

**ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE**

March 6, 2014
8:10 a.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

Representative Doug Isaacson
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."

- MOVED CSHB 127(STA) OUT OF COMMITTEE

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
02/25/14	(H)	Heard & Held
02/25/14	(H)	MINUTE(STA)
02/27/14	(H)	STA AT 8:00 AM CAPITOL 106
02/27/14	(H)	Heard & Held
02/27/14	(H)	MINUTE(STA)
03/06/14	(H)	STA AT 8:00 AM CAPITOL 106

WITNESS REGISTER

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

POSITION STATEMENT: Explained the changes made in the proposed committee substitute (CS) for HB 127, Version 28-LS0088\T, Gardner, 3/5/14, and answered questions.

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

POSITION STATEMENT: Reviewed the changes made in the committee substitute (CS) to HB 127, Version 28-LS0088/T, Gardner, 3/5/14.

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

POSITION STATEMENT: Responded to questions during the hearing on HB 127.

REE SAILORS, Deputy Commissioner
Department of Health & Social Services
Juneau, Alaska

POSITION STATEMENT: Testified during the hearing on HB 127.

STEPHEN J. Van GOOR, Bar Counsel
Discipline
Alaska Bar Association
Anchorage, Alaska

POSITION STATEMENT: Testified during the hearing on HB 127.

QUINLAN STEINER, Public Defender
Public Defender's Office
Anchorage, Alaska

POSITION STATEMENT: Testified during the hearing on HB 127.

ACTION NARRATIVE

[8:10:03 AM](#)

CHAIR BOB LYNN called the House State Affairs Standing Committee meeting to order at 8:10 a.m. Representatives Keller, Gattis, Hughes, Kreiss-Tomkins, and Lynn were present at the call to order.

HB 127-OMBUDSMAN

[8:11:12 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."

[8:11:47 AM](#)

REPRESENTATIVE KELLER moved to adopt the proposed committee substitute (CS) for HB 127, Version 28-LS0088\T, Gardner, 3/5/14, as a work draft.

CHAIR LYNN objected for discussion purposes.

8:12:14 AM

BETH LEIBOWITZ, Assistant Ombudsman, Office of the Ombudsman, explained the changes made in the proposed committee substitute (CS) for HB 127, Version 28-LS0088\T, Gardner, 3/5/14 ("Version T"). She said the first change was effected via an amendment passed at the previous hearing, which was to remove reference to residential child care facilities and residential psychiatric treatment facilities. She said the Office of the Ombudsman has asked for two changes. She directed attention to Section 6 of Version T, which would amend AS 24.55.160(a)(4), which read as follows:

(4) notwithstanding other provisions of law, have access at all times to records of every [STATE] agency, including confidential records, except sealed court records, production of which may only be compelled by subpoena, and except for records of active criminal investigations and records that could lead to the identity of confidential police informants.

MS. LEIBOWITZ said the Office of the Ombudsman asked to have the word "state" removed, because "if our jurisdiction expands to cover any nonstate entities, our records access was not going to expand with it." She said this change would bring the language back in line with the rest of that statute.

MS. LEIBOWITZ said the Office of the Ombudsman also request a change in Section 7, which read as follows:

***Sec. 7.** AS 24.55.160 is amended by adding a new subsection to read:

(c) Disclosure by an agency to the ombudsman under this chapter of a communication that is subject to the attorney-client privilege, or attorney work-product privilege, does not waive the privilege as to any other person. The ombudsman may not disclose a privileged communication provided under this subsection.

MS. LEIBOWITZ said the Office of the Ombudsman would like the following sentence added: "The Office of the Ombudsman may not disclose a privileged communication provided under this subsection." She said this seems self-evident, given that AS 24.55.160(b) already says that the Office of the Ombudsman will not disclose a confidential record received from an agency; however, the definition of record for the Office of the Ombudsman's statute expressly excludes attorney-client privileged material and attorney work product.

[8:15:50 AM](#)

REPRESENTATIVE HUGHES relayed that she had been reading through statutes addressing investigative procedures, and she said, "It seems like that was already covered, but maybe I'm missing something." She read [AS 24.55.160(b)], as follows:

(b) The ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations. However, the ombudsman may not disclose a confidential record obtained from an agency.

[8:16:16 AM](#)

MS. LEIBOWITZ reiterated that she thought that was well covered until she looked closer and saw, in AS 24.55.330(3), that the definition of "record" does not include attorney-client privileged communications, and the Office of the Ombudsman wants that material, if given to the office, to be just as protected as any other confidential material that it receives.

[8:17:26 AM](#)

MS. LEIBOWITZ stated that the Office of the Ombudsman does not support the changes proposed in Sections 3, 4, and 5, which she offered her understanding were suggested by Representative Keller. She said the new language proposed in Section 3 would allow the chair of the Administrative Regulation Review Committee to request an investigation of an administrative act of an agency. She said this would create two classes of complainant: the legislative requestor and all the other complainants served by the Office of the Ombudsman. She opined that "a legislative request is the 800-pound gorilla in a room

full of complainants." She said the Office of the Ombudsman was created to serve individuals with no other recourse, and the legislature has other recourse, including the ability to subpoena, to hold hearings, and to request audits, which gives it more power than individual complainants.

