

HB

452



Alaska State Legislature
Senate

Office of the Secretary

OFFICIAL BUSINESS

P.O. BOX V
CAPITOL BUILDING
JUNEAU, ALASKA 99811

FOR YOUR IMMEDIATE ATTENTION

DATE: March 6, 1990

TO SENATE COMMITTEE: STATE AFFAIRS

FROM: Office of the Senate Secretary *JKR*

The Chairman of the above-referenced Committee has waived the Committee referral on the following bill(s):

CS FOR HOUSE BILL 452 (SA) am

Office of the ombudsman and to the powers and duties of the ombudsman.

Thanks.

Please give the bill file(s) to the page delivering this message for forwarding to the next Committee of referral.

Thank you for your prompt attention to this request.

JR/s



State of Alaska
ombudsman

Duncan C. Fowler

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April 26, 1990

Senator Pat Pourchot
Alaska State Senate
Post Office Box V
Juneau, Alaska 99811-3100

RE: SCS CSHB 452 (Res),
Proposed ombudsman legislation

Dear Senator Pourchot:

Thanks for offering to handle this bill on the floor. The last person that had concerns about the bill has agreed to pass on them for now. The Senator agreed to advise the Chair of Senate Rules that he no longer has objections. Staff from Senate Rules advised me the bill could be on the floor as soon as April 27.

Here is some information to provide background for you on the bill's issues. This bill is truly a product of the legislative process. It was introduced at my request by the Legislative Council, heard in the House by State Affairs and Rules. It was amended on the floor of the House. It has been reviewed in the Senate by Judiciary, Resources and Rules. This final version is the product of comments and agreements from the Attorney General's civil and criminal divisions, Art Snowden of the Court System, the Department of Public Safety, the Public Defender, the Alaska Association of School Administrators and Association of Alaska School Boards.

There is a zero fiscal note associated with this bill. If passed, this bill would significantly improve and strengthen my office's ability to function as an independent investigative agency within the legislative branch of government.

Despite the fact the Alaska Ombudsman Act is considered model legislation, weakness have been identified over the past 15 years. The proposed bill offers solutions to those weakness.

The improvements are:

- * a provision to keep preliminary reports to agencies confidential while agencies prepare responses to ombudsman investigations; and
- * a provision to ensure the ombudsman's access to confidential records and a provision that the ombudsman maintain the confidentiality of those records.
- * General administrative changes such as:

requiring the appointment of a designee should the ombudsman become incapacitated;

formalizing the office's relationship with the Legislative Affairs Agency (LAA);

giving the Legislative Council authority to review the ombudsman budget prior to submission to the finance committees;

allowing oral notice (rather than letters) to advise some complainants of the results of our review; and

simplifying and clarifying the process school districts must follow to contract for ombudsman services.

The following is a discussion of each section of the proposed legislation.

Sec 1-3, 13) Appointment of an acting ombudsman

These sections require the ombudsman to designate a person to act in his/her place to ensure the orderly continuation of the Office of the Ombudsman should the ombudsman become incapacitated. Current law makes such an appointment permissive. All but one of the previous ombudsmen have chosen to make such an appointment. Not having a designated successor creates the potential of a crisis within the office. In that case, no person would have the statutory authority necessary to issue findings or recommendations as required by the Ombudsman Act should the ombudsman become incapacitated.

Sec 4) Administrative support - Legislative Affairs Agency

This section formalizes the relationship the ombudsman has enjoyed with the Legislative Affairs Agency (LAA) for the past 15 years. Current law was really intended to help open the doors of the Office of the Ombudsman in 1975, its first year of operation. It required the Legislative Council to provide the ombudsman "suitable space and equipment." Currently, the LAA provides data processing support both with our main frame applications and some of our equipment. The Legal Division provides occasional advice and opinions.

Sec 5) Legislative Council to review budget

The ombudsman budget has historically been submitted directly to the finance committees. This section requires the ombudsman to submit the budget to the Legislative Council for review and approval. This is consistent with budgeting procedures in other states with ombudsman offices: Nebraska, Iowa and Hawaii.

Sec 6, 9, 10, & 15) Access to Confidential Information

These sections clarify the ombudsman's access to confidential records in the possession of state agencies. Currently we rely on regulations to provide agencies with the assurance that their confidential records and information

will be properly handled. It would be more appropriate to clarify our access in statute.

