

H B

293





**ombudsman**

John E. Chenoweth

State of Alaska

March 31, 1983

Representative Jerry Ward  
Alaska House of Representatives  
Pouch V  
Juneau, Alaska 99811-3100

RE: ~~House Bill 293~~

Dear Representative Ward:

I am responding to your March 25 letter with reference to the above-captioned legislation.

The issue of the office's jurisdiction over the Alaska Bar Association traces back to two complaints, A79-0641 and A79-0642, filed against the association in June, 1979. The two complaints were generally directed against the association's grievance procedures and charged financial and other irregularities involving members of the board of governors and employees of the association.

The matters involved my predecessor, Frank Flavin, so I do not have direct understanding of past events to guide my response. I am advised that the bar association refused access of the ombudsman's office to certain files essential to the conduct of the investigation. The ombudsman sought enforcement of the subpoena in the superior court. Judge Moody denied the relief requested because Mr. Flavin was a member of the association and had access to the records independently of his official position. The argument whether the association was or was not subject to the ombudsman's jurisdiction was not resolved.

Some effort was made to address the issue in conjunction with a 1980 "sunset review" of the association by the Alaska Legislature. In 1980, the Legislature apparently concluded that the bar association should terminate, with a delayed date of one year (i.e. a lapse date of June 30, 1981). Because of action to terminate the association, the then-pending ombudsman's complaints were discretionarily discontinued in mid-1980.

In 1981, legislation was offered that continued the existence of the Alaska Bar Association. At least one early version of that

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legislation specifically stated that the association was to be regarded as a state agency subject to the ombudsman's jurisdiction. The final version, Ch. 52, SLA 1981, omitted any mention of the matter. As regards the issue of jurisdiction, the law has not been amended to provide clearly, one way or the other, on the matter of jurisdiction.

Complaints against the bar association are not numerous. The office received nine in 1979 (all discretionarily discontinued in light of the disposition of the litigation and the then-pending sunset termination), six in 1980, three in 1981, five in 1982, and none to date in 1983. None has culminated in an investigation.

I do not understand the association to have changed its position that it is not subject to the office's jurisdiction. Staff in my offices have cautioned persons who call an ombudsman's office with complaints against the bar association that, until the issue of jurisdiction is decided, action on the merits or substance of the complaint will be delayed. With that explanation, most realize that our chances of completing an investigation or providing assistance in a matter involving the bar association lay somewhere between "slim" and "none".

Since my appointment to this office, I have not pursued clarification of this matter through Opinion of the Attorney General, litigation, or legislation.

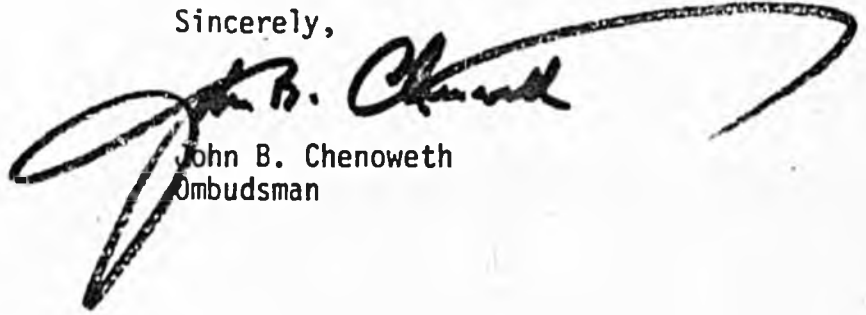
The matter deserves clarification by legislation. Please understand that I am not committed to making the association subject to our jurisdiction. The legislature could as well conclude that the association was not subject to our jurisdiction. I have enough "business" from complainants dissatisfied with agencies, boards, commissions and other entities for which there is no jurisdictional challenge. As a management philosophy, I am inclined to assert jurisdiction in instances where a complaint is received and a question of jurisdiction raised, until I am advised or otherwise conclude that jurisdiction to examine an act or decision of the agency is lacking.

