office
- Case management software and updates for the software (last procured in 1999)
- Personal services contracts for investigators – already excluded from this section

- Office furniture and equipment – usually purchased from a vendor offering a standard state discount (office furniture), or from the same vendor as used by the Legislative Affairs Agency (postal meter). Within the last 10 years, the Ombudsman purchased copiers using the small procurement process – the Ombudsman asked for quotes from office supply stores and picked the one with best price.
- Small Office supplies such as paper, post-it notes and note pads, pens, etc. from Costco or an office supply store.

Why does the current AS 24.55.275 read the way it does?

AS 24.55.275 was enacted in 1982 as § 4 Ch 144 SLA 1982 (SCSCSHB156(Fin)amS). Section three of the legislation enacted AS 24.23, including the statement that "this chapter applies to contracts for services to be provided to a legislative agency." Section four provided for the ombudsman's office, and read as follows:

> The ombudsman shall adopt by regulation procedures consistent with AS 24.23 to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals does not apply to contracts for investigations under AS 24.55.100.

Section five enacted AS 36.98, Professional Services Contracts, for the executive branch. In short, AS 24.55.275 was part of a set of statutes governing professional services contracts. See SFIN Minutes May 17, 1982 (sectional analysis of bill):

> Sections 1 and 2 acknowledge that there is another procedure which may be used in letting state contracts – a new Chapter 36.98 is established by the SCS. This chapter deals with professional services contracts in executive branch agencies.
>
> Section 3 establishes procedures by which legislative professional services contracts are let. These procedures are similar to those of the executive branch….
>
> Section 4 deals with the Ombudsman and investigative contracts.

The ombudsman's procurement procedures for services were separate from, but consistent with, the other legislative agencies.

Then, in 1986, the Legislature repealed AS 24.23 and AS 36.98. The Legislature replaced the previous procurement code with AS 36.30, which included AS 36.30.020 (Legislative Council directed to adopt procurement procedures for the legislative branch). However, the Legislature did not repeal AS 24.55.275; instead, it replaced the reference to "AS 24.23" with "AS 36.30," tying the Office of the Ombudsman's regulations to the executive branch procurement provisions instead of the legislative branch procurement process as intended in 1982.

As far as our office can determine, AS 24.55.275 is a holdover from 1982 legislation pertaining to services/professional services contracts; the rest of that 1982 legislation has since been repealed.

Note: The 1990 amendment to AS 24.55.275 added the requirement that the office's procurements comply with AS 36.30.170(b) (Alaska bidder preference, Alaska products preference, and recycled products preference).

SB 12 also amends AS 24.55.275; how does this relate to HB 127?

This session, SB 12 provides for reorganization of the Alaska Procurement Code, especially the bidder and product preferences. It includes an amendment to AS 24.55.275 changing "the office of the ombudsman shall comply with AS 36.30.170(b)" to "the office of the ombudsman shall comply with the five percent preference under AS 36.30.321(a)."

Jurisdiction over certain privatized services (§§ 12, 13, 15)

Why is the ombudsman requesting jurisdiction over private contractors?

When the Ombudsman Act was enacted in 1975, privatized services were rare, and the statute made no reference to contractors for state agencies. Now, some services that were historically performed by employees of state agencies – and thus within the ombudsman's oversight – are performed by organizations that have contracted with a state agency to carry out those functions. As a result, the Office of the Ombudsman has actually lost jurisdiction over some activities that would previously have been within the ombudsman's statutory mandate.

Would all state contracts be included?

No. For example, the ombudsman has never had jurisdiction over construction contractors retained by the Department of Transportation, and is not requesting such an expansion of jurisdiction now. As another example, the Department of Health and Social Services has contracts with health care providers for the Medicaid program, and our office is not seeking jurisdiction over those health care providers. A blanket expansion of jurisdiction to "all" contractors is neither appropriate nor practical.

