

ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE

February 25, 2014

8:08 a.m.

MEMBERS PRESENT

Representative Bob Lynn, Chair
Representative Wes Keller, Vice Chair
Representative Lynn Gattis
Representative Shelley Hughes
Representative Doug Isaacson
Representative Jonathan Kreiss-Tomkins

MEMBERS ABSENT

Representative Charisse Millett

COMMITTEE CALENDAR

HOUSE BILL NO. 127

"An Act clarifying that the Alaska Bar Association is an agency for purposes of investigations by the ombudsman; relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; providing that certain records of communications between the ombudsman and an agency are not public records; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to informal and formal reports of opinions and recommendations issued by the ombudsman; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract; and amending Rules 501 and 503, Alaska Rules of Evidence."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 127

SHORT TITLE: OMBUDSMAN

SPONSOR(s): RULES BY REQUEST

02/18/13	(H)	READ THE FIRST TIME - REFERRALS
02/18/13	(H)	STA, JUD
03/12/13	(H)	STA AT 8:00 AM CAPITOL 106
03/12/13	(H)	Heard & Held
03/12/13	(H)	MINUTE(STA)
03/21/13	(H)	STA AT 8:00 AM CAPITOL 106
03/21/13	(H)	<Bill Hearing Rescheduled to 3/26/13>
03/26/13	(H)	STA AT 8:00 AM CAPITOL 106
03/26/13	(H)	Heard & Held; Assigned to Subcommittee
03/26/13	(H)	MINUTE(STA)
02/07/14	(H)	STA AT 3:00 PM CAPITOL 120
02/07/14	(H)	Work Session on above Bill
02/25/14	(H)	STA AT 8:00 AM CAPITOL 106

WITNESS REGISTER

JIM POUND, Staff
 Representative Wes Keller
 Alaska State Legislature
 Juneau, Alaska

POSITION STATEMENT: Provided information related to a committee substitute for HB 127, labeled 28-LS0088\G, Gardner, 2/13/14.

LINDA LORD-JENKINS, Ombudsman
 Office of the Ombudsman
 Juneau, Alaska

POSITION STATEMENT: Answered questions during the hearing on HB 127.

BETH LEIBOWITZ, Assistant Ombudsman
 Office of the Ombudsman
 Juneau, Alaska

POSITION STATEMENT: Addressed changes made in the committee substitute to HB 127, labeled 28-LS0088\G, Gardner, 2/13/14.

ACTION NARRATIVE

[8:08:25 AM](#)

CHAIR BOB LYNN called the House State Affairs Standing Committee meeting to order at 8:08 a.m. Representatives Keller, Gattis, Isaacson, Hughes, and Lynn were present at the call to order. Representative Kreiss-Tomkins arrived as the meeting was in progress.

HB 127-OMBUDSMAN

[8:08:27 AM](#)

CHAIR LYNN announced the only order of business was HOUSE BILL NO. 127, "An Act clarifying that the Alaska Bar Association is an agency for purposes of investigations by the ombudsman; relating to compensation of the ombudsman and to employment of staff by the ombudsman under personal service contracts; providing that certain records of communications between the ombudsman and an agency are not public records; relating to disclosure by an agency to the ombudsman of communications subject to attorney-client and attorney work-product privileges; relating to informal and formal reports of opinions and recommendations issued by the ombudsman; relating to the privilege of the ombudsman not to testify and creating a privilege under which the ombudsman is not required to disclose certain documents; relating to procedures for procurement by the ombudsman; relating to the definition of 'agency' for purposes of the Ombudsman Act and providing jurisdiction of the ombudsman over persons providing certain services to the state by contract; and amending Rules 501 and 503, Alaska Rules of Evidence."

[8:09:14 AM](#)

CHAIR LYNN reviewed that the House State Affairs Standing Committee had heard HB 127 twice, in 2013, and appointed a subcommittee. He emphasized the importance of having an ombudsman in Alaska. He requested that Representative Keller, as chair of the subcommittee to HB 127, give a report.

[8:09:45 AM](#)

REPRESENTATIVE KELLER opined that the law of the Office of the Ombudsman is unique because it defines legislators. He talked about the checks and balances put in place by the country's Founding Fathers. He stated, "That's why we've made the three branches of government. We've made a system that's pretty inefficient and actually expensive, and it's all for the purpose of making sure that government doesn't step on the liberties of the people, of the governed." He said HB 127 is significant, because the Office of the Ombudsman works for the legislature, which has given the Office of the Ombudsman as much independence and investigative powers possible. He emphasized that the Office of the Ombudsman does not oversee; it investigates complaints.

REPRESENTATIVE KELLER relayed his interest in the Office of the Ombudsman began about ten years ago, and said he took some elementary courses last summer, which he ventured would help him explain and provide context to the important policy decisions that must be made by the committee. He acknowledged Representatives Gattis and Kreiss-Tomkins as the other two subcommittee members. He said the subcommittee worked on a proposed committee substitute, [labeled 28-LS0088\G, Gardner, 2/13/14], which he offered his understanding would be considered by the committee today.

[8:13:49 AM](#)

REPRESENTATIVE KELLER directed attention to an [eight-page] handout in the committee packet showing the Sections in statute related to the Office of the Ombudsman. He went over it section by section. He explained that AS 24.55.020 covers how an ombudsman is appointed. The governor can veto an appointed ombudsman; however, the legislature can override that veto with a two-thirds vote. Next, he pointed out that AS 24.55.030 sets forth the qualifications for the ombudsman and prohibition against political activity; AS 24.55.040 sets the term of office to five years, with a limit of three terms; and AS 24.55.050 explains how an ombudsman can be removed from office.

REPRESENTATIVE KELLER said AS 24.55.060 addresses compensation of the ombudsman, and is the subject first addressed under HB 127, with a proposed change under the aforementioned committee substitute [referred to as "Version G"]. Version G, he noted, would add a new subsection (d) to AS 24.55.070, which addresses staff and delegation.