The question to be considered in this instance, to my mind, is whether there is an existing remedy by which alleged errors or misconduct by the bar association may be systematically reviewed. If the legislature identifies an alternative, the jurisdiction of this office need not include the bar association; if the legislature's inquiry discloses no such review mechanism, does the legislature wish to commit that responsibility to the office of the ombudsman as a matter of law. Your legislation initiates a dialogue on the issue.

I am reminded that Bart Rozell, a partner in the Juneau firm of Faulkner, Banfield -- a past president of the state bar association -- may have familiarity with the litigation I describe and with the previous recent efforts to resolve the matter through legislation. May I respectfully suggest that you contact him.

Thank you for the opportunity to comment.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "John B. Chenoweth". The signature is written over the typed name and title.

John B. Chenoweth  
Ombudsman

JBC:jdt



# Alaska State Legislature House of Representatives

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WHILE IN JUNEAU  
POUCH V  
JUNEAU, ALASKA 99811  
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REPRESENTATIVE JERRY WARD  
DISTRICT 13

MEMBER FINANCE COMMITTEE  
CHAIRMAN OF SUBCOMMITTEE ON  
COMMERCE & ECONOMIC DEVELOPMENT  
CHAIRMAN OF SUBCOMMITTEE ON LABOR  
MEMBER OF SUBCOMMITTEE ON STATE LOANS

March 25, 1983

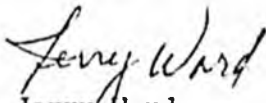
Mr Jack Chenoweth, Ombudsman  
Pouch W0, Mail Stop 3000  
Juneau, AK 99811

Dear Mr. Chenoweth:

In the Annual Report to the Office of the Ombudsman for 1981-1982, in your review of the Court System you describe the jurisdiction of your office. On page 103 of that report it is stated, "Investigation of grievances concerning the Alaska Bar Association, whose membership comprises attorneys admitted to practice in the State's courts, remains unresolved."

Please advise me of the background of this issue. Have grievances been filed against the Association? Has any formal ruling been requested as to your jurisdiction? What would be the recommendation of your office for clarifying this area?

Yours very truly,

  
Jerry Ward  
State Representative

## Court System

The State's judicial system consists of the Alaska Supreme Court, the court of appeals, superior court, and district court. Final appellate jurisdiction is assigned by the Alaska constitution to the state supreme court. Appellate jurisdiction in specified proceedings is granted by statute to the three-judge court of appeals. The superior and district courts have a jurisdiction over a wide range of civil and criminal matters. The superior court has jurisdiction on appeals of agency decisions when appeal is provided by law. The judicial system in rural areas and in urban communities is anchored by magistrates holding office under appointment of a presiding judge of the superior court.

The ombudsman may not investigate the act or decision of a justice, judge, or magistrate, nor may he inquire into the substantive content of a judicial order, decision, or opinion. Subordinate agencies of the judicial system—the court administrative system, clerical support staff, the Judicial Council, and the Council on Judicial Qualifications—can be investigated by the ombudsman. Investigation of grievances concerning the Alaska Bar Association, whose membership comprises attorneys admitted to practice in the State's courts, remains unresolved.

<b>Inquiries Received:</b>	<b>CY 81</b>	<b>FY 82</b>
Information	66	71
Complaints	89	108
<b>Complaints Closed:</b>		
Declined	56	69
Assisted	20	30
<b>Investigation initiated:</b>		
Justified/partially justified	1	5
Rectified	0	3
Partially rectified	1	1
Not rectified	0	1
Not supported	3	1
Indeterminate	0	0
Discontinued	<u>13</u>	<u>11</u>
<b>Total</b>	<b>93</b>	<b>116</b>