8:20:06 AM

JIM POUND, Staff, Representative Wes Keller, Alaska State Legislature, explained that originally the legislature was able to remove a regulation by resolution, but "the alive decision" changed that so that the legislature now has to pass a bill in order to remove a regulation. That requires the agreement of both houses, as well as the okay of the governor. He said often the Administrative Regulation Review gets "shut down," because the attitude of agencies is, "We don't care; what are you going to do about it?" He said when the Office of the Ombudsman approaches the agencies "it's a different animal." He indicated that the intent of [changes proposed in Sections 3-5] would give the chair of the Administrative Regulation Review another option.

MS. LEIBOWITZ offered her understanding that it would be the chair of the Administrative Regulation Review who would be given the ability to make the request, without even the requirement for a committee vote. She said the main issue is that the proposed language would result in a legislator's request for investigation, and she said she does not think the issues that would come from the chair of the Administrative Regulation Review would be simple, straight-forward investigative issues.

8:23:06 AM

REPRESENTATIVE KREISS-TOMKINS asked how - if the purpose of Section 3 is to get agencies to back down - the Office of the Ombudsman would "have the power to have agencies abandon or loosen regulations that the chair of the [Administrative] Regulation Review Committee wants to be gone or wants to be changed." He further asked the reason for proposing just the chair of the Administrative Regulation Review.

MR. POUND responded that it would be "just another tool in the tool box" to address the current "out-of-control" regulation process. He said regulations are promulgated that quite often do not mimic or interpret law, but rather "become law." He said the Administrative Regulation Review Committee has no investigative authority, other than holding a hearing, whereas

the Office of the Ombudsman has the ability to write a report and file it with the agency, and that report becomes more of a public record. He indicated that the documents created by the Office of the Ombudsman are permissible in court, but documents created by the legislature are not, "just because it's a public hearing."

REPRESENTATIVE KREISS-TOMKINS said he understands the intent, but is struggling to see how making the Office of the Ombudsman the investigatory agency of the Administrative Regulation Review Committee would solve the problem of regulatory oversight.

[8:25:37 AM](#)

MR. POUND, to Representative Kreiss-Tomkins' previously stated second question, said just because a request would come from the chair of the committee, does not mean it would be a unilateral decision, and he indicated that the language could be changed to reflect the entire committee's involvement.

[8:25:59 AM](#)

REPRESENTATIVE GATTIS surmised that there are other ways that the Administrative Regulation Review Committee could spread the word.

[8:27:15 AM](#)

REPRESENTATIVE KELLER said the legislature has made the Office of the Ombudsman independent to keep politics out of it; however, the office is the investigative arm of the legislature. He stated his belief that where the legislature spends money there is the potential for administrative acts that cause problems for the citizens of Alaska, thus having a venue for them to register a complaint is important. He said he thinks the legislature is "not enough in tune with that ability and responsibility." He said the proposed language would just provide a link, which he opined would not be an intimidating one. He emphasized that it is within the jurisdiction of the legislature to do this, and he predicted it would increase effectiveness and communication. He opined that "we" need more feedback regarding the cases that the Office of the Ombudsman declines to investigate. He mentioned the challenge of keeping up with complaints with limited resources. He pointed out that the Administrative Regulation Review Committee represents both the House and the Senate.

8:30:25 AM

REPRESENTATIVE HUGHES, regarding the 800-pound gorilla in the room, asked Ms. Leibowitz if there is anything currently that would prevent a legislator - as an individual, not a member of the legislature - from requesting an investigation regarding regulations.

MS. LEIBOWITZ answered that a legislator could not become a complainant for an issue that did not involve him/her personally; however, he/she could certainly ask the Office of the Ombudsman at any time to decide whether an issue warrants an ombudsman-initiated investigation. She said there have been cases like that. She noted that the ombudsman, Linda Lord-Jenkins, was available via teleconference to offer further information.

REPRESENTATIVE HUGHES asked, "So, if it doesn't personally impact the legislature, you could still decide to take it on, is that correct?"

MS. LEIBOWITZ answered yes.

8:32:24 AM

REPRESENTATIVE HUGHES asked if there is any obligation for the agency involved in a complaint to provide a follow-up report showing what steps have been taken related to the complaint.

MS. LEIBOWITZ confirmed that as part of the report process, agencies are required to respond. If they do not respond, the Office of the Ombudsman will issue a report anyway. She said the agency is asked to respond to a confidential preliminary report, and the final report incorporates the agency's response through the findings and recommendations. In response to a follow-up question, she confirmed the response of the agencies become public.

REPRESENTATIVE HUGHES said Representative Gattis made a good point that there is nothing currently that would prevent "something to be made public" by the chair of the Administrative Regulation Review Committee; however, she said she can see how, under Version T, "there would be ... a little bit [of] difference than just the way it is right now, because that report and response would both be out there, and the public would know if the problem will or will not be addressed." She said she does not see the Office of the Ombudsman as having

enforcement authority, only investigatory capabilities. She added, "But it does require, then, a response, so the idea is that hopefully things will be fixed."

[8:34:57 AM](#)

The committee took a brief at-ease at 8:35 a.m.

[8:35:52 AM](#)

MS. LEIBOWITZ said Representative Hughes is correct that the Office of the Ombudsman does not have enforcement authority. She said she does not know what an ombudsman's report can do that cannot be done by the Administrative Regulation Review Committee as a legislative committee with the power to require agency employees to come and testify and respond to the committee on public record and with auditors, attorneys and researchers at its disposal, especially when considering that those who come to the Office of the Ombudsman with complaints have none of those resources available to them.