[8:16:33 AM](#)

REPRESENTATIVE KELLER, in response to the Chair Lynn, offered his understanding that Version G proposes a change to the step increases for the ombudsman. In response to Representative Hughes, he clarified his presentation was focused on existing ombudsman law, which portions of it are addressed under HB 127, and which portions of HB 127 would have proposed changes under Version G. He reminded Representative Hughes that he is not the bill sponsor, and emphasized his preference to have the current ombudsman, Linda Lord-Jenkins, address specific questions. He stated his intent to continue with an overview and allow his staff to talk about proposed changes.

[8:18:44 AM](#)

REPRESENTATIVE KELLER returned to the handout and noted that page 3 shows AS 24.55.090, which gives the ombudsman the power to write regulations to set up the process through which the Office of the Ombudsman handles complaints, and AS 24.55.100, which addresses the jurisdiction of the Office of the Ombudsman. He highlighted that AS 24.55.110 states that the ombudsman shall investigate any complaint deemed appropriate under [AS 24.55.150], with six exceptions. He listed the first four: if a remedy for the complaint is already available; if the complaint resides outside the jurisdiction of the ombudsman; if the complainant had knowledge of the act for an unreasonable length of time; and if the complainant does not have a sufficient personal interest in the subject matter of the complaint.

[8:20:53 AM](#)

CHAIR LYNN asked to which branches of government the investigative power applies.

[8:21:13 AM](#)

REPRESENTATIVE KELLER answered that there are restrictions on what can be investigated in the judicial branch, but the executive branch is definitely included. He stated, "As you remember, the first part of the title of the original bill was a clarification of whether or not the ombudsman has jurisdiction over the Alaska Bar Association." He indicated that that was taken out of Version G, and said "instrumentality of the state" - which is what the Alaska Bar Association (ABA) is referred to - is the same as an agency. He clarified that that does not mean that the Office of the Ombudsman has jurisdiction over that which the [Alaska] Supreme Court has jurisdiction; however, he opined that it is in the best interest of the legislature to maintain the responsibility and power it has on behalf of Alaskans.

[8:22:58 AM](#)

REPRESENTATIVE KELLER returned to the handout and listed the last two of the six exceptions: if the complaint is made in bad faith and if the resources of the Office of the Ombudsman are insufficient for adequate investigation. He said the latter "comes right back on us," because the legislature is the appropriator of funds and needs to know if there are complaints that are not being handled because of a lack of funds.

Representative Keller noted that under AS 24.55.120, the ombudsman can initiate an investigation.

[8:23:27 AM](#)

REPRESENTATIVE KELLER directed attention to page 4 of the handout, to AS 24.55.130, which concerns a notice to a complainant, and to AS 24.55.140, which addresses a notice to the agency. He opined that there is good reason to require the ombudsman to report to the legislature, because he/she works for the legislature. He expressed concern that the legislators have good interaction with the ombudsman.

REPRESENTATIVE KELLER next directed attention to AS 24.55.150, which addresses appropriate subjects for investigation and read as follows [original punctuation provided]:

Sec. 24.55.150. Appropriate subjects for investigation.

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

(1) contrary to law;

(2) unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law;

(3) based on a mistake of fact;

(4) based on improper or irrelevant grounds;

(5) unsupported by an adequate statement of reasons;

(6) performed in an inefficient or discourteous manner; or

(7) otherwise erroneous.

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

REPRESENTATIVE KELLER related that he and his staff could not think of anything to add to the list, and he encouraged the other committee members to look at it.

[8:25:13 AM](#)

REPRESENTATIVE KELLER turned to page 5 of the handout, to AS 24.55.160, subsections (a) and (b), which deal with investigative procedures, and he said the aforementioned committee substitute would propose a new subsection (c). He brought attention to AS 24.55.170, on the handout, which

pertains to powers of the ombudsman. He pointed out that there are only a couple states that have given the ombudsman so much power. Alaska's ombudsman has the power to subpoena someone to get information, which he opined is excellent. He said after going to a convention, he thinks other states look up to Alaska's legislation as a model.

[8:26:25 AM](#)

REPRESENTATIVE KELLER turned to page 6 of the handout, which shows AS 24.55.190, 200, and 210. He said AS 24.55.190 relates to the procedure after an investigation; it outlines the reporting requirements of the ombudsman to the agency involved. He said AS 24.55.200 has to do with publication of recommendations. It gives the ombudsman the option to present the opinion and recommendations given to the agency to "the governor, the legislature, a grand jury, and/or the public." Representative Keller ventured that that kind of transparency "gives the ombudsman a lot of power."

REPRESENTATIVE KELLER turned to page 7 of the handout and pointed out [AS 24.55.230], which requires the ombudsman to submit an annual report. He said AS 24.55.240 relates to a [judicial] review, and its purpose is to ensure that the law has been followed. He noted that AS 24.55.250 pertains to the immunity of the ombudsman.

REPRESENTATIVE KELLER said AS 24.55.260 relates to an ombudsman's privilege not to testify, and Version G addresses this section. He said AS 24.55.275 has to do with contract procedures. He said the question is whether the ombudsman has jurisdiction to investigate contractors for the state where the money has gone indirectly to the contractors. He emphasized that it is clear the legislative audit has jurisdiction over contractors. He said he could provide legal memorandums, which he reviewed.

REPRESENTATIVE KELLER directed attention to the definition of "agency" under AS 24.55.330, shown on page 8 of the handout, and he said Version G would add, within that definition, the word "instrumentality".

[8:30:11 AM](#)

JIM POUND, Staff, Representative Wes Keller, Alaska State Legislature, stated that the subcommittee actually trimmed the size of the proposed legislation. He said HB 127 would revise

the pay of the ombudsman by adding step increases. It would expand how the ombudsman could protect attorney/client privilege. It would update the procurement procedure, by allowing it to change as necessary. He explained that it would bring the ombudsman's procurement process into compliance with that of the legislature. It would look at the growing trend of privatization by permitting investigation into private contractors, because technically those private contractors are representing the state. He said the proposed legislation would expand the authority of the ombudsman to review instrumentalities of the state. He noted there are 121 references to instrumentality in statute.

