

HB

130

# SENATE COMMITTEE REPORT

DATE: 4/12/91

FURTHER: Judiciary

DATE TURNED INTO OFFICE: 5-3-91

C&RA Committee considered CSHB 130 (JUDICIARY) am

"An Act relating to immunity of a municipal ombudsman and staff and privilege of a municipal ombudsman and staff not to testify about certain matters."

and recommended:

- replace with \_\_\_\_\_ CS \_\_\_\_\_  same title
- or adopt \_\_\_\_\_ CS \_\_\_\_\_  new title
- attached amendment(s)  technical title change (HB only)
- \_\_\_\_\_ letter of intent adopted

- do pass
- do not pass
- no recommendation
- individual recommendations
- further referral to \_\_\_\_\_

**ATTACHES NEW FISCAL NOTE(S):**

- fiscal note(s) Dept/Date: \_\_\_\_\_
- zero fiscal note(s) \_\_\_\_\_
- appropriation-no fiscal note

**APPROVES PREVIOUS:**

- fiscal note(s) House Dept Date C&RA 2/22/91
- zero fiscal note(s) \_\_\_\_\_
- Governor's bill w/fiscal note

**SIGNING DO PASS:**

*Arles Stangor*  
*Tom R. Sharkey*  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**OTHER RECOMMENDATIONS:**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

*Arles Stangor*  
 Chair: Signature and Recommendation



April 30, 1991

## Position Paper

### CS HB 130 (Judiciary) am - Immunity of Municipal Ombudsman

The Alaska Municipal League, which represents 125 local governments and their citizens throughout the State of Alaska, supports CS HB 130 (Judiciary) am. This legislation would grant immunity from civil action and privilege not to testify about certain matters to a municipal ombudsman and the staff of the ombudsman's office.

Under the provisions of the bill, which are consistent with model legislation on ombudsmen, no civil action could be brought against either a municipal ombudsman or the ombudsman's staff for anything done, said, or omitted in performing the duties of the office as established by ordinance or charter, except in cases of gross negligence or reckless or intentional misconduct. In addition, they could not testify in court regarding a matter involving their official duties except as necessary to carry out the responsibilities of the office. The protection would apply only when the ordinance or charter establishing the office of ombudsman included specific provisions.

If enacted, HB 130 would not only afford protection to municipal ombudsmen and their staffs that is comparable to the protection granted to the state ombudsman's office, it would also help to ensure confidentiality for citizens seeking assistance from a municipal ombudsman comparable to the protection they would have if they sought assistance from the state ombudsman. HB 130 would correct the inequity that currently exists between citizens of municipalities that contract with the office of the state ombudsman for services and those that have established their own locally funded ombudsman's office.

AML supports the House Judiciary CS for HB 130, as amended.

# Municipality of Anchorage



P.O. BOX 196650  
ANCHORAGE, ALASKA 99518-6650  
(907) 343-4433  
TOM FINK,  
MAYOR

OFFICE OF THE MUNICIPAL MANAGER

February 28, 1991

Senator Arliss Sturgulewski  
Community and Regional Affairs Committee  
P.O. Box V  
Juneau, Alaska 99811

RE: SB 120, Municipal Ombudsman's Immunity

Dear Senator Sturgulewski:

Enclosed is the Municipality of Anchorage Administration's position paper on SB 120, an Act relating to immunity of a municipal ombudsman and staff and privilege of a municipal ombudsman and staff not to testify about certain matters.

The Administration opposes SB 120, however, if this legislation is to go forward, we recommend the amendments outlined in the attached position paper.

Sincerely,

Larry D. Crawford  
City Manager

Position Paper on SB 120

The Administration of the Municipality of Anchorage opposes SB 120, "An Act relating to immunity of a municipal ombudsman and staff and privilege of a municipal ombudsman and staff not to testify about certain matters." If this legislation is to go forward, at the minimum, the Administration recommends adoption of the following amendments:

1. On line 9, following "or charter", add the following new language: "unless the act, statement or omission constitutes gross negligence or reckless or intentional misconduct."

Rationale: The bill, as currently written extends blanket immunity to municipal ombudsmen and their staff. This is extraordinary and should not be granted without compelling justification. No such justification exists in the case of municipal ombudsmen. The proposed new language would limit the proposed immunity to acts, statements or omissions done with ordinary negligence. Acts, statements or omissions performed with gross negligence under the circumstances, or with recklessness or intention would not be immune.

The existing provisions of Title 24 also should include consideration of this amendment and the amendments set out below.

2. On line 9, following "or charter.", add the following sentence: "This subsection does not preclude liability for civil damages for public statements reflecting adversely upon a named individual without affording the individual a right to a written reply prior to making the statement."

Rationale: One of the great potentials for abuse of immunity granted to an ombudsman is to permit the ombudsman to make public statements regarding a named individual which may do great harm to the reputation of the individual, without affording the individual an opportunity for a reply. As currently written, this kind of immunity could be deemed a "license to defame", as the immunity is absolute and there is no requirement that statements be true. This kind of conduct, be it by a ombudsman or any person should not be licensed by statute.

If this amendment is added, the ombudsman remains free to issue reports and make recommendations regarding any action by the government or its agencies so long as individuals are not named.

3. On line 11, following "involving the exercise", delete "or purported exercise".

Rationale: The privilege not to testify in court may arguably make sense if it involves the actual exercise of responsibilities pursuant to statute. However, to extend that privilege to "purported exercises" of the ombudsman's responsibilities is unwarranted. Does such a privilege attach to acts undertaken in bad faith or with malice simply because they might constitute or "purport" to be within the ombudsman's responsibilities? This language is simply inappropriate. If there is to be a privilege not to testify, it should be confined to the exercise of actual duties.

4. Following line 13, add a new section to read as follows:

\*Section 2. This act shall not apply to any act, statement or omission committed prior to the effective date of this act, nor shall it apply to any judicial or administrative proceeding commenced prior to the effective date of this act.

Rationale: Makes clear that if this bill is enacted into law, it will not have a retroactive effect.



STATE OF ALASKA  
OFFICE OF THE GOVERNOR

FEB 20 1991

BILL ANALYSIS

DEPARTMENT DCRA	DIVISION MRAD	BILL NUMBER SB 120	SPONSOR Senator Collins
SHORT TITLE OF BILL An Act relating to immunity of a municipal ombudsman and staff...			
DEPARTMENT POSITION The department has no position.			
PREPARED BY Patrick Poland, Deputy Director	DATE 2/19/91	COMMISSIONER'S SIGNATURE <i>[Signature]</i>	DATE 2-20-91

SUMMARY

OTHER AGENCIES AFFECTED BY BILL None	CONSTITUENT GROUP(S) AFFECTED BY BILL. Unknown
ORGANIZATIONAL SUPPORT FOR BILL Unknown	ORGANIZATIONAL OPPOSITION TO BILL Unknown
FISCAL IMPACT: <input checked="" type="checkbox"/> NONE <input checked="" type="checkbox"/> FISCAL NOTE ATTACHED	

BACKGROUND/LEGISLATIVE INTENT

Very few other states, if any, give total immunity to their ombudsmen.