[8:37:21 AM](#)

MR. POUND said the Administrative Regulation Review Committee can subpoena administrative staff and bring them before the committee, but that staff can [refuse to give forth information].

[8:37:51 AM](#)

REPRESENTATIVE GATTIS asked what would keep a person from [refusing to talk] to the Office of the Ombudsman.

MR. POUND answered that that is not allowed under statute. He pointed out that the investigation done through the Office of the Ombudsman is confidential until the full report is done, whereas the committee process is public.

[8:38:42 AM](#)

REPRESENTATIVE KREISS-TOMKINS said it is difficult to understand how someone's constitutional rights are suspended when the Office of the Ombudsman opens up an investigation.

MR. POUND indicated that he did not know why either, but reiterated that the statute was written giving authority to the

Office of the Ombudsman to investigate and bring witnesses "behind closed doors" to get information.

REPRESENTATIVE KREISS-TOMKINS asked if the Administrative Regulation Review Committee has encountered many people who have called upon their constitutional right not to respond to a question.

MR. POUND recollected that the Department of Education & Early Development and the fire marshal have refused to respond. In response to a follow-up question, he clarified that those entities refused to come to the hearing.

[8:40:33 AM](#)

REPRESENTATIVE GATTIS asked why the Administrative Regulation Review Committee did not subpoena those who refused to attend the meeting.

MR. POUND said at the time the chair of the committee did not think it was worth the trouble.

[8:41:42 AM](#)

LINDA LORD-JENKINS, Ombudsman, Office of the Ombudsman, stated that the Office of the Ombudsman does not, by statute, submit reports to the court. The office has immunity from testifying. She said the ombudsmen in Alaska and in the rest of the U.S., under the United States Ombudsman Association (USOA) Model Ombudsman Act for State Governments, believe that they "should not be testifying in court"; therefore, the Office of the Ombudsman has not submitted reports to a court venue. She said, "Individual litigants in a court matter, if they'd gone to the ombudsman, could present a report to the court, but we don't go to court and testify to support (indisc.)."

MS. LORD-JENKINS confirmed that the Office of the Ombudsman does have the power of subpoena; however, she said she does not recall that power being discussed in the context of exercising 5th Amendment rights, because generally that is in a criminal context, whereas the Office of the Ombudsman's reviews are administrative. She said the ombudsman's authority is to make a good case for a matter and recommend "fixes" it hopes agencies will agree to adopt; however, the Office of the Ombudsman cannot force the agencies to take action. If an agency declines to fix a situation or does a good job fixing one, the Office of the Ombudsman has the option to make that information public, which

she said often serves as a power of persuasion or tipping point for agencies to, in good faith, try to fix a problem. She said releasing a report to the media is up to the discretion of the ombudsman. She said that in her ten years as ombudsman, her office has released reports to the media on two occasions.

[8:45:49 AM](#)

MS. LEIBOWITZ said the Office of the Ombudsman objects to Section 4 of Version T, because although it supports the reporting of agency problems to the legislature, it is not clear what legislative purpose would be served by giving out the name of the individual complainant to the chair of a legislative committee. She pointed out that individual complainants are constituents, and while the Office of the Ombudsman can refer them to legislators, explain committee structures, and give them contact information, the decision to contact a legislator should belong to the constituent. She said it is not the proper role of the Office of the Ombudsman to be in the middle of that relationship and making that communication for a constituent. In response to the chair, she emphasized that even with the complainant's consent, the office would strongly encourage the complainant to initiate the communication with the legislature, because it is not the proper role of the ombudsman to do so. She reminded the House State Affairs Standing Committee that the USOA standards talk about the ombudsman's obligation of confidentiality, except as necessary to carry out the investigation and support recommendations, and she reiterated that it is unclear "how this serves any of the ombudsman's actual functions or better informs the legislature about the nature of problems with state government."

[8:48:25 AM](#)

MR. POUND said the reason the Administrative Regulation Review Committee was chosen was so that the Office of the Ombudsman would have to contact just one committee. He said the reason for proposing a consenting complainant's name be disclosed is to make it possible for the Administrative Regulation Review Committee to know who to contact if they want to offer further investigation.

[8:49:24 AM](#)

REPRESENTATIVE GATTIS asked Ms. Leibowitz what the problem would be in a legislator being able to help a constituent follow up on

a problem when that constituent, as the complainant, has consented to disclosure.

MS. LEIBOWITZ offered her understanding that what Representative Gattis described already occurs. She said if a complainant contacts the Office of the Ombudsman and lets it be known that he/she has worked with a legislator on an issue, or if the legislator refers the complainant to the Office of the Ombudsman, it is routine and expected for the Office of the Ombudsman to ask the complainant if he/she is okay with the office sharing information about the case with the legislator. She said the complainant generally says yes. In response to Representative Gattis, she offered her understanding that the proposed legislation proposes that when, for example, the Office the Ombudsman sends a letter declining an inmate's complaint because he/she has not used the grievance system within the Department of Corrections, it would also ask the inmate's permission to give his/her name to the chair of the Administrative Regulation Review Committee. She expressed bewilderment as to the purpose of that proposed language.

REPRESENTATIVE GATTIS offered her understanding that a constituent who comes to a legislator with a complaint and does not get the feedback he/she was looking for can call upon the Office of the Ombudsman without the intervention of the legislator.

MS. LEIBOWITZ responded, "I believe Representative Gattis is correct."