### Selected closed cases

COMPENSATION FOR JUROR SERVICES [J82-0082]. The complainant, a member of the jury in *State v. Hohman*, asserted that the court system had not properly computed and compensated the members of that jury for their services. Investigation disclosed that conduct of the trial generally began in the early afternoon hours and usually concluded for the day after 5:00 p.m. and, often, close to 6:00 p.m. The jurors were not advised in advance that the jury fee payable would be computed based only on one-half day's service and without reference to the portion of daily jury service that exceeded four hours. The initial determination was made with reference to court rule that recognized service based only on full- and half-day service without reference to jury service extending beyond normal hours of court. The ombudsman suggested that additional compensation was due the jurors and recommended com-

# Alaska Ombudsman Statutes

**Sec. 24.55.010. OFFICE OF THE OMBUDSMAN.** There is created in the legislative branch of the state the office of the ombudsman.

**Sec. 24.55.020. APPOINTMENT OF THE OMBUDSMAN.** (a) A candidate for appointment as the ombudsman shall be nominated by the ombudsman selection committee composed of three members of the senate appointed by the president of the senate and three members of the house of representatives appointed by the speaker of the house. One member of the minority party caucus in each house shall be appointed to the selection committee.

(b) The ombudsman selection committee shall examine persons to serve as ombudsman regarding their qualifications and ability and shall place the name of the person selected in nomination. The appointment is effective if the nomination is approved by a roll call vote of two-thirds of the members of the legislature in joint session and approved by the governor. However, the governor may veto the appointment and return it, with a statement of his objections, to the legislature. Upon receipt of a veto message the legislature shall meet immediately in joint session and reconsider approval of the vetoed appointment. The vetoed appointment becomes effective by an affirmative vote of two-thirds of the membership of the legislature in joint session. The vote on the appointment and on reconsideration of a vetoed appointment shall be entered in the journals of both houses.

(c) The appointment of the ombudsman becomes effective if, while the legislature is in session, the governor neither approves nor vetoes it within 15 days, Sundays excepted, after its delivery to him. If the legislature is not in session and the governor neither approves nor vetoes the appointment within 20 days, Sundays excepted, after its delivery to him, the appointment becomes effective.

**Sec. 24.55.030. QUALIFICATIONS; PROHIBITION AGAINST POLITICAL ACTIVITY.** (a) No person may serve as ombudsman

- (1) within one year of the last day on which he served as a member of the legislature;
- (2) while he is a candidate for or holds any other national, state, or municipal office; nor may the ombudsman become a candidate for national, state or municipal office until one year has elapsed from the date he vacates the office of ombudsman;
- (3) while he is engaged in any other occupation for which he receives compensation;
- (4) unless he is at least 21 years of age and is a qualified voter who has been a resident of the state for at least three years.

(b) It is essential that the nonpartisan nature, integrity and impartiality of the ombudsman's functions and services be maintained. The ombudsman and members of his staff may not join, support or otherwise participate in a partisan political organization, faction or activity, including but not limited to the making of political contributions. However, this subsection does not restrict the ombudsman or members of his staff from expressing private opinion, registering as to party, or voting.

**Sec. 24.55.040. TERM OF OFFICE.** (a) The term of office of the ombudsman is five years. An ombudsman may be reappointed but may not serve for more than three terms.

(b) If the term of an ombudsman expires without the appointment of a successor under this chapter, the incumbent ombudsman may continue in office until a successor is appointed. If the ombudsman dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the deputy ombudsman becomes acting ombudsman until a new ombudsman is appointed for a full term.

**Sec. 24.55.050. REMOVAL.** The legislature, by a concurrent resolution adopted by a roll call vote of two-thirds of the members in each house entered in the journal, may remove or suspend the ombudsman from office, but only for neglect of duty, misconduct, or disability.

**Sec. 24.55.060. COMPENSATION.** The ombudsman is entitled to receive an annual salary equal to that of a superior court judge.

Sec. 24.55.070. **STAFF AND DELEGATION.** (a) The ombudsman may appoint a deputy ombudsman; he shall also appoint assistants and clerical personnel necessary to carry out the provisions of this chapter.