[8:32:02 AM](#)

MR. POUND explained the changes that were drafted into Version G and compared those with the original bill version. He indicated that Version G would delete the clarifying language of the Alaska Bar Association from Section 1 of the original bill. He said, "That is taken up under 'instrumentality of the state'." He indicated that language regarding confidentiality, which was in Section 10 of the original bill, is addressed in Section 3 of Version G. He noted that confidentiality is also covered under regulation 21 AAC 10.200. He said Version G would delete Section 6 of the original bill, which included "reporting language" already "on the books" that can "also be handled by regulation." He stated, "That goes all the way through eliminating all of page 3 of from the bill, to include Section 300 complaints and responses, which are already in ... regulatory language." He pointed to language added to statute, shown within Section 11 [of the original bill version], and he said, "That deals ... with the procurement situation." He referred to a five percent preference [under AS 36.30.170(b), which is referenced under Section 11], and he said, "That language is already in the State of Alaska's legislative language and is unnecessary in this bill; it's just duplicative."

[8:33:50 AM](#)

REPRESENTATIVE ISAACSON questioned whether Section 11 in the original bill version had become Section 5 [in Version G]; however, he later surmised that Section 11 had actually become Section 7.

MR. POUND recommended that the ombudsman could better address the details of Version G.

[8:35:23 AM](#)

REPRESENTATIVE KELLER apologized for not producing the committee substitute for the committee members prior to today.

[8:35:59 AM](#)

MR. POUND ventured that Section 12 would probably elicit the most discussion, because of the aforementioned topic of instrumentality. He listed the following organizations that are some of the instrumentalities in Alaska: the Alaska Medical Facilities Authority, the Alaska State Housing Authority, the Alaska Housing Finance Corporation, the Knik Arm Bridge and Toll Authority, the Alaska Gasline Development Corporation, and the Alaska Permanent Fund Corporation, among others. He indicated that [the addition of "instrumentality" in Section 6, of Version G, would solidify the ability of the ombudsman to investigate instrumentalities. He said Section 13 of the original bill addresses a service provided in [AS 24.55.330(2)], which was the statute amended in Section 12, and he indicated the language relates to "private contractors that are primarily dealing in the custodial ... area of statute." He said Section 14 of the original bill addresses an indirect court rule amendment, which may or may not be needed, depending on how the courts may view the inclusion of the Alaska Bar Association as an instrumentality of the state.

[8:38:03 AM](#)

REPRESENTATIVE GATTIS, as a member of the subcommittee, said the ombudsman needs to work for "us," and there was language in statute that needed to be cleaned up in order to allow the ombudsman to do that. She said she thinks the subcommittee made the necessary changes, and she thinks [the committee substitute that resulted] is a good piece of legislation.

[8:39:25 AM](#)

REPRESENTATIVE KREISS-TOMKINS, as a member of the subcommittee, said it troubles him that he is seeing the committee substitute for the first time right now. He said he appreciates good intentions, but is in the same position as everyone else on the committee in that he is reading the new language for the first time.

[8:39:55 AM](#)

REPRESENTATIVE KELLER moved to adopt the proposed committee substitute (CS) for HB 127, Version 28-LS0088\G, Gardner, 2/13/14, as a work draft. There being no objection, Version G was before the committee.

8:41:10 AM

LINDA LORD-JENKINS, Ombudsman, Office of The Ombudsman, thanked Representatives Keller and Gattis for attending the United States Ombudsman Association (USOA) Conference in Indianapolis in the fall of 2013, and for doing some fact finding. She indicated that she is in charge of new ombudsman training, and Representative Keller was a student of hers and asked many questions. She said the Office of the Ombudsman proposed HB 127 as clean-up legislation. She explained that the Office of the Ombudsman was created in 1976, and there have been revisions to statute in 1986 and again in 1990, but not since then. She said the Office of the Ombudsman would not have bothered the legislature with any one single issue, but the bill addresses many issues, including a procurement revision.

8:43:39 AM

MS. LORD-JENKINS said Section 1 of Version G addresses the compensation of the ombudsman. She continued as follows:

Under the United States Ombudsman Act's model acts and standards USOA and the ombudsman -- International Ombudsman Institute suggests that ombudsmen should have a position in government where they can deal on an equal power level with department heads, because they are making suggestions often to department heads on how to rectify problems that have been discovered through ombudsman investigation.

MS. LORD-JENKINS said when the Office of the Ombudsman was created in Alaska the ombudsman was compensated on a level with a superior court judge. She said that compensation was reduced in 1986 and locked in at a range 26 A. She said anyone that works in the office does not get a merit step. She offered her understanding from talking to Skiff Lobaugh, director of Personnel, within the Legislative Affairs Agency, that the ombudsman is currently the only position within state government who is "not entitled to a consideration for the step increase." She stated that whether or not "this section" would ever apply

to her, she thinks [a frozen compensation range] is "fundamentally unfair to the position of the ombudsman.

MS. LORD-JENKINS said Section 2 addresses appointing staff to the Office of the Ombudsman under personnel contracts. She deferred to her assistant ombudsman to explain the need for this provision.

[8:45:36 AM](#)

BETH LEIBOWITZ, Assistant Ombudsman, Office of the Ombudsman, stated that she is also an attorney; therefore, she tends to consider statutory revisions related to the office. She said the reason for Section 2 is that even though the Office of the Ombudsman has been in the legislative branch, in some ways it has been separated from other legislative personnel matters. She explained that there have been many statute revisions over the years dealing with legislative personnel, and the Office of the Ombudsman has found itself to be in limbo - perceiving, but not knowing for certain, that it has the ability to use "that type of personal services contract."