ANALYSIS OF BILL/PROGRAM EFFECTS

This bill would make a municipal ombudsman and staff immune from legal suit over actions taken on behalf of the municipality. To qualify for immunity, the action must be one that falls within the parameters of the charter or ordinance authorizing the office of municipal ombudsman.

The bill also exempts a municipal ombudsman from having to testify in court regarding any action taken as a municipal ombudsman.

Since this bill has no direct impact on the department, we are not taking an active position for or against the bill. The department does feel that public employees in general should be accountable for their actions. We would note also that, presently, firemen are the only municipal employees specifically cited in statute as being exempt from personal suit (AS 09.65.070[c]). All other municipal employees, from grader operators to policemen, are subject to the provision of AS 09.65.070.

AMENDMENTS PROPOSED

None

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

# ALASKA LEGISLATURE

## Committees

JUDICIARY  
LABOR & COMMERCE  
BUDGET SUBCOMMITTEE  
ADMINISTRATION

JURIEAU  
BOX V  
JURIEAU, ALASKA 99511  
(907) 465-2647  
ANCHORAGE  
BOX 10-1776  
ANCHORAGE, ALASKA 99510  
(907) 562-1776

**Kevin "Pat" Parnell**  
Representative  
University-Midtown, Anchorage

## MEMORANDUM

TO: Senator Steve Frank, Chair  
Senate Community and Regional Affairs Committee

FROM: Representative Kevin "Pat" Parnell *Kevin Pat Parnell  
4-22-91*

DATE: April 22, 1991

SUBJECT: Request for scheduling HB 130, relating to Municipal Ombudsman Immunity

I respectfully request that you consider scheduling an early hearing for CSHB 130 (JUD), which provides immunity for a municipal ombudsman and staff in the same fashion as granted to the state ombudsman in Alaska. It is sponsored by me and co-sponsored by representatives Donley, Koponen, Gruenberg, Grussendorf, Larson, Ivan, Davidson, Hudson, and Baker.

Passage will ensure that a municipal ombudsman in this state carry out his/her duties as prescribed by law without reservation. The potential was recognized for an ombudsman to hesitate to investigate certain matters, or reserve criticism of agencies and officials, based on a threat or fear of civil action being brought as a result of carrying out their official duties.

Passage will also provide citizens who wish to report matters to a municipal ombudsman, or witnesses coming before an ombudsman, the confidentiality to which they are entitled.

The American Bar Association adopted a resolution with model ombudsman ordinance statutes that include similar provisions. The courts have ruled valid the statutes protecting the ombudsman.

If you have any questions please let me know.



Official Business

# Alaska State Legislature

Senate

SENATOR VIRGINIA COLLINS

Pouch V  
State Capitol  
Juneau, Alaska 99811

## MEMORANDUM

TO: Senator Steve Frank, Chair  
Senate Community and Regional Affairs Committee

FROM: Senator Virginia Collins *VC*

DATE: April 22, 1991

RE: Request for hearing for HB 130, "An Act relating to immunity of a municipal ombudsman and staff and privilege of a municipal ombudsman and staff not to testify about certain matters"

---

I respectfully request that you schedule the above referenced bill for hearing at your earliest convenience. This bill is the companion bill to the one which I introduced, SB 120.

SB 120 passed out of your committee March 1, 1991 with 3 "do-passes," but is still in the Senate. Since the House companion bill, HB 120, has already passed the House and I feel this legislation is good and necessary legislation, I urge you to schedule HB 120 for hearing.

Thank you. Please do not hesitate to call me or Marveen at 465-2828 if you have any questions.

# Municipality of Anchorage



P.O. BOX 196650  
ANCHORAGE, ALASKA 99519-6650  
(907) 343-4433

TOM FINK,  
MAYOR

OFFICE OF THE MUNICIPAL MANAGER

April 30, 1991

Senator Steve Frank, Chairman  
Community and Regional Affairs Committee  
P.O. Box V  
Juneau, Alaska 99811

RE: HB 130, Municipal Ombudsman's Immunity

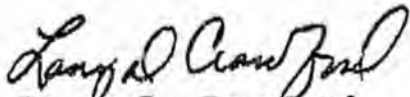
Dear Senator Frank:

HB 130 seeks to extend immunity from suit and a privilege not to testify to municipal ombudsman. Although a similar provision exists for the State ombudsman and the ombudsman of a couple of other states, the rationale for these privileges is not clear. With regard to the immunity that this proposed, it should be kept in mind that it is blanket immunity and extends to all acts of an ombudsman or member of the ombudsman staff. Therefore, even if acts involving gross negligence or intentional misconduct are involved, an individual harmed by those acts could not bring an action against the ombudsman or a member of the ombudsman's staff. This is unwarranted.

With regard to the privilege from testifying granted in the legislation, that privilege apparently extends even to criminal proceedings. Thus, if an ombudsman or member of an ombudsman's staff has knowledge of facts relevant to a criminal investigation, that individual can decline to testify before a grand jury. The search for truth in a criminal investigation should not be hampered this way.

The amendments to the original legislation in the House do not solve any of these problems, which have not been fully discussed by the Legislature. We believe it is poor public policy to create a special class of individual who is unaccountable for his or her actions and we urge you to address these issues during your deliberations on this bill.

Sincerely,

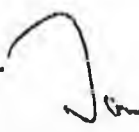
  
Larry D. Crawford  
Municipal Manager

ANCHORAGE SCHOOL DISTRICT  
ANCHORAGE, ALASKA

ASD MEMORANDUM #336 (90-91)

April 8, 1991

TO: SCHOOL BOARD

FROM: OFFICE OF THE SUPERINTENDENT 

SUBJECT: A RESOLUTION SUPPORTING STATE LEGISLATION TO PROVIDE MUNICIPAL OMBUDSMEN AND STAFF IMMUNITY AND PRIVILEGE NOT TO TESTIFY

RECOMMENDATION:

It is recommended that the School Board adopt the attached resolution entitled "A Resolution Supporting State Legislation To Provide Municipal Ombudsmen And Staff Immunity And Privilege Not To Testify."

PERTINENT FACTS:

The attached resolution supports state legislation that would provide Municipal Ombudsmen and staff immunity and privilege not to testify about certain matters (Attachment A). This information was forwarded to the Anchorage School District by the Municipal Ombudsman for action.

The immunity provision is intended to encourage impartial and independent investigations by an ombudsman by avoiding retaliatory or collateral attacks intended to influence his or her decisions. This legislation would not protect the ombudsman from accusations of "Official misconduct" or "Misuse of confidential information" (AS 11.56.850 and .860), or any other criminal statute.

The privilege not to testify provides citizens the right to confidentiality upon bringing an issue before an ombudsman, and protects the confidentiality of records obtained by an ombudsman, such as those that may be obtained from the Anchorage School District, that have privileged status.

Attachment B is a position paper on the subject which provides justification for the addition of those provisions for local ombudsmen. The American Bar Association, for example, includes the civil immunity provision as an essential element in establishing an ombudsman which they have encouraged for state and local governments.

The Anchorage Assembly passed unanimously a resolution, AR No. 91-45, in support of this legislation (Attachment C). House Bill No. 130 has passed through both the Community and Regional Affairs Committee and the Judiciary Committee where an amendment was added to define a municipal ombudsman along normally accepted standards (Attachment D). The companion Senate Bill No. 120 is awaiting their Judiciary Committee where it may face some difficult challenges (Attachment E).