(b) The ombudsman may delegate to his deputy or assistants any of his duties except those specified in secs. 190-200 of this chapter; however, during the ombudsman's absence from his principal business offices, the ombudsman may delegate the duties specified in secs. 190-200 of this chapter to his deputy for the duration of his absence. Those duties specified in secs. 190-200 of this chapter shall be performed by the deputy ombudsman when he is serving as acting ombudsman under sec. 40(b) of this chapter.

(c) The ombudsman and the staff appointed by him are in the exempt service under AS 39.25.110.

Sec. 24.55.080. **OFFICE FACILITIES AND ADMINISTRATION.** (a) The Alaska Legislative Council shall provide suitable office space and equipment for the ombudsman and his staff.

(b) The salary and benefits of the ombudsman and his permanent staff shall be paid through the same procedures used for payment of the salaries and benefits of other permanent legislative employees.

(c) The ombudsman shall submit a budget for each fiscal year to the finance committees of the legislature and shall annually submit an estimated budget to the governor for information purposes in the preparation of the executive budget.

Sec. 24.55.090. **PROCEDURE.** The ombudsman shall, by regulations adopted under the Administrative Procedure Act (AS 44.62), establish procedures for receiving and processing complaints, conducting investigations, and reporting his findings. However, he may not charge fees for the submission or investigation of complaints.

Sec. 24.55.100. **JURISDICTION.** (a) The ombudsman has jurisdiction to investigate the administrative acts of agencies.

(b) The ombudsman may exercise his powers without regard to the finality of an administrative act.

Sec. 24.55.110. **INVESTIGATION OF COMPLAINTS.** The ombudsman shall investigate any complaint which is an appropriate subject for investigation under sec. 150 of this chapter, unless he reasonably believes that

- (1) there is presently available an adequate remedy for the grievance stated in the complaint;
- (2) the complaint relates to a matter that is outside the jurisdiction of the ombudsman;
- (3) the complaint relates to an administrative act of which the complainant has had knowledge for an unreasonable length of time before the complaint was submitted;
- (4) the complainant does not have a sufficient personal interest in the subject matter of the complaint;
- (5) the complaint is trivial or made in bad faith;
- (6) the resources of the ombudsman's office are insufficient for adequate investigation.

Sec. 24.55.120. **INVESTIGATION ON THE OMBUDSMAN'S MOTION.** The ombudsman may investigate the administrative act of an agency on his own motion if he reasonably believes that it is an appropriate subject for investigation under sec. 150 of this chapter.

Sec. 24.55.130. **NOTICE TO COMPLAINANT.** (a) If the ombudsman decides not to investigate a complaint, he shall inform the complainant of that decision and shall state his reasons.

(b) If the ombudsman decides to investigate a complaint, he shall notify the complainant of his decision.

Sec. 24.55.140. **NOTICE TO THE AGENCY.** If the ombudsman decides to investigate a complaint, he shall notify the agency of his intention to investigate unless he believes that advance notice will unduly hinder the investigation or make it ineffectual.

Sec. 24.55.150. **APPROPRIATE SUBJECTS FOR INVESTIGATION.** (a) An appropriate subject for investigation by the ombudsman is an administrative act of an agency which the ombudsman has reason to believe might be

- (1) contrary to law;
- (2) unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily

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- 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.

**Sec. 24.55.160. INVESTIGATION PROCEDURES.** (a) In an investigation, the ombudsman may

- (1) make inquiries and obtain information as he considers necessary;
- (2) enter without notice to inspect the premises of an agency, but only when agency personnel are present; and
- (3) hold private hearings.

(b) The ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before him except insofar as disclosures may be necessary to enable him to carry out his duties and to support his recommendations.