Clear access to confidential records is critical for the ombudsman to do a credible job investigating several types of citizen complaints. This issue has also been the source of the majority of Attorney General opinions involving the ombudsman's office in the past 15 years. In fact, two are pending completion now.

In most cases we are able to receive releases for access to confidential medical, financial or case record data from those citizens who complain about their treatment. Many times while we investigate those complaints we find what appears to be system-wide problems but are prevented from verifying our suspicions. We are unable to access the names or files of other Alaskans in similar situations to test our concerns. I believe that in several of those cases we could have prevented problems for many more citizens other than just our complainants.

It should be noted that just because the ombudsman has greater access to confidential information, it does not allow the ombudsman to release that information to the public or other government agencies. The ombudsman would have no additional privilege to release that information than the agency that is the original custodian of the data. It should be noted also that ombudsman investigative files are confidential and staff are prevented by statute from testifying in court about matters brought before them.

The terminology used in Sec. 9 is similar in concept to Legislative Audit's statute. Section 6 makes it clear the ombudsman may implement regulations to provide the mechanisms to protect the confidentiality of the records we access. Sections 10 and 15 help define what a "record" is for the purposes of these sections.

I have enclosed copies of our existing regulations for handling confidential records and information. These regulations describe in detail how this office handles confidential information. Please note a process exists to mediate disagreements with agencies about the confidentiality of records. A provision allows for the courts to determine whether or not a record is in fact confidential.

Several agencies have offered amendments which have been included in this bill. These amendments have strengthened the bill. The court system asked that sealed court records only be accessed by subpoena. Public Safety and the Criminal Division of law asked that *active* police investigations and records identifying confidential police informants be excepted from review. This was to ensure the integrity of evidence in active criminal investigations. The amendment limiting access to the identities of confidential police informants was offered to protect the physical safety of the informants. Senate Resources provided that confidential oil and gas geological and geophysical data be exempt from review. The Public Defender asked that privileged communications between attorneys and clients be excepted as well.

Several legislators have asked me if there was anything which would hold ombudsman staff responsible for protecting the confidentiality of information obtained during the course of their work. Criminal statutes do provide penalties for those who would misuse information confidential by law. AS 11.56.860 makes the misuse of such confidential information a class A misdemeanor. Like any other public servant, if ombudsman staff ever violated that statute, (even after leaving our employment) and were convicted of that offense they would be subject to a fine of \$5,000 and one year in jail. In addition, I would consider such a violation contrary to office policy and would consider it a basis for termination of the employee.

Sec 7 & 8) Oral Notification

Each year the Office of the Ombudsman receives thousands of complaints and inquiries. We will exceed 11,300 this year. Most are received by telephone and a large number of these complaints are handled as "assists" or are "decline/advise" as premature complaints. We either "fix" the citizen's complaint with the state agency or provide the necessary guidance during that phone call. Citizens often know the disposition of their complaint by the time they hang up the phone. Current law requires written notification of the complaint's disposition to all complainants. Current staffing does not make this practicable. Further, even if given extra staff, I do not believe maintaining such a requirement would provide a better service to Alaskans.

These amendments allow oral or telephonic notification of either the intent to investigate or to decline a complaint. This has been the practice for the past 15 years and would bring our historical practice into compliance with the statute.

Sec 11 & 12) Preliminary Report Confidential

The Ombudsman Act makes it clear that records of the ombudsman are confidential and can only be released "insofar as disclosures may be necessary to carry out [the ombudsman's] duties." The problem comes when a preliminary report which is critical of an agency is sent to the agency for review and comment. It is important to understand that there are many parallels between our preliminary investigative report and a preliminary audit report issued by Legislative Audit. That process should allow an orderly procedure for an agency to dispute "facts" found in an ombudsman preliminary report and offer alternative methods of correcting our proposed recommendations.

Currently the preliminary report, once in the agency's hands, becomes subject to media access through the public information regulations (6 AAC 95). In the past, some agencies have felt compelled to release our preliminary report even though it contained areas of potential factual disagreement.

This legislation prohibits the release of the preliminary report to the public by any of the participants. It offers protection to the agencies during the period of comment and review. This is similar to the handling of Legislative Audit reports.

Sec. 14) Municipalities and School Districts

This section provides a mechanism for a school board to choose ombudsman services *independently* from the local governments' assembly or city council.