TCO/GGB/cl

Attachments

PASSED BY THE  
ANCHORAGE SCHOOL BOARD  
APRIL 8, 1941, 9:00pm

ANCHORAGE SCHOOL BOARD

*A Resolution Supporting State Legislation To Provide  
Municipal Ombudsmen And Staff Immunity And  
Privilege Not To Testify*

*Whereas*, legislation has been introduced before the Alaska State Legislature in both the House and Senate to provide a municipal ombudsman and staff immunity from civil action and privilege not to testify about certain matters; and

*Whereas*, these two provisions are in the state statute which established the state ombudsman; and

*Whereas*, citizens seeking assistance from a municipal ombudsman should be afforded the same rights to confidentiality as if they sought assistance from the state ombudsman who also serves, under contract, a number of local communities; and

*Whereas*, these provisions may only be established by state statute rather than by local ordinance; and

*Whereas*, these provisions are consistent with the American Bar Association's Model Statute on Ombudsmen and the United States Association of Ombudsmen guidelines; and

*Whereas*, the legislation is in harmony with the Anchorage Municipal Charter and the Alaska State Constitution and will further enhance the benefits that citizens of this municipality have come to appreciate by having an ombudsman within their local government.

*Now Therefore Be It Resolved*, that the Anchorage School Board endorses legislation providing municipal ombudsmen and staff immunity and privilege not to testify, and urges passage by the Seventeenth Alaska State Legislature.

*Passed And Approved* this 8th day of April, 1991.

ANCHORAGE SCHOOL BOARD

*Sharon Richards*

Sharon Richards, President

Vince Casey  
Cabot Christianson  
Walter Featherly

Darryl Jordan  
Theresa Obermeyer  
Carol Stolpe

Thomas C. O'Rourke, Superintendent

Post-It <sup>®</sup> brand fax transmittal memo 7671		# of pages	1
To	Rep. <i>Panoff / Beckley</i>	From	<i>Mike Mills</i>
Co.	<i>House</i>	Co.	<i>MOA Ombudsman</i>
Dept.		Phone #	<i>343-4461</i>
Fax #	<i>463-5661</i>	Fax #	<i>343-4780</i>

Submitted by: Assembly Members  
Evans, Flynn  
Prepared by: Ombudsman  
For reading: March 5, 1991

ANCHORAGE, ALASKA  
AR NO. 91-45

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59

A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING STATE LEGISLATION TO PROVIDE MUNICIPAL OMBUDSMEN AND STAFF IMMUNITY AND PRIVILEGE NOT TO TESTIFY

WHEREAS, legislation has been introduced before the Alaska State Legislature in both the House and Senate to provide a municipal ombudsman and staff immunity from civil action and privilege not to testify about certain matters; and

WHEREAS, these two provisions are in the state statute which established the state ombudsman; and

WHEREAS, citizens seeking assistance from a municipal ombudsman should be afforded the same rights to confidentiality as if they sought assistance from the state ombudsman who also serves, under contract, a number of local communities; and

WHEREAS, these provisions may only be established by state statute rather than by local ordinance; and

WHEREAS, these provisions are consistent with the American Bar Association's Model Statute on Ombudsmen and the United States Association of Ombudsmen guidelines; and

WHEREAS, the legislation is in harmony with the Anchorage Municipal Charter and the Alaska State Constitution and will further enhance the benefits that citizens of this municipality have come to appreciate by having an ombudsman within their local government.

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

That this body endorses legislation providing municipal ombudsmen and staff immunity and privilege not to testify, and urges passage by the Seventeenth Alaska State Legislature.

PASSED AND APPROVED by the Anchorage Assembly this 5<sup>th</sup> day of March, 1991.

*Jim Kufitz*  
Chair

ATTEST:

*Lizanne Ferguson*  
Municipal Clerk  
*Deputy*

UNANIMOUSLY APPROVED ON MARCH 5, 1991



State of Alaska  
**Ombudsman**

Duncan C. Fowler

February 19, 1991

Representative Jerry Mackie, Chairman  
Community and Regional Affairs Committee  
Alaska State Legislature  
Post Office Box V  
Juneau, Alaska 99811-3100

RE: HB 130, Municipal Ombudsmen

Dear Representative Mackie:

Please consider this letter to be in support of HB 130. Its passage will provide protections to ombudsmen established by municipal ordinance similar to those granted ombudsmen in state government.

The Alaska Ombudsman Act, which established this office, and the statutes which established the Long Term Care Ombudsman have provisions similar to the proposed HB 130. Both laws grant the ombudsmen offices immunity from civil action, excuse the ombudsmen from testifying in court and have strict confidentiality provisions preventing the disclosure of file materials. HB 130 would insure municipal ombudsmen have similar protections.

The immunity from civil action, assurance of confidentiality of investigative files, and immunity from testifying in court are common elements in model ombudsman legislation promoted by both national and international organizations. These provisions are cited as being desirable by the International Bar Association's Ombudsman Committee, the American Bar association model law and the model ombudsman act proposed in the Harvard Law Review.

There are several practical effects of such provisions. Ombudsmen, by the nature of their work, continually deal with situations where two persons are in disagreement. Some citizens believe the way to resolve disagreements is in the courts. If possible, they would sue the ombudsman if they disagreed with the office's findings and recommendations. Although the ombudsman only has the power to recommend change, the information we obtain during the course of an investigation would be valuable to persons interested in suing the state. Some attorneys would like to rely on ombudsman staff to do their paralegal work.

It is important that ombudsmen have clear access to agencies and their records in order to make factual findings and practical recommendations. This can only be done if the agencies have confidence the ombudsman will be able to maintain the confidentiality of the materials. The investigative files should not be subject to subpoena nor the subject of testimony by ombudsman staff.

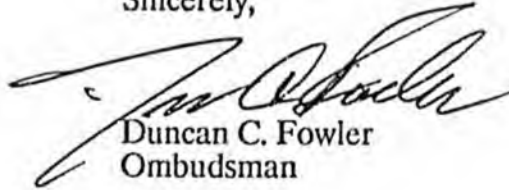
Reply to:

- P.O. Box 102638  
Anchorage, AK 99510-2638  
(907) 277-8848  
(800) 478-2624
- P.O. Box WO  
Juneau, AK 99811-3000  
(907) 465-4970  
(800) 478-4970
- P.O. Box 74358  
Fairbanks, AK 99707-4358  
(907) 452-4001  
(800) 478-3257

February 19, 1991

In summary, I do support the passage of HB 130. I believe passage will provide municipal ombudsman offices with protections that are consistent with model ombudsman laws. Please let me know if you have any other questions regarding ombudsmen and the effect of this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Duncan C. Fowler". The signature is fluid and cursive, with a large initial "D".

Duncan C. Fowler  
Ombudsman

DCF:pjc

## **Position Paper**

### **AN ACT TO PROVIDE MUNICIPAL OMBUDSMEN IMMUNITY AND PRIVILEGE NOT TO TESTIFY (SECTION 09.65.075)**

#### **A. Confidentiality / Privilege Not To Testify**

The ability for an ombudsman to effectively investigate complaints depends primarily on the ability to determine the facts surrounding the issue. Common among nearly all ombudsman offices is their authority to access essentially all information within their jurisdiction. Along with this power comes the requirement to protect information received which is confidential or privileged by law. Similarly, in an effort to ensure that an ombudsman is provided the most factual information possible from complainants or witnesses, their confidentiality is protected.