[8:53:04 AM](#)

REPRESENTATIVE KELLER clarified that [Section 4] would pertain to cases that the Office of the Ombudsman chooses not to investigate.

[8:53:46 AM](#)

MS. LORD-JENKINS asked if that would pertain only to complaints turned away by the Office of the Ombudsman that were referred to the office by the chair of the Administrative Regulation Review Committee or all complaints that come in the door. If the latter, she said it would be a time-consuming process if the Office of the Ombudsman were writing letters to each complainant, redacting them as appropriate, and then sending a redacted version to the chair of the committee.

MS. LORD-JENKINS confirmed that in the aforementioned circumstances wherein the complainant has been referred to the Office of the Ombudsman by a legislator or has notified the legislator that he/she is dealing with the ombudsman or has approached the legislator after being dissatisfied with the ombudsman, with permission of the complainant, the Office of the Ombudsman can talk to the legislator about the case. However, the Office of the Ombudsman generally provides status information, because "it doesn't do an investigation any good to have a lot of cooks ... in the stew." She expressed concern that the Office of the Ombudsman, if required to report back to legislators, would be "micromanaged in the manner in which we are conducting investigations." She cautioned against that. Ms. Lord-Jenkins stated that the Office of the Ombudsman does its best backing off and waiting until a legislative office is done reviewing a complainant's concern, because there's no need to spend its efforts if the legislative office is going forward with a review. She explained that [getting involved before then] creates confusion on the part of the complainant and the agency, and "tends to muddy the waters."

[8:56:32 AM](#)

REPRESENTATIVE GATTIS asked Representative Keller to explain the circumstance and road blocks that prompted his recommending the language being discussed, and to clarify what he hoped to address through it.

REPRESENTATIVE KELLER emphasized that he is not attempting to fix the Administrative Regulation Review Committee with Version T. He said he has appealed to the Office of the Ombudsman to find ways to improve communication between it and the legislative body. He expressed his hope that "this applies to every complaint that the ombudsman doesn't address." He mentioned one idea had been to connect zip codes with complainants and their legislators, but the zip codes did not line up with legislative districts. He stated that the legislature has a vested interest in knowing how many cases are not being investigated and why. In response to Representative Gattis, he indicated that he was prompted to propose [the language in Sections 3 through 5] by a desire for the Office of the Ombudsman to have a better relationship with the legislature so that legislators can be "faithful to this duty of responding to complainants."

REPRESENTATIVE GATTIS asked Representative Keller to confirm that he is saying he has experienced cases in which, after

receiving permission from the complainant to interact with the Office of the Ombudsman, he has not heard back from the ombudsman.

REPRESENTATIVE KELLER answered yes, but emphasized that the Office of the Ombudsman was following statutes that the legislature created; therefore, he is not criticizing the ombudsman.

REPRESENTATIVE GATTIS said that is not what she heard from Ms. Leibowitz, who, she recollected, had indicated that given the release of confidentiality the Office of the Ombudsman could work with the legislator and constituent, if the constituent had given his/her permission. She concluded, "I thought I'm hearing that in statute they already have that opportunity, [so it is] unnecessary to put another one in."

[9:03:24 AM](#)

REPRESENTATIVE HUGHES said currently the constituent has to initiate the involvement of a legislator's office, but under Version T, the legislator could "initiate it." She asked Ms. Leibowitz to clarify how the Office of the Ombudsman currently handles a situation in which it has declined a case and the complainant goes to the legislator and the legislator contacts the Office of the Ombudsman.

MS. LEIBOWITZ answered that the Office of the Ombudsman would contact the complainant as quickly as possible to find out if he/she wanted to give the office permission to discuss the complaint with the legislator's office. If the answer is yes, then the Office of the Ombudsman would discuss the case with the legislator to the extent it is able given its restrictions regarding the release of confidential information. She explained that the Office of the Ombudsman often has access to information that allows it to evaluate the complaint, but it may not be able to give that information to the legislator or the complainant.

REPRESENTATIVE HUGHES concluded that currently "we" have a way for the communication to occur if the individual initiates it, but there is "no way for the communication to occur with the legislator initiating it," because the legislator would not have the name of the person. Regarding the suggested need for the legislature to know the number of and reason for cases declined, she asked if the Office of the Ombudsman has been reporting that information to the legislature.

MS. LEIBOWITZ answered that the Office of the Ombudsman issues an annual report, and she deferred to Ms. Lord-Jenkins for further discussion. She added that the Office of the Ombudsman has the ability to provide public summaries of closed complaints and could do so by request for any legislative office. She said those summaries, while not identifying the complainant, provide the basic allegation of the complaint, the agency or agencies involved, and a summary of the reason the complaint was closed.

[9:07:45 AM](#)

REPRESENTATIVE KREISS-TOMKINS stated that he has difficulty accepting Sections 4 and 5, because he is not certain there is a problem that needs to be fixed. He said the Administrative Regulation Review Committee already has the power of subpoena at its disposal, and it is the prerogative of that committee to decline to use that tool. He said while he appreciates the intent behind Sections 3, 4, and 5, he thinks it comes down to a fundamental question of whether the ombudsman works for the people or the legislature. He stated his understanding that the ombudsman works for the people and has no obligation to report to legislators or the legislature. He said he thinks the legislature already has its own investigatory agency through Legislative Audit. He opined that there is nothing to fix in terms of confidentiality or independence as it relates to the Office of the Ombudsman. He suggested that perhaps [Sections 2-5] would receive a more thorough consideration in the House Judiciary Standing Committee.