**Sec. 24.55.170. POWERS.** (a) Subject to the privileges which witnesses have in the courts of this state, the ombudsman may

- (1) compel by subpoena, at a specified time and place, the appearance and sworn testimony of a person who the ombudsman reasonably believes may be able to give information relating to a matter under investigation; and
- (2) compel a person, by subpoena, to produce documents, papers, or objects which the ombudsman reasonably believes may relate to the matter under investigation.

(b) If a person refuses to comply with a subpoena issued under (a) of this section, the superior court may, on application of the ombudsman, compel obedience by proceedings for contempt in the same manner as in the case of disobedience to the requirements of a subpoena issued by the court or refusal to testify in the court.

**Sec. 24.55.180. CONSULTATION WITH AGENCY.** Before giving an opinion or recommendation which is critical of an agency or person, the ombudsman shall consult with that agency or person.

**Sec. 24.55.190. PROCEDURE AFTER INVESTIGATION.** (a) The ombudsman shall report his opinion and recommendations to an agency if he finds, after investigation, that

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

(b) The ombudsman may request the agency to notify him, within a specified time, of any action taken on his recommendations.

**Sec. 24.55.200. PUBLICATION OF RECOMMENDATIONS.** Within a reasonable amount of time after the ombudsman reports his opinion and recommendations to an agency he may present his opinion and recommendations to the governor, the legislature, a grand jury, the public or any of these. The ombudsman shall include with his opinion any reply made by the agency.

**Sec. 24.55.210. NOTICE TO THE COMPLAINANT.** After a reasonable time has elapsed, the ombudsman shall notify the complainant of the actions taken by him and by the agency.

**Sec. 24.55.220. MISCONDUCT BY AGENCY PERSONNEL.** If the ombudsman believes there is a breach of duty or misconduct by an officer or employee of an agency in the conduct of his official duties, the ombudsman shall refer the matter to the chief executive officer of the agency or, when appropriate, to the grand jury or to another appropriate official or agency.

Sec. 24.55.230. **ANNUAL REPORT.** The ombudsman shall submit to the legislature and the public an annual report of his activities under this chapter.

Sec. 24.55.240. **JUDICIAL REVIEW.** A proceeding or decision of the ombudsman may be reviewed in superior court only to determine if it is contrary to the provisions of this chapter.

Sec. 24.55.250. **IMMUNITY OF THE OMBUDSMAN.** No civil action may be brought against the ombudsman or a member of his staff for anything done, said or omitted in performing his duties or responsibilities under this chapter.

Sec. 24.55.260. **OMBUDSMAN'S PRIVILEGE NOT TO TESTIFY.** The ombudsman and his staff may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this chapter.

Sec. 24.55.270. **LETTERS TO OR FROM OMBUDSMAN.** A letter to the ombudsman from a person held in custody by an agency shall be forwarded immediately, unopened, to the ombudsman. A letter from the ombudsman to a person held in custody by an agency shall be delivered immediately, unopened, to the person.

Sec. 24.55.275. **CONTRACT PROCEDURES.** The ombudsman shall adopt by regulation procedures consistent with AS 24.23 to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals does not apply to contracts for investigations under AS 24.55.100.

Sec. 24.55.280. **TIME FOR JUDICIAL REVIEW OF AGENCY ACTION.** This chapter in no way extends the time limit in which judicial review of agency action must be sought.

Sec. 24.55.290. **PENALTY.** A person who wilfully hinders the lawful actions of the ombudsman or his staff, or who wilfully refuses to comply with their lawful demands, or who wilfully violates sec. 270 of this chapter, is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than \$1,000.

Sec. 24.55.300. **ADMINISTRATIVE PROCEDURE ACT.** The administrative acts of the ombudsman are not subject to the provisions of the Administrative Procedure Act (AS 44.62) except as provided in sec. 90 of this chapter.

Sec. 24.55.310. **CONFLICT OF INTEREST.** The ombudsman, the deputy ombudsman and their professional staff are subject to AS 39.50 (conflict of interest).