[8:46:33 AM](#)

MS. LORD-JENKINS stated that Section 3 would add a subsection to AS 24.55.160, which would address the Office of the Ombudsman's access to attorney/client privileged information. She relayed that when the Ombudsman's Act was enacted in 1976, the ombudsman did have access to attorney/client privileged information; however, that was revised in 1990 to exclude attorney/client privileged information from the review of the Office of the Ombudsman. She said this means that if the Department of Law is asked for an opinion by a social worker and the social worker acts on that attorney's advice, and the Office of the Ombudsman receives a complaint about an action involved in that case, the Office of the Ombudsman would not have access to "see what law has advised the OCS social worker." She explained that means that the Office of the Ombudsman cannot look at all the evidence in a complaint that comes before it. She said although she is not an attorney, her understanding is that "in large part, this is because if privilege was waived as to the ombudsman, the privilege is then considered waived as to any other entity." She said, "This provision would ... allow us to review the attorney/client privileged information or work product, but that privilege ... would not allow anyone else involved in, say, a lawsuit to look at that information."

[8:48:18 AM](#)

CHAIR LYNN asked for a hypothetical example.

[8:48:31 AM](#)

MS. LEIBOWITZ recollected a circumstance that occurred years ago, involving a division within the [former] Department of Community and Regional Affairs. She said there was a complaint and the Office of the Ombudsman asked why the division did something, to which the division replied it was told to do so by its attorney. When the Office of the Ombudsman asked what the attorney had said, the division said it could not give that information to the ombudsman. Ms. Leibowitz said it probably would have been to the division's advantage to relate what the Department of Law told it, because "one of the things we will give an agency a pass on is if they're acting on advice of counsel, and that's the reason for their conduct." She added, "But if they can't or won't show us, then we're left with something that looks, frankly, unexplainable, and that is reflected in our investigation."

CHAIR LYNN questioned how that would get reported without compromising the attorney/client privilege.

[8:49:50 AM](#)

MS. LEIBOWITZ answered that the Office of the Ombudsman has had agencies that have given "arguably privileged material to explain it," and have so far not had a problem doing so. However, she said some agencies say they cannot do that, which can result in the Office of the Ombudsman concluding that "the agency's action does not appear reasonable, because we do not have a reasonable explanation." She said the Office of the Ombudsman would like agencies to have the ability to explain their reasons for doing things without having it result in litigation with another party.

[8:50:43 AM](#)

REPRESENTATIVE GATTIS said she gets many requests regarding issues related to the Office of Children's Services (OCS), where the hands of the ombudsman are tied. She said she thinks [Section 3 of Version G] would untie those hands and allow the Office of the Ombudsman to do "the business that I think the citizens of Alaska really deserve."

[8:51:25 AM](#)

MS. LORD-JENKINS related that there have been formal investigations where the agency inadvertently provided the Office of the Ombudsman attorney/client privileged information that was "pivotal on at least one aspect of the investigation." She said the Office of the Ombudsman does not release that information publicly, because statute does not allow the office to release confidential information; however, the Office of the Ombudsman can incorporate that information into a confidential version of the report that is provided to the agency so that the agency understands what has happened. She said the Office of the Ombudsman does provide that information to [the Department of] Law, if appropriate, to let it know that the agency did not follow its advice. She concluded, "But ... we don't release confidential information in any respect, and we wouldn't release attorney/client privileged information in any respect, so that ... is our practice."

[8:52:31 AM](#)

MS. LORD-JENKINS directed attention to Section 4(b) of Version G, which would tighten up the Office of the Ombudsman's confidentiality of records. She stated that when the Ombudsman's Act was first enacted, the office relied on the ombudsman's privilege not to testify in court to protect the office's records. As the years have gone by, the Office of the Ombudsman has protected its records, but has wanted that provision "tightened up." Section 4(b) would keep the Office of the Ombudsman's notes, drafts, and records obtained from an individual or agency not releasable to the public. She said this goes along with the strong confidentiality provisions of the Office of the Ombudsman. She said those provision are core to the ombudsman's institution.

[8:53:28 AM](#)

REPRESENTATIVE ISAACSON offered his interpretation of a letter from North Star Behavioral Health (NSBH) [included in the committee packet] was that the entity has the inherent benefit of having an internal advocate to investigate and work with the team to address concerns. He questioned what language in the proposed committee substitute addressed the concern of North Star Behavioral Health. He remarked that the legislature is supposed to ensure that agencies being funded by the legislature are using the funds appropriately. He asked Ms. Lord-Jenkins to

address the concern that having an ombudsman may interfere in getting a client the best treatment.

[8:55:47 AM](#)

MS. LEIBOWITZ pointed out that the concerns of NSBH apply to Section 6, which addresses contractors or grantees.

REPRESENTATIVE ISAACSON requested that his question be addressed when the time came for discussion of Section 6.

[8:57:01 AM](#)

MS. LEIBOWITZ directed attention to Section 5 of Version G, which deals with contract procedures. She explained that in a past iteration of the procurement code, language was put into statute related to the Office of the Ombudsman; the procurement code "moved on," and the Office of the Ombudsman was "left with what appears to be an anachronistic reference that caused us to be the only legislative branch agency that would be making procurement regulations tied to [AS] 36.30, rather than to the legislative procurement policies that everyone else in the legislative branch is using." She said Section 5 was designed to put the Office of the Ombudsman back in the legislative branch in terms of procurement.

[8:57:59 AM](#)

MS. LEIBOWITZ stated that Section 6 of Version G addresses two issues. The first is the inclusion of "instrumentality" in the definition of agency for the purpose of the Office of the Ombudsman. She continued as follows:

Over the years, we have had no problem with asserting jurisdiction with regard to University of Alaska or Alaska Housing Finance Corporation or a number of other entities, some of which are instrumentalities. However, we have had a long-running ambiguity with regard to the [Alaska] Bar Association, which looks like an administrative agency in many respects, but is defined only as an instrumentality and has generally said that they are not within our jurisdiction.

MS. LEIBOWITZ said the Office of the Ombudsman has had a choice over the years to either litigate a test case or ask the legislature to resolve the issue one way or another, and it is now asking the legislature to decide one way or the other.