CHAIR LYNN said the Office of the Ombudsman is a creation of the legislature.

REPRESENTATIVE KREISS-TOMKINS responded that it is up to the legislative branch to preserve the independence of the ombudsman.

[9:10:34 AM](#)

MR. POUND said the reason for choosing the Administrative Regulation Review is that it meets year-round and is made up of both legislative bodies. He remarked upon the singular nature of the Legislative Budget & Audit [Committee's] authority. He said under existing requirements, the ombudsman can submit an oral report to the legislature, unless a written report has specifically been requested.

[9:12:01 AM](#)

MS. LEIBOWITZ offered her understanding that under the proposed Section 5 of Version T, the ombudsman would declare in writing the reasons for declining complaints. She said she is not sure of the intent of Section 5, because under current law, the Office of the Ombudsman can routinely provide a basic summary of why it has declined a complaint. She said it cannot, in many cases, simply provide a copy of the letter provided to the complainant, because of confidentiality reasons. She gave an example, wherein the complaint related to child support.

[9:13:29 AM](#)

MR. POUND said Section 5 relates to complaints that are being denied, not ones that have been investigated.

[9:13:53 AM](#)

REPRESENTATIVE GATTIS asked if there have been circumstances where people were not happy that the Office of the Ombudsman refused to consider complaints, such that Section 5 is necessary to prevent the ombudsman from arbitrarily turning somebody down. She said she has not heard any specific examples, and she is a proponent of not fixing something that is not broken.

[9:14:40 AM](#)

MR. POUND responded, "Part of the reason is because we're not receiving the information on what's being denied." He added that it is not possible to cite something that does not exist.

REPRESENTATIVE GATTIS reiterated that she has not heard any compelling reasons today that there is a problem. She said she would expect to have heard repeatedly from constituents, but has not.

MR. POUND, in response to the chair, confirmed that the proposed language is more a preventive measure.

[9:16:22 AM](#)

REPRESENTATIVE HUGHES remarked that she has not received such a call from a constituent either, but asked Representative Keller if he has.

REPRESENTATIVE KELLER answered that he has never received any information about any investigation that has been declined, but explained it is that which concerns him, because "we want to get a scope on ... what is being missed out there." He said he would like Ms. Lord-Jenkins to talk about how the office reports cases that it does not investigate. He said a "report" is a judgment call, and there is criterion in statute for cases that are not investigated.

[9:18:00 AM](#)

MS. LORD-JENKINS said a legislator may get a call from someone complaining that the Office of the Ombudsman would not investigate his/her complaint. She said that often translates in a number of ways: the Office of the Ombudsman may decline to investigate the complaint, because the complainant had not used the existing grievance appeal process; the Office of the Ombudsman may decide that the situation for which there is a complaint happened too long ago under the regulatory time frame; or the complainant might not have sufficient personal interest. She said she has seen repeatedly where [the Office of the Ombudsman] might send a five-page letter explaining why it declined a case, and the complainant only hears "no." She said the Office of the Ombudsman documents its declined cases, and it would be happy to provide the public versions of the closing summaries, which have the associated case number attached. She expressed her concern that the Office of the Ombudsman might be required to document in a letter each one of "these," which she said would be onerous.

MS. LORD-JENKINS, regarding previous discussion of Section 4, on the topic of a legislator that may contact the ombudsman after being contacted by a constituent, stated that under statute and confidentiality requirements, the Office of the Ombudsman cannot speak to the legislator about the complainant, without express permission from the complainant waiving confidentiality as to that or any legislator. She said she has had several instances where individuals have received an answer from the Office of the Ombudsman and gone to their legislators, and the ombudsman has asked the complainant for permission to speak to the legislator(s), and the complainant has declined. Ms. Lord-Jenkins reemphasized that under such circumstances, the Office of the Ombudsman would not be allowed to discuss the case with the legislator(s).

[9:21:57 AM](#)

REE SAILORS, Deputy Commissioner, Department of Health & Social Services, relayed that by reading the latest annual report [from the Office of the Ombudsman], she found out that there had been 290 complaints against the department. She indicated that 194 of the complaints were against the Office of Children's Services (OCS), and of those 194, 100 were released either via a court decision or as being inappropriate for the Office of the Ombudsman; 15 were either resolved or deemed inappropriate; and 75 cases were considered by the Office of the Ombudsman. Ms. Sailors said the department has had an ongoing working relationship with the Office of the Ombudsman. She said the fact that the department serves 200,000 Alaskans gives it ample opportunity to be exposed to complaints, and the department is run by human beings, thus it is capable of making mistakes.

