

Agency Response from the Department of Law



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

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October 6, 2023

RECEIVED

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LEGISLATIVE AUDIT

Kris Curtis, Director
Division of Legislative Audit
P.O. Box 113300
Juneau, Alaska 99811
Email: legaudit@akleg.gov

Re: Preliminary Audit Report, Spending on Contracts Related to *Janus*

Dear Ms. Curtis:

You have requested on behalf of the Legislative Budget and Audit Committee a written response to the Legislative Audit Division's May 19, 2023 preliminary audit report entitled *Department of Law, Spending on Contracts Related to Janus*. For the reasons indicated in the enclosed response, the Department of Law disagrees with your conclusion that it acted outside the scope of its budgetary authority in managing its outside contracts.

The preliminary audit essentially attempts to "audit" two competing but reasonable legal opinions, one from the Department of Law, and one, predominantly, from Legislative Legal Services. Although I appreciate the recognition in the audit that "a final legal determination can only be made by the appropriate court,"¹ the preliminary audit nonetheless goes on to assert that the Department of Law's payment of outside counsel for services related to *Janus v. AFSCME* "likely violated" AS 37.07.0S0(a) and Article IX, section 13 of the Alaska Constitution. The adjudication of legal disputes is far beyond the scope of standard auditing procedures and outside the purview of the legislative branch.²

Having dealt with many audits in my private career, the question for the auditor is always whether the entity relied on reasonable legal advice—not whether the legal conclusion is correct. If the client relied on reasonable legal advice, it should be end of story for an auditor.

¹ Preliminary Audit, at pg. 9.

² See *Bradner v. Hammond*, 553 P.2d 1, 6 (Alaska 1976).

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As noted in the preliminary audit, reasonable attorneys have offered differing opinions regarding the legality of the legislature's restriction on payment of outside counsel. The Department of Law undertook a detailed review of this question, summarized in the enclosed response, and concluded that the restriction was an unconstitutional violation of the confinements clause and the separation of powers. Nothing in the preliminary audit suggests that this conclusion is unreasonable; in fact, the preliminary audit seems to acknowledge that these legal arguments have merit.

The Department of Law acted in conformity with the reasonable legal advice of its attorneys, which is the normal and prudent practice when navigating a question of unsettled law. The Department is not bound by the legal opinions of Legislative Legal, and certainly not by those of the Division of Legislative Audit.

In terms of the proposed "remedies" for the alleged violations, we do not support resorting to wasteful litigation over this question, which might or might not result in a judicial determination of the merits. Alternatively, while the legislature may moot this question by ratifying the expenditures, the Department does not believe that ratification is necessary.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Treg Taylor', with a stylized, flowing script.

Treg Taylor
Attorney General

Enclosure

Response of the Department of Law to Preliminary Audit Report: *Spending on Contracts Related to Janus*

I. Background

During the creation of the FY 21 and FY 22 state budgets, the legislature deviated from years of prior practice in constructing the Department of Law budget. Typically, the legislature appropriates funds to the Department at the division level, with one appropriation for the Criminal Division and one appropriation for the Civil Division.¹ However, in FY 21 and FY 22, the legislature bifurcated the Department's Civil Division budget in an effort to control litigation decisions made by the Attorney General. The appropriations in question are identified as "Civil Division Except Contracts Relating to Interpretation of *Janus v. AFSCME*" and "Legal Contracts Relating to Interpretation of *Janus v. AFSCME* Decision." Your letter purports to find legal error in the Department of Law's handling of certain outside counsel contracts in relation to this irregular, and likely illegal, budget structure.

The preliminary audit contends that the Department of Law improperly expended a total of \$315,034 on payments to outside counsel. It contends that these payments violate the FY 21 and FY 22 budget structure described above. It is the opinion of the Department of Law that any payments made to outside counsel within the contested timeframe are valid and fully contained in the appropriations granted to the Department by the legislature. Furthermore, it is the Department of Law's determination that a legislative effort to restrict the spending authority of the Department based on subject matter, and attempts to dictate the allocation of attorney resources, raises multiple legal issues and is likely a violation of the Alaska Constitution.

As previously stated by this office,² certain attempts to constrain the discretion of the Attorney General through an appropriation bill violates the confinement clause of the Alaska Constitution³ and represents an improper encroachment on the powers of a

¹ Separate allocations exist under each Division, however, the allocation of the appropriations is not relevant to the analysis contained in the preliminary audit.

