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The Honorable Matt Claman, Chair
Senate Judiciary Committee
Alaska State Capitol
Juneau AK, 99801

Senator Claman:

With this letter, I wish to provide the following written response to the Committee's request for the Department of Law's testimony on Senate Bill 165.

The Department of Law takes seriously its responsibility in administering the Executive Branch Ethics Act, including its role in providing formal and informal advice to public officials on compliance with the Act. Public officials, including the governor, lieutenant governor, and attorney general, should be entitled to rely on that advice. Because of unique procedures applying only to the governor, lieutenant governor, and attorney general, however, they remain subject to ethics act litigation even in instances where they relied on advice provided by the Department of Law. Consequently, it does not create a conflict of interest for the Department to defend these officials in such cases, and other similar situations where the Department determines such representation is in the public interest.

Even before the Department promulgated the new regulations in November 2023, it served many roles under the Act including educator, advisor, and prosecutor. When requested, the Department's designated Ethics Attorney trains state agencies, boards, and commissions on the requirements of the Ethics Act and their responsibilities as public officers. The Ethics Attorney also advises current and public officials when they have specific questions. *See* AS 39.52.240 (advisory opinions); AS 39.52.250 (advice to former public officers). This advice can result in a formal advisory opinion issued under AS 39.52.240(a) or it can occur less formally and look no different than the agency advice that Department attorneys offer their respective clients daily. The most formal role the Department fills is that of prosecutor. For complaints filed against all public officials other than the governor, lieutenant governor, or attorney general, the Department is responsible for investigating and prosecuting violations of the Ethics Act.

In fulfilling each of these functions, it became apparent that there was an ambiguity that needed to be filled. Alaska Statute 39.52.240(a) provides a mechanism whereby, upon request, the attorney general can issue advisory opinions to public officials interpreting the Ethics Act. It further provides that if the public official discloses all material facts and acts in accordance with the opinion, the public official will not be held liable under the Act. AS 39.52.240(d). Although this statute allows all "public officers" to seek advisory opinions from the Attorney General, it is unclear how this provision applies to the governor, lieutenant governor, or attorney general. Given that the Ethics Act set up a separate process whereby any complaint filed against the governor, lieutenant governor, or attorney general is automatically referred to the personnel board and reviewed by independent counsel, the question becomes whether the legislature really intended for the Ethics Attorney to have the authority to issue an advisory opinion under the attorney general's name that would insulate any of these three officials from liability under the Act.

Recognizing that these public official are entitled to a similar safe harbor for relying upon advice of the Department of Law relate to ethics questions, the Department addressed this obvious gap by adopting these regulations. Whereby all other public officials can seek an advisory opinion and be provided a safe harbor from liability, the Department's new regulation provides that the Department of Law will represent the governor, lieutenant governor, or attorney general before the personnel board when such representation is in the "public interest." One obvious circumstance in which such representation would be in the "public interest" would be when any one of these officials acted in accordance with advice from the Ethics Attorney but nevertheless drew an Ethics Act complaint.

Proponents of SB 165 argue this new regulation conflicts with the Department's role concerning the Ethics Act, conflicts with the Attorney General's role, and that the regulations do not serve a public purpose and are therefore unconstitutional. Although the Department disagrees with these assertions, it nevertheless recognizes that the legislature is free to amend the Ethics Act in a way that would invalidate this regulation or it may annul the regulation via a bill. It also appreciates the opportunity to appear before the committee to address these concerns.

First, the regulation does not create a conflict of interest. To be sure, it would be a conflict of interest for the attorney general's office to serve as both prosecutor and defense counsel for complaints adjudicated under its authority. However, as the Sullivan Opinion expressly recognized, there is no conflict for our office to serve as counsel for the governor, lieutenant governor, or attorney general in proceedings that take place before the personnel board. That is because in those situations it is the independent counsel hired by the personnel board that serves as the investigator and prosecutor, not the attorney general's office.

The other concerns raised by the Sullivan Opinion were addressed by the regulation's requirement that representation of these officials be in the "public interest." For instance, one concern raised in the Sullivan Opinion, and parroted by proponents of SB 165, is that the Department of Law, in representing the governor, lieutenant governor, or attorney general could find itself arguing a provision of the Ethics Act is unconstitutional or should be more narrowly construed than the attorney general had previously asserted in other proceedings. Similarly, proponents argue that the Department could find itself prosecuting a public officer for something factually related to an ethics complaint against a high-ranking officer the Department is defending.