Recently, the City and Borough of Juneau School Board became the first school board to consider ombudsman services. When we considered the procedures necessary to implement such jurisdiction, it became apparent that no simple or independent method was provided to allow school boards the ability to make that decision. This is despite the fact the Alaska Ombudsman Act seems to envision such services for schools. This amendment to the Ombudsman Act allows school boards to choose or terminate jurisdiction by the Office of the Ombudsman by resolution independently from decisions made by another elected body. Neither the Alaska Council of School Administrators nor the Association of Alaska School Boards found objection to this provision.

Failed Amendments offered on the House Floor:

(1) To remove Corrections from the jurisdiction of the Ombudsman. I sent the enclosed letter to House members explaining we helped minimize the state's liability exposure by our availability and reviews. It failed.

(2) To place the Governor and Lt. Governor, individually, under the jurisdiction of the ombudsman. I asked that be defeated as the actions of elected officials are more properly reviewed by the voters. The ombudsman provides review of "bureaucrat's" actions.

Please let me know if you have any questions regarding the Office of the Ombudsman or this proposed legislation. I appreciate your support of what I believe to be important improvements to Alaska's Ombudsman Act.

Sincerely,



Duncan C. Fowler
Ombudsman

DCF:pjc
Enclosures



State of Alaska
ombudsman

Duncan C. Fowler

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February 25, 1990

Members of the house
Alaska Legislature
Box V
Juneau, Alaska 99811

RE: HB 452 Ombudsman Act amendment

Dear Representative

Amendment No.2 to HB 452 was offered on the floor last Friday. It virtually eliminates the ombudsman's jurisdiction over the Department of Corrections. It would significantly decrease legislative oversight over one of the largest departments in state government. The Office of the Ombudsman does not support this amendment. I would appreciate your support of my position.

The Alaska Ombudsman Act is a model act. HB 452 was proposed to correct problems identified over the past 15 years. The Ombudsman Act contains specific provisions to insure persons held in state custody (whether it be mental, medical or correctional) have rapid and uncensored access to this office. Persons who are held in state facilities are in an unusual position. The state has virtually total control over all aspects of their daily life. Despite the fact most state employees do a good job, humans do error. And sometimes the wrong person is hired to do a job. Abuses of patients and inmates can and do occur in Alaska facilities. It is unfortunate that some have even died because of errors made.

The ombudsman fixes problems between the "keepers" and the "kept" on a daily basis both formally and informally. There are times we support decisions made by correctional managers. There are other times we find the inmate was wronged and we recommend that the agency make things right. We provide an external review and offer solutions to problems. Our review of an issue, even on an informal level, gives an air of legitimacy to many of the department's decisions in the eyes of the inmates. We are not part of that system.

No matter who the complainant is, staff are required to see what the person has done to resolve the problem. If they haven't done anything about it we explain how to fix it on their own. With inmates, this is done very quickly. With the exception of emergencies involving health or safety issues, inmates are required to go through corrections' internal grievance process. Ombudsman staff are very familiar with those procedures and can quickly provide advice to the inmate.

Ombudsman staff are urged to attempt to resolve all complaints as quickly as possible. This means that a large number of significant issues are resolved at an informal level. This is especially true with inmate complaints. Internally we use

terminology like "Assist" or "Decline/Advise" to describe the informal complaint resolution process. Here are examples of issues that have been resolved informally:

Denial of medical treatment or prescription drugs. Ombudsman staff resolve these with institutional supervisors and medical personal.

Inmate personal property and funds kept in the departments custody being lost, damaged, stolen or unaccounted for.

An officer used MACE on inmates several times without cause. No action was taken until advised we would pursue it if they didn't.

Inmate *court* papers being "lost", "destroyed" or "misplaced" by correctional staff.

We receive frequent complaints about "lost" or "never received" grievances. We review grievances that are summarily denied without reasons given. We have even received a "cop out" (preliminary grievance form) with a big red "NO" stamped on the form without further explanation. Corrections holds inmates to appeal and grievance time lines but is not obligated to do likewise. It is important that the state play by the rules. The ombudsman acts as a check on the fairness of that process.

In the past 5 years we have formally investigated 103 corrections complaints. Fifty-six percent were fully or partially justified. Examples of inmate complaints where allegations were found to be "Justified" or "Partially Justified" are:

Failure to comply with fire safety requirements in jail cell area. Inoperable smoke alarms, sprinklers and fire extinguishers.