In order for an ombudsman to guarantee that these confidentiality laws are not violated and that citizens can continue to enjoy their right to speak freely to their ombudsmen, it is necessary to establish the privilege for an ombudsman and their staff not to testify in court regarding matters involving an ombudsman's official duties.

There is precedence for establishing this privilege not to testify for ombudsmen both on a national and international level. The State of Alaska specifically restricts the Ombudsman from testifying (Sec. 24.55.260); and the State of Nebraska prevents the Ombudsman from being required to testify or produce evidence (Sec. 81-8,253).

Common among nearly every classical ombudsman office is the provision to protect the confidentiality of certain individuals and information. The inclusion of specific language within a statute provides further clarification that an ombudsman should not be required to divulge information, or the identity of a complainant or a witness, which was received with the expectation of privacy. Case law is supportive of this protection at the state level, with Alaska contributing toward the courts' respect for the provisions contained within ombudsman statutes. Notwithstanding the limitations of states' statutes, the U. S. federal courts have exhibited considerable efforts in respecting the confidentiality provisions of state ombudsmen.

## **B. Immunity From Civil Action**

The structure of the classic ombudsman is designed to ensure that the ombudsman be provided the freedom to investigate any act or failure to act by an agency, official, or public employee with only specific exceptions. One of the essential provisions which the American Bar Association recommended in its 1969 Resolution promoting the establishment of ombudsmen within state and local governments was to provide immunity for ombudsmen and their staff from civil liability on account of official actions. Apparently the potential was recognized for an ombudsman to hesitate to investigate certain matters, or reserve criticism of agencies and officials, based on a threat or fear of civil action being brought as a result of carrying out their official duties.

The Immunity provision has been previously established at the local level as exemplified in the Charter of the City of Detroit (Sec. 4-315). The majority of classic ombudsman offices at state, provincial and national levels are provided protection from civil suits according to survey results from the International Ombudsman Institute. Many of these offices are protected from criminal suits as well; Hawaii and Puerto Rico among them. The Hawaii State Ombudsman also has jurisdiction over local governmental units.

## **SUMMARY**

The proposed amendments essentially allow duly established municipal ombudsmen the same protection from civil suits, and the privilege not to testify, as afforded our State Ombudsman. The benefits of these provisions within the Alaska State Ombudsman Statute have already reached certain local governments in this State by virtue of their contracting with the State Ombudsman for ombudsman services (i.e. Juneau). It would be consistent to include similar provisions as proposed for municipal ombudsmen.

Passage will ensure that municipal ombudsmen in this State carry out their duties as prescribed by law without reservation; and provide citizens who wish to report matters to an Ombudsman, or witnesses coming before an Ombudsman, the confidentiality to which they are entitled. . . .

The appendices, including model statutes from the American Bar Association and the Harvard Journal on Legislation, provide significant justification for passage of this legislation.

Prepared by:  
Michael P. Mills  
Municipal Ombudsman, Anchorage  
(Past President, U. S. Association of Ombudsmen)

# THE HOME RULE CHARTER

For  
The Municipality of Anchorage, Alaska

by  
Anchorage Area  
Charter Commission



September 16, 1975

## PREAMBLE

We, the People of Anchorage, in order to eliminate waste and duplication in government, to achieve common goals, to support individual rights, to form a more responsive government, and to secure maximum local control of local affairs, hereby establish this Charter.

## ARTICLE I NAME AND BOUNDARIES

### Section 1.01 Name

The municipality shall be known as Anchorage.

### Section 1.02 Boundaries

The boundaries of Anchorage shall include all areas within the Greater Anchorage Area Borough on the date of ratification of this Charter. The boundaries may be altered in the manner provided by law.

## ARTICLE II BILL OF RIGHTS

This Charter guarantees rights to the people of Anchorage that are in addition to rights guaranteed by the Constitution of the United States of America and the Constitution of the State of Alaska. Among rights guaranteed by this Charter are:

- (1) The right of initiative; the right of referendum; and the right to recall public officers, as herein provided.
- (2) The right of immunity from the creation or alteration of a service area, except upon a vote within the area affected.
- (3) The right to establish local community councils to assure maximum community self-determination, exercised in conjunction with others and without infringement upon the rights of other persons.
- (4) The right of immunity from sales taxes, except upon approval by a majority of qualified voters voting on the question.
- (5) The right of immunity from official actions of the Assembly taken after twelve midnight and before seven o'clock a.m., actual time.
- (6) The right to the assistance of a municipal ombudsman in dealing with grievances and abuses.
- (7) The right to opportunities in housing, public accommodations, employment, and education without regard to race, religion, sex, color, national origin, marital status, or physical handicap; and the right to an Equal Rights Commission at the municipal level in aid thereof.
- (8) The right to a locally directed, ongoing planning process that is based upon the community's goals, objectives and policies for the future.
- (9) The right—whether as a taxpayer, as a municipal employee, or both—to a comprehensive personnel classification and procedures system created by ordinance and based upon merit.
- (10) The right to be heard at public hearings prior to adoption of proposed six-year plans of the school system and the municipality, or approval of the annual budget or any ordinance (except an emergency ordinance as defined herein).

ffered in subsequent proced-  
-ent statements, and (2) pro-  
nt to attack or enforce a plea

ffective August 1, 1979)

#### ility Insurance.

erson was or was not insured  
ot admissible upon the issue  
gently or otherwise wrong-  
ntly require the exclusion of  
e against liability when offered  
e, such as proof of agency,  
l. or bias or prejudice of a wit-

effective August 1, 1979)

#### Annotations

endant's conduct to determine whether  
ropriate, it should make no difference that  
or uninsured; accordingly, where jury  
on on special verdict form on whether  
ative damages, exclusion of evidence of  
ror, merely harmless error, even though  
present evidence to demonstrate his  
ve damage award. *Shane v. Rhines*, Op.  
aska 1983).

#### vidence Illegally Obtained.

obtained shall not be used over  
he defendant in a criminal prose-  
-ose except:

llegally obtained in violation of  
- under *Miranda v. Arizona*, 384  
ay be used in a prosecution for  
ment is relevant to the issue of  
nd if the prosecution shows that  
otherwise voluntary and not

nce illegally obtained may be  
-ution for perjury if it is relevant  
nocence and if the prosecution  
-ence was not obtained in sub-  
-rights.

4 effective August 1, 1979)

#### Annotations

wful, fact that arresting officer uses exces-  
-: the evidence obtained as a result of the  
-ality. *Martin v. State*, Op. No. 2298, 623

ence may be considered in fashioning a  
-ally seized evidence is reliable, when the  
- in obtaining the evidence does not shock  
-art, and when it is clear that the evidence  
-poses of influencing the sentencing judge.  
-40, 633 P2d 292 (Alaska App. 1982).

The traditional requirement of standing has not been abrogated  
in search and seizure cases by adoption of this rule. *G.R. v. State*,  
Op. No. 61, 638 P2d 191 (Alaska App. 1982).