But neither of these arguments consider the public interest requirement. If the governor, lieutenant governor, or attorney general sought the advice of the Ethics Attorney and then acted in accordance with this advice (or acted in accordance with prior formal and informal opinions), then it is within the public's interest for Department of Law's attorneys to appear before the personnel board, represent these officials, and defend its advice. In contrast, if these officials acted contrary to advice of counsel (or contrary to the Department's prior formal and informal opinions), then it is presumably not in the public interest for the Department's attorneys to represent them. And, similarly, it would not be in the public interest for the Department of Law to defend the governor, lieutenant governor, or the attorney general against an alleged violation of the Ethics Act when the Department is also prosecuting lower-level officials for related conduct.

In considering these various circumstances, the Department again emphasizes how seriously it takes its role. The Department of Law seeks to provide advice that is consistent, both with its prior formal and informal opinions and across all classifications of public officers. In other words, its advice under the Ethics Act is consistent whether it is advising the governor, lieutenant governor, or attorney general, or if it is advising one of the many public officers that hold lower-level positions. If a representation would require the Department to take a position contrary to its longstanding interpretation of the Ethics Act, then such representation would not be in the public interest as required by the regulation.

What the proponents of SB 165 fail to acknowledge is that these officials do not live in a vacuum. They routinely seek advice from the Ethics Attorney on the scope of the Ethics Act, yet they likely do not have the same opportunity for protection that other public officers may obtain. The November regulations plugged this hole by at least allowing the Department of Law to defend its advice in the event there is a complaint. It also incentivizes these high-ranking officials to seek the advice of the Ethics Attorney early and often.

Second, there is no conflict between what the regulations allow and the attorney general's role. The attorney general is charged with the responsibility to interpret and enforce the Ethics Act. If representation would unjustly require the Department of Law to

act contrary to its prior interpretations, then that representation would not be in the public's interest. But, on the other hand, if the governor, lieutenant governor, or attorney general relied on the advice of the Ethics Attorney, then it is also in the public's interest for these public officers to be represented. Just like it is in the public's interest for lower-level public officials to benefit from the safe harbor provided by an advisory opinion when they follow the Attorney General's advice.

Third, the argument that the Department's representation of these officials can never serve a public purpose necessarily assumes that the "public purpose" requirement in the regulation has no meaning. But that simply is not true. As explained above, the public purpose requirement serves as an important sideboard for this regulation. It encourages these officials to seek advice from the Department's Ethics Attorney early and often. It allows the Department to defend its interpretation of the Ethics Act, presumably the same interpretation it has offered to other public officials through formal and informal advice. It recognizes that probable cause is not the functional equivalent of a "guilty" finding. And it encourages Alaskans from all walks of life to enter public service. One should not need to be independently wealthy to serve the State. Rather, public officials who rely on the advice of the Department's attorneys should trust that the Department will represent them when someone inevitably disagrees.

Fourth, under SB 165, public monies will still be expended to reimburse fees incurred by the governor, lieutenant governor, or attorney general in defending against ethics complaints where no violation is ultimately found. Having the Department conduct the defense in these circumstances is more cost efficient than applying state dollars to reimburse for private attorneys' fees on the back end, especially where the Department provided the advice on which the official relied in the first place. Conversely, under the current regulations, the Department will decline to provide representation where it determines that representation is not in the public interest, shifting the burden to the official to defend against the complaint and seek reimbursement later in the event they are vindicated.

In sum, the current regulations strike a balance between the competing values of ensuring that ethical violations are prosecuted and providing guidance and protection to public officials, including the governor, lieutenant governor, and the attorney general, who seek to act within those ethical constraints. It does not create a conflict of interest for the Department to defend the governor, lieutenant governor, or the attorney general, in cases where those officials have relied in good faith on the Department's own advice, and in other similar situations where the Department determines that such representation is in the public interest.

Thank you for the opportunity to provide this testimony and for your service to the state and your constituents.

Sincerely,

TREG TAYLOR
ATTORNEY GENERAL

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