Inmate placed in Maximum Security because superintendent had personal grudge. Appeal to the director was unfairly handled.

Staff placing untruthful incident reports in inmate's file.

Jail food was unsanitary. It had bugs crawling in it.

Agency refusal to allow an inmate to attend a civil court hearing.

Refusal to allow inmates in lock down to contact their attorneys.

Loss of engagement ring. This resulted in restitution to the inmate and significant revisions to institutional property control procedures.

Unfair and inconsistent disciplinary penalties including loss of months of "good time" and use of punitive segregation.

Many complaints involving the internal agency grievance and appeal system.

Improper handling of inmate mail. Refusal of agency to investigate resulting misconduct complaint.

Several of these complaints had the potential for litigation. Ombudsman intervention can eliminate the need for an inmate to look to the courts for relief. Alaska is already subject to a growing number of inmate law suits. In 1983 only 13 were filed. But, in *each* of the past three years more than 100 new suits have been filed. With appropriate resources, I believe the ombudsman office is a cost effective way to help stem the growing number of law suits.

Alaska is not alone in its frustrations of having to care for criminals. Three states, Michigan, Kansas and Minnesota, have only corrections ombudsman. They have recognized the liability of an improperly monitored correctional system. The states of Nebraska, Iowa and Hawaii have general jurisdiction ombudsman as in Alaska. All of the states are challenged by a large number of inmate complaints. I note that the Hawaii legislature was so frustrated with the large number of inmate complaints to their ombudsman, they passed a resolution directing the Department of Corrections to improve its grievance system.

The number of complaints about the Department of Corrections will double this year to 1272 and I am concerned about it. Many of you know I worked in corrections for several years. Please accept my observation that managing a correctional system is not an easy task. *They have the legal responsibility to be the fairest of the fair.* And to make things more difficult, when you hire humans to *contain* other humans, conflicts will naturally arise. To keep order, an effective internal and external dispute resolution process is required in a correctional setting. I believe the ombudsman is a key in that external review. We are a cost effective tool that helps insure fair and humane treatment in our correctional facilities. It helps to reduce the states liability exposure. We help increase the security of the prisons by helping to reduce conflict.

In closing, it is important for you to understand the roll of the Cleary Monitors. They are Corrections employees who are supervised and evaluated by the local institution's superintendent. They do a good job in resolving many problems and are invaluable to my staff. But, they only provide an internal review and it does make sense to keep your boss happy. In fact it is not unusual for us to get a call from a monitor asking us to pursue a problem they have been unable to resolve internally.

This past week the media reported that Corrections has been less than cooperative with this office in a couple of recent issues. I believe passing Amendment No.2 could send an unintended message to managers in the executive branch. I would appreciate your support of my position in this matter.

Sincerely,

Duncan C. Fowler
Ombudsman

agency, the agency has initiated corrective action or commits itself to take corrective action substantially as recommended.

(b) If an agency does not initiate corrective action or does not commit itself to take corrective action substantially as presented in the ombudsman's recommendation or modified recommendation, the ombudsman will, in his or her discretion, after considering any response received from the agency, submit a report of the matter to the chief executive officer of the agency or to the governor, and then make a report to the legislature, to the press, or to the public, as the ombudsman considers appropriate.

(c) The provisions of (b) of this section do not limit the ombudsman from making a report on any investigation to the legislature, the press, or the public, as the ombudsman considers appropriate. (Eff. 9/16/84, Reg. 91; am 3/28/86, Reg. 97)

Authority: AS 24.55.090
AS 24.55.200

21 AAC 20.250. COMPLAINANT TO BE INFORMED. Within 15 days after receipt of an agency's acceptance or rejection of an ombudsman's recommendation or modified recommendation, the ombudsman will notify the complainant of the result of the investigation and of the action taken or proposed to be taken by the agency. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090

**ARTICLE 4.
CONFIDENTIAL INFORMATION**

Section

- 300. Disclosure of confidential information
- 310. Disclosure with written consent
- 320. Disclosure of information from public sources
- 330. Disclosure as statistical information
- 340. Disclosure to agency
- 350. Assertion of privacy interest by agency
- 360. Disclosure to the complainant
- 370. Disclosure to governor, legislature, or grand jury
- 380. Public disclosure
- 390. Definitions