MS. SAILORS questioned proposed changes related to grantees and contractors. She referred to language, addressed by the committee at its [2/27/14] hearing, [found in Section 6 of HB 127, Version 28-LS0088\G, Gardner, 2/13/14, on page 3, lines 6-27, which read as follows]:

* **Sec. 6.** AS 24.55.330(2) is amended to read:

(2) "agency" includes a department, office, institution, corporation, authority, organization, commission, committee, instrumentality, council, or board of a municipality or in the executive, legislative, or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, instrumentality, council, or board of a municipality or of the state government independent of the executive, legislative, and judicial branches, or a person under a contract with a state agency or a person who has been awarded a grant from a state agency to provide a prison, halfway house, or similar residential service on behalf of the Department of Corrections, to provide a juvenile correctional or detention facility, home, or work camp as authorized by AS 47.14.010 - 47.14.050, to provide a residential child care facility or a residential psychiatric treatment center as defined in AS 47.32.900 to the extent that the facility or treatment center accepts placement of juveniles committed to the custody of the Department of Health and Social Services, or to determine eligibility for a state program or benefit; it also includes an officer, employee, or member of an

"agency" acting or purporting to act in the exercise of official duties, but does not include the governor, the lieutenant governor, a member of the legislature, the victims' advocate, the staff of the office of victims' rights, a justice of the supreme court, a judge of the court of appeals, a superior court judge, a district court judge, a magistrate, a member of a city council or borough assembly, an elected city or borough mayor, or a member of an elected school board;

MS. SAILORS remarked that at the last hearing, the committee had adopted [Amendment 1, which removed the following language from lines 17-20, on page 3, of Section 6]:

, to provide a residential child care facility or a residential psychiatric treatment center as defined in AS 47.32.900 to the extent that the facility or treatment center accepts placement of juveniles committed to the custody of the Department of Health and Social Services

MS. SAILORS indicated that it is the opinion of the department that the adopted Amendment 1 did not go far enough, because it left in the Division of Juvenile Justice. She explained that the department does not believe the division belongs in the language because it does not have contracts or grants with anyone regarding justice facilities; therefore, "we're kind of talking about something that doesn't exist." She commented that the statutory language is old. For example, she said she has talked to employees who have worked for the department for over 17 years, and they have never seen or heard of a "**work camp**". She stated the department's wish that the references to "juvenile detention facilities, homes, et cetera, that remain in the bill" be removed.

[9:24:50 AM](#)

MS. SAILORS said another issue for the department has to do with grantees or contractors who would determine eligibility for services. She offered her understanding that this would apply to all state agencies. She said the department's position is that it is responsible for "these actions and our grantees and their actions." She said the department fears unintended consequences of the proposed legislation. She indicated that defining grantees and contractors as agencies creates a situation where, under the requirements of the proposed legislation, they are not to release information. She said the

department questions whether the Office of the Ombudsman would be able to "release information about one of those agencies to us so that we can have our ability to investigate and sanction and take regulatory actions." She said the inability of grantees and contractors to share information with the department, which has the enforcement powers, leaves the department in "a void." She said the department, in some instances, licenses its grantees, thus, it has strings attached via the funding, which the grantee receives from the department.

MS. SAILORS said the department also has the capability to "bring in disciplinary teams" and "to work quickly." She indicated that the department has observed a lag in time from the point at which the Office of the Ombudsman starts an investigation to the time the report of that investigation is completed. Ms. Sailors characterized the possible result of the separation of grantees from the department as a "potential for triangulation," which she said she thinks would bifurcate "the accountability and the responsibility that we feel we have to the resources" appropriated and requirements given to the department by the legislature to provide services in the state, "whether it's through contract, grantees, or ourselves." She said she thinks the aforementioned language may potentially interfere with the department's ability "to take advantage of a situation where the ombudsman would go in." She said if the language is kept as is, the department strongly requests that it be notified when the Office of the Ombudsman either receives a complaint or initiates an investigation, so that the department "can move quickly into a situation." She said the department not only has worked in cooperation with the Office of the Ombudsman, it has also worked on out-of-state situations with the help of authorities in other states. She said, "So, we have ... certain enforcement powers that we don't want to have delayed or interfered by virtue of this confidentiality situation."

[9:28:46 AM](#)

MS. SAILORS, returning to the issue of juvenile justice, said the philosophy in Alaska for some time now has been one of services, treatment, and building a sense of responsibility and accountability for youth in the juvenile justice system. She said the department deals with medical records for medical and psychiatric treatment and holds those records within its facilities. She recollected that Representative Hughes had asked about the security of personal health information. She said the department is concerned that there be some provision

that is consistent with the Health Insurance Portability and Accountability Act (HIPAA). She said HIPAA does allow people to have access to personal health information if it is required in statute; however, the department is concerned with interpretation of existing language as it relates to the ability to access records of personal health information without notice to or consent of the individual. She recounted that the State of Alaska has been fined by the federal Department of Justice's Office of Civil Rights, in excess of a million dollars, for a questionable breach regarding personal health information. She said there is a nationwide movement to take strong regulatory action against states, as well as private entities, for violating HIPAA. She said she would hate to have the Office of the Ombudsman, as an entity of the state, "trigger another fine." She indicated that as a result of the aforementioned breach, the State of Alaska has had to contract with monitors that watch what the state does. Ms. Sailors opined that in order to protect the right of privacy, there should be "a requirement to get a very exclusive consent to access personal health records."

[9:32:07 AM](#)

MS. SAILORS said she thinks the attorney-client privilege issue is of concern to the department, which feels it has the right to get its own counsel. She recollected an example had been given that in the past "we" asked "an agency" why it had chosen a particular course of action, and the agency said it was advised by its attorneys, but it would not divulge further information. She stated that having been an "investigator of things" in her past, it is her opinion that an investigation does not need "to turn on a confidential advice memo from an attorney to a client." She concluded, "The evidence is there, the facts are there, the law is there, and the availability of interpretation, without the benefit of somebody else's counsel, is certainly available to be made."