Sec. 24.55.320. **MUNICIPALITIES.** A municipality may by ordinance elect to become subject to the jurisdiction of the ombudsman appointed under this chapter. If a municipality so elects, it shall notify the ombudsman of that election and shall thereafter be considered an agency for the purposes of this chapter. If a municipality subjects itself to the jurisdiction of the ombudsman, the municipality shall pay its pro rata share of the cost of the operation of the office of the ombudsman based on the number of complaints or the case load emanating from that municipality, as prescribed by the ombudsman. If a municipality elects to remove itself from the jurisdiction of the ombudsman, it shall do so by ordinance, shall notify the ombudsman of that election and shall not thereafter be considered an agency for the purposes of this chapter.

Sec. 24.55.330. **DEFINITIONS.** In AS 24.55.010 - 24.55.340

- (1) "administrative act" means an action, omission, decision, recommendation, practice, policy, or procedure of an agency, but does not include the preparation or presentation of legislation or the substantive content of a judicial order, decision or opinion;
- (2) "agency" includes a department, office, institution, corporation, authority, organization, commission, committee, 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, council or board of a municipality or of the state government independent of the executive, legislative and judicial branches; it also includes an officer, employee or member of an "agency" acting or purporting to act in the exercise of his official duties, but does not include the governor, lieutenant governor, a member of the legislature, justice of the supreme court, judge of the court of appeals, a superior court judge, district court judge, magistrate, member of a city council or borough assembly, elected city or borough mayor, or a member of an elected school board;
- (3) "municipality" means a home rule or general law borough or city; including but not limited to a unified municipality organized under AS 29.68.010 - 29.68.580.

Sec. 24.55.340. **SHORT TITLE.** This chapter may be cited as The Ombudsman Act.

STATE OF ALASKA  
FISCAL NOTE

Revision Date \_\_\_\_\_, 1983

I. REQUEST

Bill/Resolution No.: HB 293  
 Title: Ombudsman  
 Sponsor: Ward  
 Requestor: House Judiciary Committee

II. FISCAL DETAIL

Agency Affected: Alaska Court System  
 Program Category Affected: Justice  
 BRU, Program of Subprogram(s) Affected: \_\_\_\_\_

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
<b>OPERATING</b>						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
<b>TOTAL OPERATING</b>		-0-	-0-	-0-	-0-	-0-
<b>CAPITAL</b>						
<b>REVENUE</b>						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard P. Barrier, Deputy Admin. Director Phone: 264-0545  
 Division: Alaska Court System Date: 4/25/83

Approved by Commissioner: \_\_\_\_\_ Date: \_\_\_\_\_  
 Department: \_\_\_\_\_

Distribution:

- Original to Legislative Finance
- Copy to Office of Management and Budget (for Legislature introduced bills)
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- Copy to Requestor (if different from Sponsor)

3/8/83

STATE OF ALASKA  
FISCAL NOTE

Revision Date / , 1983

I. REQUEST

Bill/Resolution No.: HB 293  
 Title: "... 'agency' in the Ombudsman Act."  
 Sponsor: Repr. Ward  
 Requestor: House Judiciary Committee

II. FISCAL DETAIL

Agency Affected: Department of Law  
 Program Category Affected: General Govt.  
 BRU, Program of Subprogram(s) Affected: Legal Services

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

III. SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

N/A

IV. ANALYSIS: Attach a separate page for any Analysis

Prepared By: Richard I. Pegues Director Phone: 465-3672  
 Division: Administrative Services Division Date: April 15, 1983  
 Approved by Commissioner: Richard I. Pegues/for Date: April 15, 1983  
 Department: Department of Law

Distribution:

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- Copy to Requestor (if different from Sponsor)

HB 293  
Fiscal Note  
Analysis

This bill amends AS 24.55.330(2) by including the Alaska Bar Association in the definition of "agency" in the Ombudsman Act. The Department of Law has no direct governmental connection with the Association and therefore the bill will not have a fiscal impact on the department.