21 AAC 20.300. DISCLOSURE OF CONFIDENTIAL INFORMATION. A confidential record provided by an agency or a person to the office of the ombudsman during the course of an ombudsman's investigation may not be disclosed by the office of the ombudsman except as provided in 21 AAC 20.310 - 21 AAC 20.390. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090
AS 24.55.160

Art. I, sec. 22, Alaska Constitution

21 AAC 20.310. DISCLOSURE WITH WRITTEN CONSENT. The ombudsman will, in his discretion, disclose a confidential record if the ombudsman first obtains the written consent of the person about whom information in the confidential record relates. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090
AS 24.55.160

Art. I, sec. 22, Alaska Constitution

21 AAC 20.320. DISCLOSURE OF INFORMATION FROM PUBLIC SOURCES. The ombudsman will, in his discretion, disclose a confidential record if the information contained in the record is reasonably obtainable from other public sources without the consent of the person about whom the information relates. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090
AS 24.55.160

Art. I, sec. 22, Alaska Constitution

21 AAC 20.330. DISCLOSURE AS STATISTICAL INFORMATION. The ombudsman will, in his discretion, disclose information contained in a confidential record as a statistical report if the person about whom the information relates is not identifiable in the statistical report. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090
AS 24.55.160

Art. I, sec. 22, Alaska Constitution

21 AAC 20.340. DISCLOSURE TO AGENCY. Except as provided in 21 AAC 20.350, the ombudsman will, in his discretion, disclose to an agency a confidential record produced by the agency or a confidential record used by the agency in the conduct of its business in order to enable the ombudsman to present a finding,

opinion, or recommendation made to the agency. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090

AS 24.55.160

Art. I, sec. 22, Alaska Constitution

21 AAC 20.350. ASSERTION OF PRIVACY INTEREST BY AGENCY. If the ombudsman receives written notice from an agency which has provided a confidential record that it asserts a privacy interest in the record, the ombudsman

(1) will, in his discretion, disclose the record only to the person or persons within the agency having custody of the record; and

(2) will, in his discretion, make any other disclosure of the record only in accordance with 21 AAC 20.380. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090

AS 24.55.160

Art. I, sec. 22, Alaska Constitution

21 AAC 20.360. DISCLOSURE TO THE COMPLAINANT. The ombudsman may not disclose information in a record to the complainant if federal or state law or regulation prohibits disclosure of the record to the complainant. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090

AS 24.55.160

Art. I, sec. 22, Alaska Constitution

21 AAC 20.370. DISCLOSURE TO GOVERNOR, LEGISLATURE, OR GRAND JURY. If the ombudsman determines that a confidential record produced by an agency should be disclosed under AS 24.55.200 to the governor, the legislature, or a grand jury in order for the ombudsman to seek review of a finding, opinion or recommendation, the ombudsman will, in his discretion, return the record to the agency that produced it and recommend its disclosure by the agency to the governor, the legislature, or the grand jury, as applicable. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090

AS 24.55.160

Art. I, sec. 22, Alaska Constitution

21 AAC 20.380. PUBLIC DISCLOSURE. (a) The provisions of this section apply to

(1) disclosure of a confidential record to a person within an agency other than the person having custody of a confidential record if that record has been provided to the ombudsman by the agency and the agency has asserted a privacy interest under 21 AAC 20.350; and

(2) public disclosure under AS 24.55.200 of a confidential record produced by an agency.

(b) Before disclosing a confidential record, the ombudsman will give written notice to the agency having custody of the record and to the person about whom information in the record

relates that the ombudsman intends to disclose the record at the expiration of a 15-day period. The period during which the agency or a person may object can be extended by the ombudsman at the request of the agency or person. In providing notice, the ombudsman will indicate the basis of the decision to disclose the record.

(c) The agency or person to whom notice is given under (b) of this section may object to disclosure of the record by filing with the ombudsman a written objection to the disclosure. The objection filed by the agency or person must identify the portion of the record that the agency or person believes should remain confidential and must state the reasons for the objections to disclosure.

(d) If objection to disclosure has not been filed with the ombudsman in accordance with (c) of this section at the end of 15 days from the date of notice, or of any extension of that period approved by the ombudsman, the ombudsman will, in his discretion, disclose the confidential record.