Defendant did not have standing to argue that his confession  
should be suppressed on the ground that it was the product of an  
illegal arrest and detention of his companion. *G.R. v. State*, Op. No.  
61, 638 P2d 191 (Alaska App. 1981).

Defendant had no standing to object to police officers' contact  
with his building manager and no right to seek suppression of the  
evidence derived from her even if the contact was the result of a  
trespassory entrance into the apartment building. *Hubert v. State*,  
Op. No. 62, 638 P2d 677 (Alaska App. 1981).

Defendant had standing to contest the illegal arrest of codefend-  
ant which led to defendant's confession. *Unger v. State*, Op. No. 65,  
640 P2d 151 (Alaska App. 1982).

This rule, which permits evidence illegally obtained to be used  
under certain circumstances in perjury prosecutions, applies to  
such evidence regardless of the basis for determining that it was  
illegally obtained. *Wortham v. State*, Op. No. 69, 641 P2d 221  
(Alaska Op. No. 1982).

Suppression of illegally obtained evidence in defendant's  
cocaine prosecution was not res judicata nor did it collaterally estop  
the state from using the evidence in defendant's subsequent perjury  
prosecution where there was no suggestion that this rule was consid-  
ered at the first suppression hearing. *Wortham v. State*, Op. No. 69,  
641 P2d 223 (Alaska App. 1982).

Illegally obtained tape recording of conversation between  
defendant and undercover police agent which was properly sup-  
pressed at defendant's drug trial was admissible at defendant's  
subsequent perjury trial where the recording was made in good faith  
and was not an intentional violation of the law. *Wortham v. State*,  
Op. No. 214, 657 P2d 856 (Alaska App. 1983).

Although this rule is not necessarily limited to violations of  
constitutional rights, it does not automatically apply to violations  
of all statutes. *Harker v. State*, Op. No. 2665, 663 P2d 932 (Alaska  
1983).

Illegally obtained tape recording of conversation between  
defendant and undercover police agent was admissible at defend-  
ant's perjury trial. *Wortham v. State*, Op. No. 2697, 666 P2d 1042  
(Alaska 1983).

This rule contains a standing requirement for search and sei-  
-zure violations, but under the Alaska Constitution there are excep-  
-tions to the requirement. *Waring v. State*, Op. No. 2719, 670 P2d  
357 (Alaska 1982).

A defendant has standing to assert the violation of a co-defend-  
ant's fourth amendment rights if he or she can show (1) that a police  
officer obtained the evidence as a result of gross or shocking mis-  
conduct, or (2) that the officer deliberately violated the co-defend-  
ant's rights. *Waring v. State*, Op. No. 2719, 670 P2d 357 (Alaska  
1983).

Assuming, without deciding, that the warnings received by  
defendant regarding his testimony at a coroner's inquest were less  
than adequate to safeguard his right to remain silent, his testimony  
was nevertheless not involuntary or the product of coercion; there-  
fore, his testimony at the coroner's inquest could be used against  
him in subsequent trial for perjury. *Esmailka v. State*, Op. No. 721,  
740 P2d 466 (Alaska App. 1987).

## ARTICLE V. PRIVILEGES

### Rule 501. Privileges Recognized Only as Provided.

Except as otherwise provided by the Constitution  
of the United States or of this state, by enactments of

the Alaska Legislature, or by these or other rules  
promulgated by the Alaska Supreme Court, no per-  
son, organization, or entity has a privilege to:

- (1) refuse to be a witness; or
- (2) refuse to disclose any matter; or
- (3) refuse to produce any object or writing; or
- (4) prevent another from being a witness or dis-  
-closing any matter or producing any object or writ-  
-ing.

(Added by SCO 364 effective August 1, 1979)

### Rule 502. Required Reports Privileged by Statute.

A person, corporation, association, or other orga-  
-nization or entity, either public or private, making a  
return or report required by law to be made has a  
privilege to refuse to disclose and to prevent any  
other person from disclosing the return or report, if  
the law requiring it to be made so provides. A public  
officer of an agency to whom a return or report is  
required by law to be made has a privilege to refuse  
to disclose the return or report if the law requiring it  
to be made so provides. No privilege exists under  
this rule in actions involving perjury, false state-  
-ments, fraud in the return or report, or other failure  
to comply with the law in question.

(Added by SCO 364 effective August 1, 1979)

### Rule 503. Lawyer-Client Privilege.

(a) Definitions. As used in this rule:

(1) A client is a person, public officer, or corpora-  
-tion, association, or other organization or entity,  
either public or private, who is rendered profes-  
-sional legal services by a lawyer, or who consults a  
lawyer with a view to obtaining professional legal  
services.

(2) A representative of the client is one having  
authority to obtain professional legal services and to  
act on advice rendered pursuant thereto, on behalf of  
the client.

(3) A lawyer is a person authorized, or reason-  
-ably believed by the client to be authorized, to prac-  
-tice law in any state or nation.

(4) A representative of the lawyer is one  
employed to assist the lawyer in the rendition of  
professional legal services.

(5) A communication is confidential if not  
intended to be disclosed to third persons other than  
those to whom disclosure is in furtherance of the  
rendition of professional legal services to the client  
or those reasonably necessary for the transmission of  
the communication.

most privileges are such that they can be equally well served by the creation of substantive rights by the legislature or procedural rights by the courts. There may be cases in which a determination of their character—*i.e.*, procedural or substantive—will have to be made in order to decide whether article IV, section 15 of the Alaska Constitution has been satisfied (requiring a two-thirds vote of the legislature to supersede rules of practice and procedure promulgated by the Supreme Court). But such cases may never arise and it would be premature to comment upon them in advance.

### Rule 501. Privileges Recognized Only As Provided.

This rule codifies the existing law that privileges are not recognized in the absence of statutes or rules specifically providing for them. No attempt is made in these rules to incorporate the constitutional provisions which relate to the admission and exclusion of evidence, whether denominated as privileges or not. Similarly, privileges created by specific statutes generally are not within the scope of these rules. *E.g.*, AS 09.25.150-220 (public officials, reporters); AS 24.55.260 (ombudsman).

Although Federal Rule 501 adopts state created privileges whenever state law governs with respect to any element of a claim of defense, this Rule does not adopt the converse; *i.e.*, except in unusual cases, federal privileges will not govern in Alaska courts even though federal law provides the rule of decision with respect to any element of a claim or defense. Some commentators have suggested that the approach taken by this rule is so plainly correct that explanation is unnecessary. *See, e.g., Hart, The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954) ("The general rule . . . is that federal law takes the state courts as it finds them . . . [S]tate rules . . . may ordinarily be applied also to federal claims and defense . . ."); Ladd, *Privileges*, 1969 *Law & Social Order* 555, 560 ("If the action arose in a state court upon a matter involving a federal question, it would appear impossible to prevent the state court from using state privileges . . ."). But, in view of *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 96 L. Ed. 398 (1952), and *Brown v. Western Ry.*, 338 U.S. 294, 94 L. Ed. 100 (1949), a few words are in order.

In the vast majority of federal cases, state law issues are not so intertwined with federal questions that deference to state policies that both govern primary human conduct and possibly affect the outcome of litigation in important ways imposes much of an incremental burden on the judges who must determine state substantive law. Indeed, Congress has not only restricted the power of the Supreme Court to modify state created substantive rights, 28 U.S.C.A. § 2072 (West Cum. Supp. 1978), but has itself demonstrated respect for state law in Rule 501.