The ombudsman is requesting jurisdiction over entities that hold people in custody on behalf of the Department of Corrections or Department of Health and Social Services Division of Juvenile Justice. The ombudsman is also requesting jurisdiction over entities that are contracted with the state to determine eligibility for a state benefit program or programs, such as a vendor determining whether an individual qualifies for Temporary Assistance from the Division of Public Assistance.

In other words, the ombudsman is requesting jurisdiction over two types of core services that currently are performed by both state agencies and by contractors for those agencies. Both facilities that hold people in custody for the state and entities that act as gatekeepers for access to state benefits are wielding considerable power over individuals, power usually delegated by a

state agency. The ombudsman believes that affected individuals should be able to ask for ombudsman oversight regardless of whether that power is being wielded by a state employee or a private contractor.

Why does the ombudsman believe this change in jurisdiction is important?

The ombudsman believes that it is important that a citizen's recourse to the ombudsman not be severed because the state agency privatized its function. The ombudsman believes that this is crucial when the function that has been delegated to a contractor is to either (1) hold individuals in custody; or (2) control access to the benefits of a state program.

The primary example motivating the ombudsman's request for this jurisdictional change is a cluster of complaints received from Alaska inmates held in the Hudson, Colorado contract facility. These complaints alleged failure to provide care for major medical conditions. Because these complaints originated in the contract facility, ombudsman investigators could not directly interview the staff at the facility or require immediate delivery of the inmates' records. The Office of the Ombudsman asked the Department of Corrections (DOC) to follow up with its contractor and to then respond to the ombudsman. For several of the complaints, it took months for DOC to respond and provide medical records from Hudson. Fortunately, the most serious of these complaints proved unsupported. Because the ombudsman did not have direct access to Hudson personnel and records, these health/safety complaints could not be addressed efficiently. Further, these ultimately unsupported complaints were open and consuming staff time far longer than should have been necessary, due to the ombudsman's reliance on indirect access to the evidence.

The ombudsman notes that the Department of Corrections is moving inmates from Hudson, Colorado to the new Goose Creek Correctional Center; however, the state still has inmates at Hudson today. Also, DOC houses inmates in halfway houses around Alaska, and the ombudsman receives complaints regarding conditions at some of those facilities as well.

Would this apply to private businesses with existing contracts?

No. The legislation is designed to apply prospectively, with ombudsman jurisdiction made a required term of new contracts. An entity currently operating under a contract will not be "surprised" by an ombudsman investigation.

When would this provision take effect?

Section 15 of HB 127 provides for a delayed effective date. The ombudsman would only have jurisdiction over contractors (performing services listed in section 12) acting under contracts entered into after January 1, 2015.

How will the ombudsman implement these changes in jurisdiction?

Beginning in 2015, section 13 of HB 127 makes the ombudsman's jurisdiction a required term of any contract for a service listed in section 12 of HB 127, i.e. custodial/detention services and services to determine eligibility for a state program or benefit. As contracts are solicited or renewed, the ombudsman's jurisdictional mandate will gradually take effect.

Before 2015, the ombudsman expects to work with affected state agencies, primarily the Department of Corrections and the Department of Health and Social Services, to explain the ombudsman's role in regard to contract providers. As part of this process, the ombudsman anticipates promulgating regulations, and expects to receive substantial feedback on draft regulations from both state agencies and contract service providers.

Will the ombudsman need more staff to handle the office's expanded jurisdiction?

No, the ombudsman does not anticipate requesting additional positions due to this statutory change, at least not for several years. First, this expansion of jurisdiction will "ramp up" gradually, beginning in 2015. Second, complaints about contract services – especially private prison facilities and halfway houses – are already taking up existing staff resources. Our office cannot currently investigate these complaints directly, but we already spend substantial amounts of time referring such complaints back the state agency supervising the contract and then following up with that agency. This indirect review of complaints tends to be inefficient and actually take up more time than it would take to look directly at the complaint.

Will this jurisdictional change be expensive for the executive branch agencies that contract for services covered by the amendment?

That seems unlikely. The ombudsman does not anticipate a significant increase in contract costs due to this legislation. Further, the legislation does not require additional staff at any of the executive branch agencies affected.