[9:33:02 AM](#)

MS. LEIBOWITZ said the section addressing attorney-client privileged information is phrased such that it is not a mandate to the Office of the Ombudsman to obtain the information, but rather it is an option for the agency. She said the Office of the Ombudsman cannot and does not want to "compel the offering up of that kind of information." She stated, "That section is intended to function so that an agency can give us that information without it coming back to cause them damage in

unrelated litigation or in another context." She said if an agency refuses to tell the Office of the Ombudsman what the attorney general said, then "that's how it is" and the Office of the Ombudsman would then "pull what facts it can" and move on with the investigation as Ms. Sailors noted. She concluded, "Sometimes the agency actually prefers to be frank with us about what it is they got by way of advice, but that is [an] option, not a requirement."

[9:34:38 AM](#)

MR. POUND recommended that if the committee was going to adopt Version T as a work draft, it should delete "to any other complainant," from page 2, lines 24-25, because he said it could be interpreted as any person being allowed access to the Office of the Ombudsman's reason for not investigating a complaint.

[9:35:51 AM](#)

CHAIR LYNN removed his objection to the motion to adopt the proposed committee substitute (CS) for HB 127, Version 28-LS0088\T, Gardner, 3/5/14, as a work draft. [There being no further objection, Version T was before the committee.]

[9:35:57 AM](#)

REPRESENTATIVE KELLER moved to adopt Conceptual Amendment 1 to HB 127, Version T, as follows:

On page 2, line 24:

Following "Committee,"
Delete "or to any other complainant,"

There being no objection, Conceptual Amendment 1 was adopted.

[9:37:20 AM](#)

CHAIR LYNN said he would like to hear from someone with legal expertise, but indicated he may leave debate of some issue to the House Judiciary Standing Committee.

[9:37:50 AM](#)

REPRESENTATIVE HUGHES requested that the House Judiciary Standing Committee consider her concern that medical records obtained are destroyed sometimes only on an annual basis. In

response to Representative Keller, she said she had not spoken with Ms. Leibowitz about this issue, but she stated her belief that medical files should be destroyed immediately after they are no longer needed.

REPRESENTATIVE KELLER, [as chair of the House Judiciary Standing Committee], committed to addressing that issue.

[9:40:04 AM](#)

STEPHEN J. Van GOOR, Bar Counsel, Discipline, Alaska Bar Association (ABA), stated that the disciplinary process in Alaska is working; it is strictly supervised by the Alaska Supreme Court and the ABA's disciplinary board. He said multiple levels of review are already in the disciplinary enforcement rules concerning investigation and prosecution. A complainant - anyone dissatisfied with the decision of the ABA not to open an investigation - can have the decision reviewed by a disciplinary board member called the board liaison. The complainant, if still dissatisfied, can file an application for direct review by the Alaska Supreme Court. Mr. Van Goor said that has happened. Similarly, a decision to dismiss a grievance after investigation can be reviewed by a member of a hearing panel, after which, if the complainant is still not satisfied, he/she can petition the Alaska Supreme Court for a review of that decision.

MR. Van GOOR said when the rules of disciplinary enforcement were revised in the 1980s, public members were added to the board of governors by the legislature and became involved in the critical stage of the disciplinary process as members of hearing panels, which hear evidence and make findings, conclusions, and recommendations. He emphasized that those recommendations go to the disciplinary board, which comprises 12 members, three of whom are public members subject to confirmation by the legislature. He said every legislative audit conducted of the ABA since the '80s has recommended the continuation of the [disciplinary] board and its responsibility for the investigation and prosecution of attorney misconduct. He stated that the system is not broken, but would be if the proposed amendments in Version T are adopted. He said lawyers often have to explain what was done on a client's behalf, and that involves confidential information. He said clients would not be sure that confidential information would be protected, since it would be subject to review outside of the disciplinary process.

[9:42:38 AM](#)

MR. Van GOOR said the two obligations an attorney has to a client are loyalty and confidentiality, but a lawyer would have no recourse if a non-lawyer spread confidential information outside of the disciplinary process. He stated that even though the staff in the Office of the Ombudsman includes three lawyers, none of those lawyers are in an attorney-client privileged relationship with the person making the complaint. Further, none of those lawyers are specifically authorized access to the information under the Alaska Supreme Court's procedural rules. He said the ABA could not comply with a request for an investigation, because of requirements imposed on the process by rules adopted by the court. He said Doug Gardner, the director of Legislative Legal and Research Services, confirmed the court's inherent authority in this area in a memorandum dated March 21, 2013. Mr. Van Goor predicted that the Office of the Ombudsman would be frustrated, as would the ABA, which would be "stuck in the middle of this situation." He concluded by requesting on behalf of the ABA that the House State Affairs Standing Committee amend Version T either by stating that the ABA is not an agency for the purposes of the Office of the Ombudsman's jurisdiction or by listing the ABA as exempt in the list of exempted officials. He said, "That would answer the ombudsman's question regarding jurisdiction that she posed last year and would avoid the problems I just identified."

[9:44:30 AM](#)

REPRESENTATIVE GATTIS stated for the record that she had an amendment that she would hold for the House Judiciary Standing Committee.