On the other hand, federal law, especially federal constitutional questions, may arise throughout state litigation. To separate federal and state issues could be an enormous burden on state judges. Federal issues have been decided by state courts from the nation's beginning. There is no indication that the Congress is unhappy with the results. Since state law governs most conduct of most citizens, its rules of privilege are especially important to citizens seeking guidance as to what is and is not privileged. Hence, state privilege law will govern in all litigation in Alaska state courts, unless the supremacy clause of the United States Constitution requires otherwise.

This rule is drawn from proposed federal rule 501. However, it adds language to make clear that *persons* protected by privileges can include organization and government entities.

Despite these rules, claims of privilege at times may have to give way to constitutionally protected rights, especially in criminal cases. *See, e.g., Salazar v. State*, 559 P.2d 66 (Alaska 1976).

On the other hand, claims of privilege themselves may have roots in the Constitution. The attorney-client privilege is not unrelated to the right to counsel guaranteed all citizens in all but the most petty criminal cases. And the marital communications privilege reflects an ideal of privacy and special relationship that has received constitutional protection in other contexts. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510 (1965). The communications to clergymen privilege and the political vote privilege are related to first amendment concepts. Recently, the Alaska Supreme Court has suggested that the doctor-patient privilege has constitutional overtones. *See, e.g., Falcon v. Alaska Public Offices Commission*, 570 P.2d 469 (Alaska 1977).

### Rule 502. Required Reports Privileged by Statute.

This rule provides that any person, organization, or entity required by law to furnish certain information to the government has a privilege to refuse to disclose the information provided, if such a privilege is provided for by the governing statute. A claim of privilege can be invoked to prevent any person from disclosing the information, and a public officer or agency that receives information may refuse to disclose it if the governing legislation so provides. The rule extends to reports required by the federal government, the State of Alaska, and other states.

In light of Rule 501, Rule 502 is redundant in its reference to the State of Alaska. Rule 501 establishes that privileges can be created by these rules or by enactments of the Alaska legislature. It is therefore clear that even without Rule 502 any privilege provided for by statute would be recognized. *See, e.g., AS 28.35.120*. Despite the redundancy, Rule 502

Article 6. Abuse of Public Office.

Section

850. Official misconduct

860. Misuse of confidential information

**Collateral references.** — 63 Am. Jur. 2d, Public Officers and Employees, §§ 346-359.

67 C.J.S., Officers, §§ 120-126, 255-263. Infamous crime or one involving moral turpitude constituting disqualification to hold public office, 52 ALR2d 1314.

Official oppression, what constitutes offense of, 83 ALR2d 1007.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest law breaker, 41 ALR3d 700.

Removal of public officer for misconduct during previous term, 42 ALR3d 691.

Validity and construction of statute authorizing grand jury to submit report concerning public servant's noncriminal misconduct, 63 ALR3d 586.

Sexual misconduct or irregularity amounting to "conduct unbecoming an officer," justifying officer's demotion or removal or suspension from duty, 9 ALR4th 614.

**Sec. 11.56.850. Official misconduct.** (a) A public servant commits the crime of official misconduct if, with intent to obtain a benefit or to injure or deprive another person of a benefit, the public servant

(1) performs an act relating to the public servant's office but constituting an unauthorized exercise of the public servant's official functions, knowing that that act is unauthorized; or

(2) knowingly refrains from performing a duty which is imposed upon the public servant by law or is clearly inherent in the nature of the public servant's office.

(b) Official misconduct is a class A misdemeanor. (§ 6 ch 166 SLA 1978)

**Sec. 11.56.860. Misuse of confidential information.** (a) A person who is or has been a public servant commits the crime of misuse of confidential information if the person

(1) learns confidential information through employment as a public servant; and

(2) while in office or after leaving office, uses the confidential information for personal gain or in a manner not connected with the performance of official duties other than by giving sworn testimony or evidence in a legal proceeding in conformity with a court order.

(b) As used in this section, "confidential information" means information which has been classified confidential by law.

(c) Misuse of confidential information is a class A misdemeanor. (§ 6 ch 166 SLA 1978)

Section

900. Definitions

**Sec. 11.56.900** requires otherwise.

(1) "improperly witness to

(A) testify false hold testimony in

(B) avoid or attempt to testify in an official proceeding has issued;

(C) be absent from being summoned;

(D) engage in conduct

(2) "judicial officer" chief justice, a justice of the court, a district court judge,

(3) "juror" means a person who has been sworn as a juror;

(4) "physical evidence" or other thing of value;

(5) "testimony" means other material that is given in a proceeding;

(6) "witness" means

(A) a witness summoned to testify;

(B) a person who is present in an official proceeding.

(§ 20 ch 12 SLA 1978)

**Cross references.** — terms used in this title,

Applied in State v. F 613 (Alaska Ct. App. 1988)

Quoted in State v. Jo (Alaska Ct. App. 1988)

**Sec. 24.55.200. Publication of recommendations.** Within a reasonable amount of time after the ombudsman reports the opinion and recommendations to an agency the ombudsman may present the opinion and recommendations to the governor, the legislature, a grand jury, the public or any of these. The ombudsman shall include with the opinion any reply made by the agency. (§ 1 ch 32 SLA 1975)

**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 the ombudsman and by the agency. (§ 1 ch 32 SLA 1975)

**Article 5. Miscellaneous.**

<b>Section</b>	<b>Section</b>
220. Misconduct by agency personnel	270. Letters to or from ombudsman
230. Annual report	275. Contract procedures
240. Judicial review	280. Time for judicial review of agency action
250. Immunity of the ombudsman	290. Penalty
260. Ombudsman's privilege not to testify	

**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 the officer's or employee's official duties, the ombudsman shall refer the matter to the chief executive officer of the agency or, when appropriate, to a grand jury or to another appropriate official or agency. (§ 1 ch 32 SLA 1975)

**Sec. 24.55.230. Annual report.** The ombudsman shall submit to the legislature and the public an annual report of the ombudsman's activities under this chapter. (§ 1 ch 32 SLA 1975)

**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. (§ 1 ch 32 SLA 1975)

**Sec. 24.55.250. Immunity of the ombudsman.** A civil action may not be brought against the ombudsman or a member of the ombudsman's staff for anything done, said or omitted in performing the ombudsman's duties or responsibilities under this chapter. (§ 1 ch 32 SLA 1975)

**Sec. 24.55.200. Ombudsman's privilege not to testify.** The ombudsman and the staff of the ombudsman 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. (§ 1 ch 32 SLA 1975)

**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. (§ 1 ch 32 SLA 1975)

**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. (§ 4 ch 144 SLA 1982)

**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. (§ 1 ch 32 SLA 1975)

**Sec. 24.55.290. Penalty.** A person who wilfully hinders the lawful actions of the ombudsman or the staff of the ombudsman, or who wilfully refuses to comply with their lawful demands, or who wilfully violates AS 24.55.270, is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than \$1,000. (§ 1 ch 32 SLA 1975)