(e) If objection to disclosure is filed with the ombudsman in accordance with (c) of this section and if, despite the objection, the ombudsman believes that disclosure of the record is essential to obtain agency acceptance of a finding and implementation of a recommendation in order to correct an action, decision or omission of the agency that was detrimental to the complainant, the ombudsman will give written notice to the agency or to the person or persons making objection under (c) of this section that he intends to disclose the record. In his notice, the ombudsman will

(1) briefly state the reason or reasons for his decision to disclose;

(2) indicate the date on which the ombudsman expects to make public disclosure of the record, not sooner than 15 days from the date of his notice; and

(3) state that the date may be extended only by mutual agreement between the agency or person and the ombudsman.

(f) At any time before expiration of the date on which the ombudsman indicates that he will dis-

close the document to the public, an agency or a person to whom notice is required to be sent under (e) of this section may apply to the superior court for an order preventing the ombudsman from disclosing the record. In making a determination as to whether the ombudsman may disclose the record

(1) if the record contains both disclosable and confidential information and the confidential information cited by the agency or person objecting to disclosure of the record may be reasonably separated from confidential portions in a manner that will allow meaningful information to be disclosed, the court may determine that the confidential information identified under the authority cited by the agency or person objecting to disclosure of the information or record must be deleted and thereafter may allow the ombudsman to release the disclosable information;

(2) if the record is wholly confidential, or if the record contains both disclosable and confidential information and the confidential information cited by the agency or person objecting to disclosure of the record cannot be reasonably separated from confidential portions in a manner that will allow meaningful information to be disclosed, the court may allow the ombudsman to disclose the record if the court determines that the need for disclosure outweighs the nature and weight of the privacy interest asserted by the agency or person. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090
AS 24.55.160

Art. I, sec. 22, Alaska Constitution

21 AAC 20.390. DEFINITIONS. In 21 AAC 20.300 — 21 AAC 20.390

(1) "confidential" means a record or information in a record that is nondisclosable under a valid federal or Alaska statute or regulation, or by a privilege, exemption, or principle recognized by the courts, or by an agency protective order authorized by law;

(2) "person" has the same meaning as in AS 01.10.060(7);

(3) "record" means a document, paper, memorandum, book, letter, drawing, map, plat, photo, photographic file, motion picture, film,

microfilm, microphotograph, exhibit, magnetic or paper tape, punched card, or other item of any other material, regardless of physical form or characteristic, developed or received under law or in connection with the transaction of official business by an agency or person, and preserved as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the agency or person or because of the informational value in them; the term also includes staff manuals and instructions to staff that directly or indirectly affect the public. (Eff. 9/16/84, Reg. 91)

Authority: AS 24.55.090

AS 24.55.160

Art. I, sec. 22, Alaska Constitution



State of Alaska
ombudsman

Duncan C. Fowler

April 27, 1990

Pat Pourchot, Senator
Alaska State Senate
Post Office Box V
Juneau, Alaska 99811-3100

RE: Possible Kerttula Amendments to HB 452

Dear Senator Pourchot:

I met with Senator Kerttula yesterday to see what his concerns were about scheduling HB 452 for the floor. He indicated he had considered a couple of amendments but was too busy to deal with them now and would tell Arliss to let the bill go. It was to be scheduled on the floor April 27th.

Since that time he has had second thoughts. He has asked that the bill be held a day so he can offer some amendments. He has not really discussed these with me but I am surmising that they might involve the following:

Minimum Qualifications for Assistant Ombudsman:

The Senator has mentioned on occasion that he wondered what the qualifications of my staff were. I believe it is his perception that assistant ombudsmen are, for a large part, untrained and unqualified folk. I have given him a letter in the past describing the backgrounds of several of my staff. I believe his perceptions to be wrong.

The Alaska Ombudsman Act has placed several stiff and strict requirements when the Legislature screens and selects an ombudsman. These were intended to ensure the appointment of a person who is capable, nonpartisan and qualified to fulfill those responsibilities. The Act also gives the appointee wide latitude for structuring and operating the office. This is to ensure the independence of the office and help insulate it from political manipulation. Legislative review is provided in the budgeting and selection process.