² See LTR from AG Clarkson to Chairs of House Finance Committee dated Feb. 14, 2020; LTR from Acting AG Sniffen to Rep. Andy Josephson dated Oct. 29, 2020; LTR from Acting AG Sniffen to Chair Gary Stevens dated Dec. 31, 2020; LTR from AG Taylor to Rep. Andy Josephson dated Jan. 21, 2022; LTR from AG Taylor to Division of Legislative Audit dated Sept, 7, 2022.

³ Art. II, Sec. 13, Alaska Const.

separate branch of government.⁴ And, while we are in general agreement that the Legislature has broad appropriation authority, it is not an unfettered power.⁵ The Legislature's appropriation authority is constrained by the Alaska Constitution, both directly⁶ and indirectly.⁷ Moreover, Alaska's constitution recognizes strong executive control over state expenditures⁸ and the Alaska Supreme Court has instructed the legislature to avoid the administration of Executive Branch activities through the use of appropriation power.⁹ In contrasting the Legislature's authority over appropriations and its authority to detail the duties of Executive Branch agencies, the Court stated:

The process for enacting substantive bills gives meaningful opportunity for public notice and comment. Article II, section 14 of the Alaska Constitution requires three readings of a substantive bill, on three separate days, 'to ensure that the legislature knows what it is passing' and to ensure an opportunity for the expression of public opinion and due deliberation.' This opportunity may be stifled if substantive provisions are attached to appropriation bills in the form of conditions. Unlike other legislation, appropriations are not subject to the single-subject requirement of article II, section 13—a requirement meant to avoid logrolling. Allowing substantive

⁴ "The doctrine prohibits one branch from encroaching upon and exercising the powers of another branch." *Bradner v. Hammond*, 553 P.2d 1, 5 n.8 (Alaska 1976).

⁵ See *State v. Alaska Legislative Council*, No. S7612 at p. 16 (Alaska August 12, 2022) ("[The Constitution] create[s] a strong executive branch with a strong control on the purse strings of the State and limit the legislature's power to impose current spending priorities on future governors and legislatures")(internal quotations omitted); *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001) ("The confinement clause prevents the legislature from enacting substantive policy outside the public eye. The process for enacting substantive bills gives meaningful opportunity for public notice and comment").

⁶ Art. II, Sec. 13, Alaska Const.

⁷ *State v. Alaska Legislative Council*, No. S7612 at p. 15 (Alaska August 12, 2022)("We acknowledge that none of the Constitution's budgetary clauses expressly prohibit forward funding. We reiterate, however, that 'often what is implied is as much a part of the constitution as what is expressed.' Implicit in the budgetary clauses is a requirement that the budget be determined annually; when examined together, the budgetary clauses, the sources from which they were drawn, the underlying policies they were designed to promote, and our case law all support this conclusion").

⁸ *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977). See also *State v. Alaska Legislative Council*, No. S7612 at p. 15-16 (Alaska August 12, 2022).

⁹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

enactments in an appropriation bill may also be problematic because appropriation bills are frequently a product of a free conference committee and, as such, must be voted on in their entirety and cannot be amended on the floor. Consequently, as the superior court noted, the confinement clause prevents a legislator seeking to advance unpopular legislation from burying it in a popular appropriation measure. Strict enforcement of constitutional limits helps ensure that the public will be fully informed of proposed legislation.¹⁰

Consequently, the Legislature is without the authority to alter or negate the actions of the Executive Branch—including by restricting the subject matter of litigation or the deployment of attorney resources—through the use of an appropriation bill.¹¹

II. Confinement Clause

While the audit concludes that the legislature is free to dictate how an executive branch agency deploys its resources,¹² the Alaska Supreme Court has already stated that legislative attempts to limit executive discretion in staffing and managing state programs violate Art. II, Sec. 13 of the Alaska Constitution.¹³ The legislative auditor’s authority does not extend to overturning Alaska Supreme Court decisions.

The Alaska Supreme Court has rejected legislative attempts to defund specific positions in the Executive Branch.¹⁴ In *Knowles*, the Court recognized that the Executive Branch has wide discretion in the expenditure of appropriated funds and that legislative attempts to circumvent that discretion in an appropriation bill violated the confinement clause.¹⁵ Consequently, Legislative Legal’s argument that the Department of Law had sufficient internal resources to accomplish the tasks handled by outside counsel is

¹⁰ *Id.* (internal citations omitted).