MS. LEIBOWITZ said the second part of Section 6 of Version G addresses the issue of agencies that have changed from public to private. She explained that the Office of the Ombudsman cannot supervise or investigate every contract or grant issued by the State of Alaska; therefore, it has chosen those private entities that fit a category of being a critical area over which the ombudsman should have jurisdiction in spite of privatization. She said the first on the list are adults in state custody. She explained that while the Office of the Ombudsman may have assisted an inmate in a state prison, that inmate may be transferred to an out-of-state prison or half-way house where the ombudsman has no jurisdiction. This is where the ombudsman has seen the most need to remove the distinction between the Department of Corrections and contractors. She said, "We've had enough cases involving private facilities that we think there's a demonstrated need in that area."

[9:01:36 AM](#)

CHAIR LYNN observed that the Office of the Ombudsman would be working with the person in the facility, which is more important than working with a facility.

MS. LEIBOWITZ responded that whether the complaint is merited or not, if a person is an inmate, he/she is in state power. She said the Office of the Ombudsman does not want its jurisdiction limited because an inmate is in a state facility, whether or not that state facility is located in or out of state.

[9:02:32 AM](#)

MS. LEIBOWITZ related that the next category is juveniles in state custody. For example, minors in McLaughlin Youth Center or Johnson Youth Center are clearly within the state's jurisdiction. She said those facilities provide treatment, and their orientation is more therapeutic than the adult facilities, but they are state agency facilities. She said juveniles are in a lower level of security; they are placed in one of many facilities run by nonprofit organizations - "quasi-institutional environments." She said the Office of the Ombudsman has asked for jurisdiction over a certain set of facilities that deal with those juveniles.

MS. LEIBOWITZ said the last category includes contractors or grantees that determine eligibility for a state program or benefit. For example, she said there are a couple of nonprofit

entities that are contracted to determine eligibility for daycare assistance. She said, "If it's in an area where the Division of Public Assistance is handling it directly, they can bring us the complaint. If it's been contracted or put out to a grantee for that same determination, then suddenly it's not really within our jurisdiction." She said the Office of the Ombudsman would like jurisdiction over any contractor or grantee that is serving as "gatekeeper" to a state service. She said the Office of the Ombudsman is amenable to letting the state agency that made the contract or grant handle matters if it can; however, it believes the office needs the option of having direct jurisdiction if matters are not being handled.

[9:05:23 AM](#)

REPRESENTATIVE ISAACSON reiterated his question regarding Section 6. He offered his understanding that NSBH is saying that perhaps it is not constructive to have the Office of the Ombudsman involved in its affairs. He asked the ombudsman for justification for being directly involved.

[9:07:08 AM](#)

MS. LORD-JENKINS answered that the practice of the Office of the Ombudsman, in most cases, is to route the complainant through the available process; however, people still frequently feel that the agency's action has not been fair, reasonable, or consistent with its policies and procedures. It is at that point, she explained, that the Office of the Ombudsman can look at what the agency has done in response to an individual complaint. She said that is how the office does most of its work. She explained that with only 10 staff members, there is not time to handle every complaint about all agencies.

MS. LORD-JENKINS shared one concern presented to her by the Mental Health Board is that the Office of the Ombudsman would be violating best practice standards by asking for this [jurisdiction]; however, she said "this is not uncommon." She said the ombudsman in Iowa and Nebraska both have the ability to look at contractors for health and social service agency services. She said they do not have statutory authority, but they "follow the money." If a government agency pays a contractor for a service that is being delivered on behalf of the government agency, [the Office of the Ombudsman] has jurisdiction. She said if the State of Alaska has a therapeutic residential home that it can put a child in, then that child would be subject to the jurisdiction of the ombudsman. She

asked, "If the State of Alaska does not have that home and contract with the private entity to put a child in state supervision in the custody of that entity, why do they then lose their right to have the ombudsman oversight?"

REPRESENTATIVE ISAACSON opined that having the option to seek out the Office of the Ombudsman when not satisfied with an agency's process is important for individual, because it means he/she has final recourse. He said all the agencies are good, but some of them can get "siloeed," and families can feel that their voices have not been heard. He questioned what the recourse would be for those families if not the Office of the Ombudsman. He asked if they would have to go to court.

[9:11:03 AM](#)

MS. LORD-JENKINS responded that court review would be one option. She offered her understanding that if a child has been committed to the custody of the Department of Health and Social Services (DHSS) and, with the agreement of the family, is put in a residential home by DHSS, then presumably [the family] could go to court and ask for some sort of oversight. However, one of the reasons that the ombudsman exists in the United States is to keep people out of court sometimes. It is often cheaper and more expeditious to have the ombudsman look at a complaint. She clarified, "We don't advocate for a complainant, nor do we advocate for an agency; we take a complaint and we look to see if an agency is acting in accordance with their statutes, their regulations, their policies and procedures, best practices, and if they are not, we make recommendations." She said in one document she saw it was pointed out that the Office of the Ombudsman does not have the power to enforce, but we make a good argument for making a change in practice, either systemically or for an individual complainant, if that's appropriate.

REPRESENTATIVE ISAACSON opined that it is important to keep people out of court, be expeditious, and, through the annual report, tell the legislature what changes might need to be made to ensure best practices.

[9:12:50 AM](#)

REPRESENTATIVE HUGHES asked Ms. Lord-Jenkins why the Office of the Ombudsman chose not to "follow the money." She then questioned whether it thinks the legislation it is asking for will cover its every need. Finally, she mentioned attorney/client privileged information, and she asked if the

Office of the Ombudsman would have access to NSBH's physician/client privileged information during an investigation.