[9:44:57 AM](#)

QUINLAN STEINER, Public Defender, Public Defender's Office, stated that the consequence of giving the Office of the Ombudsman the authority to investigate the ABA would be to undermine the review of agency attorneys' conduct with respect to a client's complaint. He said currently a client can complain to the public defender about a problem with his/her attorney's conduct, and the public defender can evaluate the complaint with access to all the attorney-client confidences that are necessary to review the complaint. Alternatively, the client can complain to the ABA. When a client complains to the ABA, that entity asks for a response from agency attorneys. Presently attorneys fully comply by including all attorney-client confidences, because it is permissible under a rule to do

so. However, if that information could be released to an entity outside of the ABA, the attorneys would no longer be able to fully respond, which would have the effect of undermining the review of the client's complaint by narrowing his/her option for issuing a complaint to only the public defender. Mr. Steiner said having a full candid review benefits the criminal justice system as a whole, and certainly benefits the client. He opined, "I think that's worth considering when evaluating how this is executed."

[9:47:04 AM](#)

CHAIR LYNN closed public testimony on HB 127.

[9:47:21 AM](#)

REPRESENTATIVE HUGHES expressed hope that the House Judiciary Standing Committee would consider a letter, dated 2/24/14, from Mr. Van Goor, regarding enforcement action initiated by the Office of the Ombudsman, because she offered her understanding that the committee had learned that the Office of the Ombudsman does not have enforcement action. She mentioned having looked at the Alaska Rule of Professional Conduct, and said she had noted "some rules that perhaps would apply." She said it addressed situations in which there may be allegations regarding attorney and where disclosure could be allowed if required by law. She indicated that she would like committee discussion regarding those issues found in the Alaska Rule of Professional Conduct.

[9:49:10 AM](#)

REPRESENTATIVE KELLER said he would commit to a thorough discussion of all issues that come up during the House Judiciary Standing Committee's upcoming review of HB 127. He emphasized that his interest in the proposed legislation is on behalf of the legislature.

[9:50:19 AM](#)

REPRESENTATIVE KREISS-TOMKINS stated his preference that the House Judiciary Standing Committee review HB 127 without Sections 3-5.

CHAIR LYNN reminded Representative Kreiss-Tomkins he would have the chance to indicate his view of HB 127, Version T, when signing the bill report.

REPRESENTATIVE KREISS-TOMKINS said he would rather see the change made before a motion to move the proposed bill out of committee.

[9:51:35 AM](#)

REPRESENTATIVE KREISS-TOMKINS moved to adopt Conceptual Amendment 2, to remove the language that was added in Sections 3-5.

REPRESENTATIVE KELLER objected.

[9:51:51 AM](#)

REPRESENTATIVE GATTIS asked for clarification that Representative Kreiss-Tomkins wished to delete Sections 3-5 entirely.

REPRESENTATIVE KREISS-TOMKINS responded, "That's it."

REPRESENTATIVE GATTIS reiterated that she did not think the language in Sections 3-5 was necessary; therefore, she stated her support of Conceptual Amendment 2.

REPRESENTATIVE KELLER said he thinks [the language in Sections 3-5] "is a real elegant fix to a couple problems."

[9:52:48 AM](#)

REPRESENTATIVE HUGHES indicated that she does not support [Sections 3-5] as currently written, and said she has not come to the point where she is ready to make a policy call. She asked Representative Keller if this issue would be taken up in the House Judiciary Standing Committee if Conceptual Amendment 2 was adopt in this committee, because she ventured that there may be some value in continuing the discussion on what the three sections are addressing.

REPRESENTATIVE KELLER answered yes. He said he thinks it is "too broad of a brush" to take all that language out, while leaving it in would ensure a robust discussion. He added that he does not anticipate that the proposed legislation would move out of the House Judiciary Standing Committee as written.

REPRESENTATIVE HUGHES clarified that she wanted to know if the discussion would be brought back to the table in the next

committee of referral if the House State Affairs Standing Committee adopted Conceptual Amendment 2.

REPRESENTATIVE KELLER said the discussion would happen either way, but he stated his preference that the language remain in the bill.

REPRESENTATIVE HUGHES said she would vote against Conceptual Amendment 2, not because she supports the language in Sections 3-5 entirely, but rather in the interest of continuing the discussion in the next committee of referral. For example, she said she does not believe that the chair of the Administrative Regulation Review should have sole discretion.

[9:55:05 AM](#)

REPRESENTATIVE GATTIS said she thinks that the House State Affairs Standing Committee has held a robust discussion of [Sections 3-5] and it is time to take that language out and start over again.

[9:56:07 AM](#)

REPRESENTATIVE KREISS-TOMKINS said if the committee is all in agreement that the bill language should be cleaned up, it would be logical to start with "less" and have the burden to prove every change to the bill, rather than having that language in the bill and then "work to subtract." He said it does not make sense to pass a bill out of committee with troublesome language still in it. He said he feels that adopting Conceptual Amendment 2 would be a more conservative, cautious, and deliberate approach to produce the best possible [legislation] to pass on to the next committee of referral.

REPRESENTATIVE KELLER maintained his objection.

[9:57:12 AM](#)

A roll call vote was taken. Representatives Kreiss-Tomkins and Gattis voted in favor of Conceptual Amendment 2. Representatives Hughes, Keller and Lynn voted against it. Therefore, Conceptual Amendment 2 failed by a vote of 2-3.

[9:57:58 AM](#)

REPRESENTATIVE KELLER moved to report CSHB 127, Version 28-LS0088\T, Gardner, 3/5/14, as amended, out of committee with

individual recommendations and the accompanying fiscal notes. There being no objection CSHB 127(STA) moved out of the House State Affairs Standing Committee.

9:58:43 AM

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 9:59 a.m.