**Article 6. General Provisions.**

<b>Section</b>	<b>Section</b>
300. Administrative Procedure Act	330. Definitions
310. Conflict of interest	340. Short title
320. Municipalities	

**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 AS 24.55.090. (§ 1 ch 32 SLA 1975)

**Sec. 24.55.200. Publication of recommendations.** Within a reasonable amount of time after the ombudsman reports the opinion and recommendations to an agency the ombudsman may present the opinion and recommendations to the governor, the legislature, a grand jury, the public or any of these. The ombudsman shall include with the opinion any reply made by the agency. (§ 1 ch 32 SLA 1975)

**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 the ombudsman and by the agency. (§ 1 ch 32 SLA 1975)

**Article 5. Miscellaneous.**

<b>Section</b>	<b>Section</b>
220. Misconduct by agency personnel	270. Letters to or from ombudsman
230. Annual report	275. Contract procedures
240. Judicial review	280. Time for judicial review of agency action
250. Immunity of the ombudsman	290. Penalty
260. Ombudsman's privilege not to testify	

**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 the officer's or employee's official duties, the ombudsman shall refer the matter to the chief executive officer of the agency or, when appropriate, to a grand jury or to another appropriate official or agency. (§ 1 ch 32 SLA 1975)

**Sec. 24.55.230. Annual report.** The ombudsman shall submit to the legislature and the public an annual report of the ombudsman's activities under this chapter. (§ 1 ch 32 SLA 1975)

**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. (§ 1 ch 32 SLA 1975)

**Sec. 24.55.250. Immunity of the ombudsman.** A civil action may not be brought against the ombudsman or a member of the ombudsman's staff for anything done, said or omitted in performing the ombudsman's duties or responsibilities under this chapter. (§ 1 ch 32 SLA 1975)

**Sec. 24.55.260. Ombudsman's privilege not to testify.** The ombudsman and the staff of the ombudsman 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. (§ 1 ch 32 SLA 1975)

**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. (§ 1 ch 32 SLA 1975)

**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. (§ 4 ch 144 SLA 1982)

**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. (§ 1 ch 32 SLA 1975)

**Sec. 24.55.290. Penalty.** A person who wilfully hinders the lawful actions of the ombudsman or the staff of the ombudsman, or who wilfully refuses to comply with their lawful demands, or who wilfully violates AS 24.55.270, is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than \$1,000. (§ 1 ch 32 SLA 1975)

**Article 6. General Provisions.**

<b>Section</b>	<b>Section</b>
300. Administrative Procedure Act	330. Definitions
310. Conflict of interest	340. Short title
320. Municipalities	

**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 AS 24.55.090. (§ 1 ch 32 SLA 1975)

## Appendix

- A. University of Miami Law Review (Spring 1975)  
American Bar Association Model Ombudsman Statute for State Governments  
*Q. Section 17. Ombudsman's Immunities and C. Section 3. Definitions*  
Comment by Bernard Frank, Chairman, Ombudsman Committee, ABA.
  
- B. American Bar Association Model Ombudsman Statute *Background Summary*  
Ombudsman Committee Chairman Bernard Frank.
  
- C. American Bar Association Resolution (1969).  
*Dealing with Establishment of an Ombudsman*
  
- D. Harvard Journal on Legislation (June 1965)  
*A State Statute to Create the Office of Ombudsman*  
Sections 603, 604 & 605, and Comment.
  
- E. International Bar Association, Ombudsman Committee Letter (November 1978)  
Chairman Bernard Frank to MOA Ombudsman, Karla L. Forsythe  
*Necessity of State Statute for Municipal Ombudsman Protection.*
  
- F. Anchorage Municipal Attorney Memorandum (July 1990)  
*Lack of Privilege Not to Testify.*
  
- G. Alaska Statute: *Sec. 24.55.240-260, Office of The Ombudsman*
  
- H. Alaska Statute: *Sec. 44.21.231, 235 & 236, Long Term Care Ombudsman*
  
- I. International Ombudsman Institute Report (July 1986)  
*Court Cases of Special Interest to the Ombudsman Institution*  
(Excerpts from United States court cases)

# university of miami law review

VOLUME 29

SPRING 1975

NUMBER 3

## STATE OMBUDSMAN LEGISLATION IN THE UNITED STATES

BERNARD FRANK\*

✓ I. INTRODUCTION .....	397
✓ II. THE ABA MODEL OMBUDSMAN STATUTE FOR STATE GOVERNMENTS** .....	402
A. <i>Legislative Purpose</i> .....	402
B. <i>Short Title</i> .....	403
✓ C. <i>Definitions</i> .....	404
D. <i>Creation of Office</i> .....	409
E. <i>Nomination and Appointment</i> .....	409
F. <i>Qualifications</i> .....	410
G. <i>Term of Office</i> .....	413
H. <i>Removal and Vacancy</i> .....	414
I. <i>Compensation</i> .....	416
J. <i>Organization of Office</i> .....	417
K. <i>Powers</i> .....	420
L. <i>Investigation of Complaints</i> .....	426
M. <i>Rights of Complainant—Communication with Complainant</i> .....	430
N. <i>Rights of Agency</i> .....	432
O. <i>Recommendations</i> .....	434
P. <i>Reports</i> .....	437
✓ Q. <i>Ombudsman's Immunities</i> .....	439
R. <i>Witnesses' Privileges</i> .....	441
S. <i>Obstruction</i> .....	441
T. <i>Relation to Other Laws</i> .....	442
U. <i>Appropriation</i> .....	443
V. <i>Effective Date</i> .....	443
W. <i>Severability</i> .....	443
III. CONCLUSIONS .....	444

### I. INTRODUCTION

Year after year, Ombudsman proposals have been introduced in a majority of the state legislatures in the United States.<sup>1</sup> Legislation has been passed for state-wide Ombudsmen in Hawaii, Nebraska, Iowa, and Alaska.<sup>2</sup> The word "Ombudsman," Swedish in origin, means...

1975]

STATE OMBUDSMAN LEGISLATION

439

#### Q. Section 17. Ombudsman's Immunities

(a) NO PROCEEDING, CONCLUSION, RECOMMENDATION, OR REPORT OF THE OMBUDSMAN OR MEMBER OF HIS STAFF SHALL BE REVIEWABLE IN ANY COURT;

(b) THE OMBUDSMAN AND HIS STAFF SHALL HAVE THE SAME IMMUNITIES FROM CIVIL AND CRIMINAL LIABILITIES AS A JUDGE OF THIS STATE.

(c) THE OMBUDSMAN AND HIS STAFF SHALL NOT BE COMPELLED TO TESTIFY OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING WITH RESPECT TO ANY MATTER INVOLVING THE EXERCISE OF THEIR OFFICIAL DUTIES EXCEPT AS MAY BE NECESSARY TO ENFORCE THIS ACT.

ABA  
MODEL  
STATUTE

COMMENT. (a) Sub-section (a) precludes judicial review of the Ombudsman's work, unless, of course, he has violated the Act.

(b) This sub-section avoids litigation and harassment by an uncooperative agency, but does not preclude

## UNIVERSITY OF MIAMI LAW REVIEW [Vol. XXIX]

prosecution for serious misconduct, or removal from office (§ 8(a)).