[9:14:05 AM](#)

MS. LORD-JENKINS clarified that "follow the money" came from Dayton, Ohio, where the ombudsman is a "classical" ombudsman, similar to that in Alaska, Hawaii, Iowa, and Nebraska, and does not have a lot of enabling legislation, which is why it uses the "follow the money" standard. She said the Office of the Ombudsman in Alaska prefers to have its jurisdiction set in stone, "not unlike the ombudsman's standards, which were referenced in the Mental Health Land Board's reaction/comments ... on our bill." She said the USOA recommends jurisdiction be clear, not to the extent of excluding contractors, but to ensure that the ombudsman does not extend past that jurisdiction. She said when the Office of the Ombudsman was reviewing the proposed legislation and considering whether it was appropriate to expand its jurisdiction, it considered what points were more critical to the wellbeing of people, and decided that, given its resources, focusing its limited funds on the custodial aspect of contractors that provide prison or residential treatment services is more important than "a contractor that's hauling gravel [and] broke somebody's windshield."

[9:17:13 AM](#)

REPRESENTATIVE HUGHES asked if the Office of the Ombudsman could request an expansion of its jurisdiction in response to an event it needed to address and if that expansion would then cover the event retroactively.

MS. LORD-JENKINS said currently the Office of the Ombudsman has the ability to look at what contractors do, but it is a circuitous route. She offered an example, similar to an actual incident, in which an inmate contacted the Office of the Ombudsman and reported that he had slipped into a diabetic coma the night before, and the cell mate called for help, but the private contractor's employee did not respond for four hours. In this situation, the Office of the Ombudsman could not call [the contractor], but would have to tell the inmate to call the Department of Corrections (DOC), and then the Office of the Ombudsman would check to find out how DOC handled the complaint. She said, "It took us a lot of time to look at that particular issue, and we could only touch on it peripherally." She said if the legislature decided it wanted the Office of the Ombudsman to address an incident, it could probably enact legislation with

that directive. She mentioned that the legislature commissioned someone to look at what is known as "Troopergate."

[9:19:43 AM](#)

MS. LEIBOWITZ, in response to Representative Hughes, said she is not sure that a retroactive addition to the jurisdiction could be made, but suggested Representative Hughes contact someone from Legislative Legal and Research Services for advice.

MS. LORD-JENKINS, in response to Representative Hughes, said at this point she is comfortable with [the language in Version G]. She related that in the last five to ten years, 25-27 percent of the Office of the Ombudsman's caseload has come from the Department of Health & Social Services, and about the same number of cases has come from the Department of Corrections; therefore, those are the big areas that the office is trying to address. She added that they are the areas with a lot of privatization.

[9:22:06 AM](#)

MS. LEIBOWITZ, in response to Representative Hughes, said the Office of the Ombudsman has access to medical records produced within a state agency or possessed by a state agency. She said, "Our mandatory access to state agency records, whether confidential or not, is pretty clear." She said like other confidential information, the Office of the Ombudsman holds the information and does not release it.

[9:22:48 AM](#)

REPRESENTATIVE ISAACSON indicated that Ms. Lord-Jenkins had mentioned a letter from [the Alaska Mental Health Board and the Advisory Board on Alcoholism and Drug Abuse], which addressed unintended consequences related to giving the Office of the Ombudsman jurisdiction over complaints about therapeutic foster parents.

[9:23:23 AM](#)

MS. LEIBOWITZ offered her understanding of the request drafted by the Office of the Ombudsman is that it tried hard "not to pick up foster homes, therapeutic or otherwise." She said residential child care facilities and residential psychiatric treatment centers are defined in AS 47.32.900 and refer to an entity staffed by employees. She offered her understanding that

therapeutic foster parents are not considered employees and that a therapeutic foster home is not a residential child care facility.

REPRESENTATIVE ISAACSON responded, "But they are being reimbursed by the state, and therefore are gatekeepers of state service."

MS. LEIBOWITZ said a foster home does not decide whether or not a child will be placed there. She said an example of a gatekeeping function is when contractors that provide prior authorizations for Medicaid or employee health insurance decide whether or not an employee gets to travel or have a procedure covered.

REPRESENTATIVE ISAACSON said the natural parents of a child may complain about the foster parents' treatment of a child, and [under HB 127, Version G], the Office of the Ombudsman would have to investigate that complaint.

MS. LEIBOWITZ responded that the Office of the Ombudsman made a deliberate decision to focus on entities that are quasi-institutional, and it does not think that foster parents are in that category. She said the office does get complaints related to foster parents, and it talks to a guardian ad litem (GAL), to the OCS caseworker or to someone in the Division of Juvenile Justice, to the parents, and to "licensing." She said she has seen cases in which "licensing" conducts active investigations where the licensing worker and, quite often, the OCS caseworker go to the foster home for a visit. She said the Office of the Ombudsman decided that it had neither the resources nor the need to "go into that category." She concluded, "... We feel that there is a qualitative distinction between a foster home and a residential facility that is providing a less parental and more institutional type of care for juveniles who are in custody."

REPRESENTATIVE ISAACSON said he anticipates from Ms. Leibowitz' comment that the distinction would be specified in regulation.

MS. LEIBOWITZ replied that she thinks that is a reasonable assumption and that some detailed regulations would be "in order."

[9:29:10 AM](#)

REPRESENTATIVE ISAACSON noted that some mental health care facilities had also expressed concern that the Office of the

Ombudsman had underestimated the cost of the proposed legislation in the fiscal note and would not really have enough funds to "dig into this section anyway." He asked how the office thinks that without additional staff or funding it would be able to do a good job related to the instrumentalities.

9:30:07 AM

MS. LORD-JENKINS answered that it has not been her practice to ask for money when she does not have the numbers to back it up. Conversely, when the Office of the Ombudsman has a sizeable increase in its caseload, she will ask for the funds to address that increase. She clarified that she thinks it would be "a fool's errand" to ask for money in anticipation of what might happen under the proposed legislation. She reiterated that if she saw an increase in caseloads from that area of complaints coming in, she would ask for more staff; however, she said that at this point she does not have anything on which to base such a request.

9:30:57 AM

CHAIR LYNN asked what the approximate caseload is today.

MS. LORD-JENKINS answered approximately 1,300 complaints; however, she noted that in the first seven weeks of the year, the Office of the Ombudsman is up 40 percent over cases last year. The increase in 2013 was only 4 percent. She surmised the higher increase in early 2014 "may be because of Goose Creek [Correctional Center]."