¹¹ *See also State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 117 (W. Va. 2002) (“no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing its inherent constitutional functions”).

¹² Preliminary Audit, at pg. 9-10. As noted above, the audit recognizes that “a final legal determination can only be made by the appropriate court” yet nonetheless proceeds to its own legal conclusion, *ipse dixit*.

¹³ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 380 (Alaska 2001).

¹⁴ *Id.*, at 370.

¹⁵ *Id.*, at 381.

meaningless. The legislature is without the power to assign specific employees to specific duties, and stating that sufficient internal resources exist is simply an attempt to administer the program of expenditure in violation of the precedent established in *Knowles* by dictating to the Department in how it should deploy its resources.

Moreover, it is important to note that the Department of Law did not exceed its appropriation limit in FY 21 or FY 22. The Department's expenditures on in-house and outside counsel did not exceed the cap set by the legislature, despite the apparent attempt to reorganize the Department into two different Civil Divisions (one housing all functions except *Janus* contracts and the other solely dedicated to *Janus*).¹⁶ Neither the Alaska Constitution nor the legislation establishing the Department of Law limits or deprives the Attorney General of the power to appoint outside counsel when, in the wide discretion granted, the Attorney General believes such an arrangement to be in the public interest and within the appropriations granted by the legislature.¹⁷ Accordingly, the language in the FY 21 and FY 22 appropriation bills served to restrict the Attorney General from entering into contracts regarding particular legal matters.¹⁸ This attempt to administer a program of expenditures was an overreach by the legislature and thus in violation of the Confinement Clause of the Alaska constitution.¹⁹

¹⁶ The Legislature's attempt to reorganize the Department of Law through an appropriation bill may also be a violation of Art. III, Sec 23, of the Alaska Constitution.

¹⁷ *State v. Breeze*, 873 P.2d 627, 634–35 (Alaska App. 1994) (holding appointment of special prosecutor valid in absence of a law limiting the power).

¹⁸ This differs from the multi-year appropriations in recent years funding efforts related to protecting the state's interests in managing its natural resources. *See, e.g.*, § 69(a), ch. 11 SLA 2022. Those appropriations did not restrict staffing or use of resources within law on certain subject matters. Instead, it provided an additional funding source for specific types of matters, while not restricting the department's overall ability to decide how to staff cases and allocate resources. This is an example of a permissible type of appropriation, whereas the appropriation structure that is the subject of the special audit was not.

¹⁹ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950–51 (Alaska 1975) ("In that field[control of litigation], the discretion of the Attorney General is plenary. He is a constitutional officer . . . and, as such, the head of the state's legal department. His discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state")(internal citations omitted). Moreover, the courts have frowned on the State wielding its appropriation power for purely political purposes. *See Order Granting Summary Judgment, American Civil Liberties Union of Alaska v. Dunleavy*, Superior Court No. 3AN-19-08349CJ (Oct. 16, 2020).

The Legislature is without the authority to use an appropriation bill to pick and choose which attorneys will work on a case, just as it is without the power to direct where and how state employees are to be employed or whether contract services are needed.

III. Separation of Powers

In addition to the Confinement Clause issues discussed above, the Legislature's actions and the audit's conclusions represent an encroachment on the powers and duties of the Executive Branch. As discussed in the Department's previous communications, the Office of the Attorney General is established by statute²⁰ in furtherance of Art. III, Sec. 16 of the Alaska Constitution. Under law, "[t]he attorney general is the legal advisor of the governor and other state officers."²¹ The Attorney General is required to defend the Constitution of the State of Alaska, bring, prosecute, and defend all necessary and proper actions in the name of the state, and administer state legal services.²²

As the audit notes,²³ there was debate before the legislature whether the FY 21 and FY 22 appropriations were really fiscally prudent or "an inappropriate attempt to manage LAW's decision process by reducing the funding for a specific issue that members did not agree with."²⁴ By enacting its unique budget structure in FY 21 and FY 22, it appears 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.²⁵ As was recently noted by the Anchorage Superior Court, one branch of government cannot exercise its power in a manner threatening to undermine the independence of another co-equal branch of government.²⁶

"The doctrine [of separation of powers] prohibits one branch from encroaching upon and exercising the powers of another branch."²⁷ More specifically, the doctrine is

²⁰ AS 44.23.010.