The selection and determination of staff qualifications have been delegated to the ombudsman by statute. This is to allow the selection of persons with the background and training the ombudsman feels can best do the job within budgetary constraints. Historically, my predecessors and I have sought qualified staff with an eclectic background. This is because of the wide variety of issues which are presented to this office. Currently I have staff with experience as attorneys, personnel managers, fraud investigators, governmental planning, social work and correctional practitioners and administrators, grant and program managers,

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municipal government, statistical analysis, investigative reporting, real estate and small business, educators and even an anthropologist.

I believe this broad variety of skills and backgrounds has contributed to the quality of this office's work and our ability to objectively review the diversity of complaints received by the ombudsman.

Currently, minimum qualifications for "Assistant Ombudsman" (investigator) are:

Graduation from an accredited college and three years of a combination of relevant education and employment experience. Acceptable relative experience may include:

- (1) adjustment or investigation of claims such as workers compensation or insurance claims;
- (2) analysis of reports or data for the preparation of surveys, studies or reports;
- (3) hearing officer;
- (4) investigative work for public or private agencies;
- (5) investigative newspaper reporting involving government;
- (6) paralegal or attorney;
- (7) professional experience in administration, management analysis research or planning; or

Substitution: Although a college degree is preferred, that requirement and the work requirement may be satisfied by a high school diploma or equivalent and a demonstrated work history of at least seven (7) years of progressively responsible and relevant work history.

Upon employment staff do undergo several weeks of on the job training. This includes working with trained investigators, completion of suggested reading including our policy and procedure manual, statutes, investigative and research techniques, philosophy and background on the role of an ombudsman. In addition, throughout the year staff are encouraged to take appropriate training classes through universities or other sources as the budget allows. We also have an annual staff training meeting where we can help assure a common knowledge base for the staff.

None of the ombudsman statutes from Nebraska, Iowa or Hawaii have requirements for ombudsman staff set in law. Neither do the three model state laws that I have reviewed suggest setting staff qualifications in law (The Harvard Journal on Legislation, The American Bar Association or Annotated Model Ombudsman Statute by Dr. Walter Gellhorn). In fact there is much to argue against that practice. Dr. Gellhorn states:

Qualifications. The Ombudsman shall be a person well equipped to analyze problems of law, administration, and public policy, and shall not be actively involved in partisan affairs.

COMMENT . . . Requiring any specific experience or absolutely excluding any category of persons . . . seems undesirable.

The same logic for staff would seem to apply as later states in this model statute:

COMMENT. This section gives the ombudsman a free hand in staffing his office, without even the restraints of civil service and classification acts. The highly personal nature of the ombudsman work, . . . justifies giving this leeway to so highly placed and, by hypothesis, responsible an official.

I note that statutory requirements for minimum qualifications do not exist for staff of the Legislative Auditor or Legislative Research.

Subpoena Powers

There is a possibility the senator may have concerns over the ombudsman's ability to issue subpoenas. He may believe that some entity should review the propriety of each subpoena when issued.

Every ombudsman I am aware of in North America has the ability to issue subpoenas. I am not aware that any of them have external committee review or approval of their subpoenas. Ombudsman statutes have been carefully crafted to minimize political manipulation of the office and committee review could raise that as an issue.

Alaska law, like the model laws, provides:

AS 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 . . ." [Emphasis added.]

This provision allows those who think the ombudsman may be exceeding the authority of the office to have the courts quash the subpoena. This is the most appropriate review of the application of the power of subpoena.

Our existing statutory authority and the protections offered the public conform to model acts and are adequate.

Preliminary Review of Investigation.

The Senator may have concerns that those affected by investigations may not have adequate opportunities to review preliminary reports before we issue them.

HB 452 does provide additional protections to agencies in section 11. It makes preliminary investigation reports confidential during the agency review period.

Existing AS 24.55.180 requires the ombudsman to "*consult*" with the agency or person *before issuing a critical opinion* or report. Our regulations also ensure in misconduct complaints that the affected person have an opportunity to review our report *before* the involved agency sees it. Regulations set 30 days as being that normal period of review.

This fairly well sums up the areas that I believe Senator Kerttula could be having difficulties with. Again, this is very speculative on my part. I have offered to meet with him and discuss them with no success.

Thanks for your help.

Sincerely,

Duncan C. Fowler
Ombudsman

DCF:pjc

AMENDMENT

#1

OFFERED IN THE SENATE:

BY: RODEY

To: SCS CS SENATE BILL No. _____

HOUSE BILL No. 452 (Res)

PAGE: 3

LINE: 18

After "except" insert "personnel and"