9:31:29 AM

REPRESENTATIVE KREISS-TOMKINS asked how many complaints the Office of the Ombudsman currently turns away that it would be accepting under HB 127, Version G.

MS. LORD-JENKINS, in response to the use of the phrase "turn away," prefaced her answer by giving an overview of the complaint process. She said complaints come in the office via phone, letters, and e-mail. The office assesses the complaint to see if it has jurisdiction. If it does not, the office routes the complainant to an appeal or grievance process. She explained that in general, a complaint that is not jurisdictional is one that is made against a private business or the federal government or a municipal government. She reviewed that jurisdictional complaints are those concerning a state

agency. For jurisdictional complaints, the Office of the Ombudsman gets more information about that which the complainant is unhappy. The office determines what program is involved and takes a look at that program's policies and procedures, and it educates the complainant about the program's appeal or grievance process, if one exists. Using child support enforcement as an example, she said the Office of the Ombudsman has a problem resolution team to which it can route a complainant who is unhappy over how his/her caseworker is handling the complaint. She said some people might think of that as turning a complainant away, but the Office of the Ombudsman is just rerouting the complainant to the proper entity that, within the agency's resources, may be able to solve or address the complainant's problem. She said the complainant can return to the Office of the Ombudsman if he/she feels the problem resolution team has not solved the issue "adequately, fairly reasonably, whatever." She concluded, "It's generally been about 50/50, ... where we go beyond just education on those complaints."

REPRESENTATIVE KREISS-TOMKINS clarified his previous question.

MS. LORD-JENKINS estimated that the complaints that are currently not under the jurisdiction of the Office of the Ombudsman that would become jurisdictional under HB 127, Version G, are few. She said currently the office does not "get that many complaints about that category - certainly the ... juvenile justice aspect of ... complaints." She said when the Hudson Correctional Facility was running and had 1,500 inmates, the Office of the Ombudsman tracked the number of complaints, "but it was maybe 7 percent of the complaints that we got in." She said word spreads through a prison population quickly that if someone calls the Office of the Ombudsman to complain about a private prison and is turned away, he/she will not talk about it; however, if the office can handle the complaint, finds merit in it, and effects change, then "the word will spread." She stated, "It's hard to really measure the need for this by the number of cases that we would turn away, because right now we turn them away, and so people don't see any success."

[9:36:02 AM](#)

CHAIR LYNN asked what the top two or three sources of complaints are.

[9:36:15 AM](#)

MS. LORD-JENKINS answered now that Goose Creek Correctional Center is running again, DOC - primarily its inmate population - is the number one agency, accounting for 28-29 percent of the complaints in 2014 thus far. Ranking second, she said, is DHSS, which was running about 27 percent of the caseload last week. She said of that, 16-18 percent of the complaints has come against OCS. After that, she listed the following: the Division of Public Assistance, the Child Support Services Division, and sometimes the Division of Alaska State Troopers.

9:37:35 AM

REPRESENTATIVE HUGHES expressed concern that the Office of the Ombudsman may be given access to mental health records, and she asked how deep that access would go, and if the agencies would have the ability to limit that access.

9:38:47 AM

MS. LORD-JENKINS responded that the presumption is that [under HB 127, Version G], if the Office of the Ombudsman received a complaint about a [mental] health care agency or OCS, that complaint would be filed by either the parent or grandparent - "somebody who has a reasonable personal interest in the complaint." She said if the Office of the Ombudsman receives a complaint from a neighbor who filed a report of harm and did not believe it was acted upon, the office could not report back to the neighbor, other than to say it believes the agency acted reasonably or "we're looking at it, but we can't tell you under the law what it is we've seen." She added, "So, we don't spread the records around." She said the records of the Office of the Ombudsman remain in its office; it does not share records that it has obtained from the individual complainant with the agency or vice versa. She said, "We don't serve as a conduit ... for records to go transmitted back and forth from an agency to an individual." She said the presumption would be that if someone complained to the Office of the Ombudsman about an activity, then that person has given the office permission to contact the agency and look at the records in the agency. She said there are some agencies that require a specific permission slip. The Office of the Ombudsman has long contended that it does not need to [provide a permission slip] because it has the authority to access those records; however, on occasion complainants have signed that document. She said one situation in which the Office of the Ombudsman would have the complainant sign a waiver would be if it was necessary to look at information that is held in a private doctor's office in order to consider a

complainant's request for eligibility of some service. She said there are 10 staff members in her office, all of which have access to the caseload in the office. All individuals who work in the Office of the Ombudsman are required to sign a confidentiality statement; the Office of the Ombudsman is required by law to keep its business confidential. She said staff consults each other. For example, one of her staff members is getting a master's degree in Public Health, so Ms. Lord-Jenkins said she consults with that person on complaints within that area of expertise.

9:42:09 AM

REPRESENTATIVE HUGHES opined it is good that the state agency involved would not be receiving confidential information from the Office of the Ombudsman. She expressed concern that a person could come to the Office of the Ombudsman in an upset state and not realize that the office had access to "what could be volumes" of records. She said she thinks it would be appropriate for the Office of the Ombudsman to make it part of its process to have a specific discussion with the complainant and perhaps even have the person sign acknowledgement that he/she has been told what access the office will have to which records.

MS. LORD-JENKINS said it is currently standard practice for the Office of the Ombudsman to inform individuals about what its investigative practice is. She said she thinks it would be necessary to put into regulation the need for the Office of the Ombudsman to "explain this to the individual." She said it certainly would be proper in policies and procedures. Regarding whether a complainant could control how much access the Office of the Ombudsman has to his/her records, she explained that if the office receives a complaint, the response depends upon the nature of the complaint. For example, if parents are calling and saying that an entity is not allowing them to have visitation to their child, the Office of the Ombudsman would not have to look at the records of all the children to investigate that complaint; it would look at the appropriate information in the child's file. For example, the therapist, based on years of training and time spent with the child, may have recommended that the parents not have access to the child. She said the Office of the Ombudsman would not have to look at every note written by the therapist or that was held in the residential facility in order to make a decision.