²¹ AS 44.23.020.

²² AS 44.23.020(b)(1)-(5).

²³ Preliminary Audit, at pg. 12.

²⁴ *Id.*

²⁵ *Bradner*, 553 P.2d at 6 n.11 (the purpose of the doctrine of separation of powers is, in part, "to safeguard the independence of each branch of the government and protect it from domination and interference by the others").

²⁶ Order Granting Pl.'s Mot. For Summ. J., *American Civil Liberties Union of Alaska v. Dunleavy*, 3AN-19-08349CI Anc. Superior Court (Oct. 16, 2020).

²⁷ *Bradner*, 553 P.2d at 5 n.8.

breached when “[o]ne department of government usurps the powers of another department [by] exercise[ing] coercive influence on the other.”²⁸ The Attorney General’s duty to defend and prosecute in the name of the State is so entrenched in law that other Executive Branch agencies must seek the Attorney General’s approval before seeking legal services outside the Department of Law.²⁹ It is critical to note that “[t]he attorney general’s discretion to bring suit is plenary and is beyond the control of any other state department or officer.”³⁰ Importantly, the Alaska Supreme Court has stated that:

Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state’s litigation which he thinks best . . . This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.³¹

When an act is committed to the discretion of a particular branch of state government, interference with that discretion is a violation of the doctrine of separation of powers.³² Accordingly, “no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing” its inherent functions.³³ The Legislature’s attempt to control the discretion of the Attorney General in the prosecution and defense of state litigation by rearranging the Department of Law’s budget for one specific case violates the separation of powers doctrine.

IV. Other Concerns

While your letter is constrained to consideration of the confinement clause and the separation of powers doctrine, as the Department has previously stated, other considerations exist that question whether a legal error exists in the Department’s expenditure of funds. The Legislature’s attempts to defund an existing contract may have

²⁸ *Solomon v. State*, 364 P.3d 536, 546 (Kan. 2015).

²⁹ AS 36.30.015(d); *Breeze*, 873 P.2d at 633–34.

³⁰ *State ex rel. Hatch v. Am. Fam. Mut. Ins. Co.*, 609 N.W.2d 1, 4 (Minn. Ct. App. 2000).

³¹ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

³² *Id.*

³³ *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 117 (W. Va. 2002).

implications under Art. I, Sec. 15, of the Alaska Constitution.³⁴ In addition, your letter fails to address the fact that termination of an outside-counsel arrangement, or other withdrawal from litigation, must be accomplished in a manner that does not have an adverse material effect on the state's interest.³⁵

V. Conclusion

The preliminary audit outlined ratification as one specific recommendation, and alluded to potentially remedying the dispute through litigation.³⁶ While the Department of Law does not support wasteful and needless litigation between co-equal branches of government, we believe your recommendation and potential remedy are reasonable conclusions to resolve differing legal opinions if that is what the legislature chooses. Because the Department disagrees with Legislative Legal's opinion that the expenditures in question were unauthorized, we do not believe that ratification is necessary. Nonetheless, the Department agrees that the legislature's ratification would moot the disagreement.³⁷

³⁴ The Department recognizes all state contracts and expenditures are subject to legislative appropriation; nevertheless circumstances can arise that require a state agency to meet its obligations despite a lack of supporting appropriations. *See generally DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 443 (Alaska 1987) (finding attorney services are property rights under Art. I, Sec. 18, Alaska Const.).

³⁵ Cmt to ARPC 1.16. For example, under Rule 3.2, the Attorney General is required to avoid undue delay in the pursuit of litigation. To immediately revoke outside counsel agreements and attempt to transfer complex and fact-intensive projects to Assistant Attorneys General that are already operating at capacity based on the political whims of the legislative branch may violate the Attorney General's duty under the professional rules.

³⁶ Preliminary Audit, at pg. 19.

³⁷ The Department of Law does not believe it acted outside the scope of its appropriation authority.

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Legislative Auditor's Additional Comments

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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October 11, 2023

Members of the Legislative Budget
and Audit Committee:

I have reviewed management's response to this audit. Nothing contained in the response causes me to revise or reconsider the report conclusions and recommendation.

Sincerely,

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

Kris Curtis, CPA, CISA
Legislative Auditor

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