REPRESENTATIVE HUGHES reiterated her concern about the collection of private information. She asked if there could ever be any information in the Ombudsman's report that reflected that the office had access to the records that would not be in that report otherwise. She asked if names are removed from the report and if the individual has any say over whether the report is presented publicly.

MS. LORD-JENKINS answered that the practice of the Office of the Ombudsman is to post some formal investigations on line. She continued as follows:

Those investigations are either redacted or, in some few cases, if the complainant has given us permission, then we would release their -- we would include that on line. But we haven't done that in probably five years; it's all -- anything we post on line is redacted.

Medical information is confidential. Although we would have access to review the medical information, we don't ... give that information out to individuals who don't have that access. The process would be: if we have a complaint, like, say, ... against a residential facility, we would ... write a report to the residential facility, which has access to that information; we would include in that report whatever interviews we conducted with whoever we needed to talk to; we would come to our conclusion and we would ... notify the residential facility what the conclusion was, based on all of that information. All of ... that medical information would be -- if it's classified, it's confidential information, and it's not something that the agency would provide, and we believe that fulfills statutory and regulatory requirements, we would not provide that to -- ... we would give that to the agency that knows all of this information and needs to know what the basis of our report is; but wouldn't go posting that on the Internet or ... on a web site or even that level of detail on our closing summary.

REPRESENTATIVE HUGHES asked Ms. Lord-Jenkins to confirm that if a patient was bi-polar, for example, that information would not be mentioned in any report that would go public, and that the Office of the Ombudsman would use general terms that would not reveal anything about the person's care and treatment.

MS. LORD-JENKINS confirmed that is correct. She stated that the Office of the Ombudsman takes great steps to "blur everything." She said this is an area in which the Office of the Ombudsman has not handled that many complaints, but she said she has had cases where she has not posted anything on line, even though the information was "kind of out there in the community," because the complainant had requested anonymity, and she did not want to compromise that. In that case, she said, there was no way to redact anything, so the agency got the response and the complainant got the Ombudsman's findings, but nothing was posted on line.

[9:50:18 AM](#)

REPRESENTATIVE KREISS-TOMKINS referred to a letter from Kate Burkhart [the aforementioned letter from the Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse] and offered his understanding that "there may or may not be clarity in the statute, as presented in the CS, whether therapeutic foster parents would be subject to the jurisdiction of the Ombudsman, but ... that jurisdictional question would be resolved through regulation and therapeutic foster parents would be excluded from the Ombudsman jurisdiction by regulation." He asked if that is accurate.

[9:51:03 AM](#)

MS. LEIBOWITZ stated her understanding of HB 127, Version G, is that therapeutic foster parents would not be included in the jurisdiction of the Office of the Ombudsman. She added that it was never the intention of the office to have that jurisdiction, and she said the Office of the Ombudsman "tried very hard to get statutory specificity on what we were going to pick up."

REPRESENTATIVE KREISS-TOMKINS referred to a portion of Ms. Burkhart's letter, which read as follows [original punctuation provided]:

Under SB 72, the Alaska Ombudsman seeks to broaden jurisdiction to include non-governmental actions - by "a person under a contract . . . with a state agency to provide a juvenile detention facility, treatment facility, or residential treatment program accepting placement of juveniles committed to the custody of the Department of Health and Social Services."

REPRESENTATIVE KREISS-TOMKINS asked, "How, to your mind, does that exclude therapeutic foster parents?"

MS. LEIBOWITZ responded by citing the language in HB 127, Version G, [page 3, lines 17-18], which read, "to provide a residential child care facility or a residential psychiatric treatment center as defined in AS 47.32.900". She said AS 47.32 is a Chapter addressing a variety of entities, including assisted living homes and nursing facilities, but it also includes a residential child care facility, which is defined as: "a place staffed by employees where one or more children who are apart from their parents receive 24-hour care on a continuing basis." She opined that "staffed by employees" does not sound like a therapeutic foster home. Further, she noted that under AS 47.32, residential psychiatric treatment center is defined as: "a secure or semi-secure facility or inpatient program in another facility that provides, under the direction of physician, psychiatric diagnostic evaluation and treatment services on a 24-hour-a-day basis to children with severe emotional or behavioral disorders."

REPRESENTATIVE KREISS-TOMKINS said he thinks his question pertains to language on page 3, lines 15-17, of Version G, which read, "to provide a juvenile correctional or detention facility, home, or work camp as authorized by AS 47.14.010 - 47.14.050". He reiterated his question regarding how the language would exclude therapeutic foster parents.

[9:54:55 AM](#)

MS. LEIBOWITZ said AS 47.14 essentially deals with correction-oriented placements for juveniles, and she said she does not think the state currently has any private entities that are providing that service.

REPRESENTATIVE KREISS-TOMKINS asked if "home" relates to those entities in the correction and detentions world.

MS. LORD-JENKINS said that is her understanding. She stated that AS 47.14 deals with the specific realm of placing juvenile delinquents. She added, "It's more on the delinquent aspect than it is on the therapeutic aspect."

[9:56:08 AM](#)

CHAIR LYNN noted there were seven people waiting to testify.

[9:56:57 AM](#)

MS. LEIBOWITZ, in response to the chair, said the basic points had been covered. She said the Office of the Ombudsman thinks the clean-up sections of the proposed legislation are essential and asks that the legislature address the jurisdictional questions. She commented on the length of time between requests from the Office of the Ombudsman.

[9:57:38 AM](#)

CHAIR LYNN pointed out that people were available to testify from the following agencies: the Alaska Mental Health Board and Advisory Board on Alcoholism and Drug Abuse; the Alaska Bar Association; the Mental Health Trust; the Department of Health and Social Services (DHSS); North Star Behavioral Health; and the Behavioral Health Association.

[9:59:18 AM](#)

CHAIR LYNN announced that HB 127 was held over.

[10:00:16 AM](#)

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 10:00 a.m.