(c) This sub-section acts with § 11(h) to protect the secrecy and confidentiality of information obtained—in order to instill public confidence in his work; it also prevents unnecessary interruptions of his work to testify, while allowing him to proceed in court whenever necessary (§ 11(i)).

Section 17(a) precludes judicial review of the proceedings, conclusions, recommendations, or reports of the Ombudsman or members of his staff. Judicial review is likewise forbidden in the Nebraska statute and the Hawaii statute except if in Hawaii the Ombudsman contravenes the provisions of the statute.<sup>79</sup> The Iowa law is silent on the subject. It would seem to be implicit in the ABA Model Statute and the Nebraska statute that if the Ombudsman violates the Ombudsman statute his actions are subject to court review.

Section 17(b) further provides that the Ombudsman and staff shall have the same immunities from civil and criminal liabilities as a judge of the state. Somewhat similar language is used in the Hawaii statute except staff are omitted.<sup>80</sup> Iowa provides for no civil action except removal from office under Iowa law against the Citizens' Aide or his staff unless an act or omission is actuated by malice or is grossly negligent.<sup>81</sup> There is no provision in the Nebraska statute with respect to immunity from civil and criminal liabilities.

Section 17(c) specifically gives the Ombudsman and his staff immunity from being compelled to testify or produce evidence in any judicial or administrative proceeding with respect to any matter involving the exercise of their official duties except such testimony or evidence that might be necessary to enforce the Act. Somewhat similar language is used in the Nebraska statute as to both judicial or administrative proceedings and in the Hawaii and Iowa statutes as to court proceedings.<sup>82</sup> As written, the Ombudsman and his staff may voluntarily testify, but cannot be compelled to do so at least in the state courts. It is the inability to compel the Ombudsman and his staff to testify in the state courts which protects the confidentiality of the information obtained by the Ombudsman. Application of the privileged communication immunity by statute to the activities of the Ombudsman is important to the Ombudsman office. However, it is submitted that the state Ombudsman and his staff can be compelled to testify in the federal courts<sup>82a</sup>—a problem which would have to be

79. NEB. REV. STAT. § 81-8,253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968).

80. HAWAII REV. STAT. § 96-17 (1968).

81. IOWA CODE ANN. § 601G.20 (Supp. 1974).

82. NEB. REV. STAT. § 81-8,253 (Supp. 1969); HAWAII REV. STAT. § 96-17 (1968); IOWA CODE ANN. § 601G.20 (Supp. 1974).

82a. Raymond A. Cornell, Deputy Citizen's Aide for Corrections, Iowa, was subpoenaed to

resolved by appropriate federal legislation.<sup>83</sup> That a complaint-handling official appointed by, responsible to, and serving at the pleasure of the executive has no immunity at all, is one of the reasons the use of the term "Ombudsman" should be confined to those coming within the definition given at the outset of this article.

## UNIVERSITY OF MIAMI LAW REVIEW [Vol. XXIX

## C. Section 3. Definitions

AS USED IN THIS ACT,

(a) "AGENCY" MEANS ANY DEPARTMENT, ORGANIZATION, BOARD, COMMISSION, COUNCIL, INSTITUTION OR OTHER GOVERNMENTAL ENTITY OF \_\_\_\_\_  
[NAME OF STATE], AND ANY OFFICIAL, OFFICER, EMPLOYEE, OR MEMBER THEREOF ACTING OR PURPORTING TO ACT BY REASON OF HIS CONNECTION WITH \_\_\_\_\_

[NAME OF STATE], EXCEPT:

(1) ANY COURT, OR JUDGE AND APPURTENANT JUDICIAL STAFF;

(2) THE LEGISLATURE, ITS MEMBERS, ITS COMMITTEES, ITS STAFF AND ITS EMPLOYEES;

(3) THE GOVERNOR AND HIS PERSONAL STAFF;

[(4) (ALTERNATE A) ANY POLITICAL SUBDIVISION OF THE STATE;]

[(4) (ALTERNATE B) MAYORS, COUNCIL MEMBERS, AND JUDGES OF ANY POLITICAL SUBDIVISION AND THEIR PERSONAL STAFFS;]

(5) ANY MULTI-STATE GOVERNMENTAL ENTITY.

(b) AN "ACT OF AN AGENCY" MEANS ANY ACTION, DECISION, FAILURE TO ACT, OMISSION, RULE OR REGULATION, INTERPRETATION, RECOMMENDATION, POLICY, PRACTICE OR PROCEDURE OF ANY AGENCY.

(c) "PERSON" MEANS ANY INDIVIDUAL, AGGREGATE OF INDIVIDUALS, CORPORATION, PARTNERSHIP, OR UNINCORPORATED ASSOCIATION.

## COMMENT.

1. ...

4. Local government exclusion from or inclusion in the Ombudsman's jurisdiction is left to the decision of the legislature. If political subdivisions are to be excluded (as in Nebraska), appropriate language is recommended in the ABA Model Statute. If local government is to come within the jurisdiction of the Ombudsman, then the ABA Model Statute recommends that the phrase "and local" be included in the legislative purpose (section one) and further that consideration be given to exclude in the section three definition of "agency" certain local officials. Both Iowa and Hawaii have jurisdiction over

19. IOWA CODE ANN. § 601G.1-2(a) (Supp. 1974); NEB. REV. STAT. § 81-3,240(1) (Supp. 1969).

20. HAWAII REV. STAT. § 96-1(a)(1) (Supp. 1974).

21. HAWAII REV. STAT. § 96-1(a)(2) (1968); IOWA CODE ANN. § 601G.1-2(b) (Supp. 1974).

22. NEB. REV. STAT. § 81-3,240(1)(b) (Supp. 1969).

23. HAWAII REV. STAT. § 96-1(a)(1) (Supp. 1974).

## UNIVERSITY OF MIAMI LAW REVIEW [Vol. XXIX]

local government, but only the Hawaii law makes provision (by a 1974 amendment) for an exclusion for mayors and councils of the various counties.<sup>24</sup>

It is appropriate to discuss at this point several problems in connection with local government. It is obvious that omitting local government from the jurisdiction of the state Ombudsman does not prevent the creation of the office by a political subdivision of the state. On the other hand, the comment to section one does raise the question (originally posed by Professor L. Harold Levinson, a member of the Ombudsman Committee) whether inclusion of local government will be interpreted as preempting to the state jurisdiction over both state and local agencies to prevent a local government from establishing its own local Ombudsman. The ABA Model Statute does not address this point, but this writer believes that the question must be answered in the affirmative. The problem of immunities of the local Ombudsman discussed hereafter under section 17 points to the desirability of state legislation covering the subject of local government. Either a state should give its Ombudsman jurisdiction over both local and state agencies or a state should have several statutes, one permitting local government to establish a local Ombudsman under the detailed provisions of a state statute and the other establishing a state Ombudsman without local jurisdiction.<sup>25</sup>

Another possible alternative suggested by Professor Levinson is to have a statute provide for a state-wide Ombudsman without local jurisdiction but to give enabling authority for any local government to establish a local Ombudsman with essentially the same attributes and powers, subject to some variations.<sup>26</sup>

5. It is made clear in the ABA Model Statute and the three state statutes that multi-state government entities are exempt from the jurisdiction of the Ombudsman.<sup>27</sup> However, the language of the ABA Model Statute and the Hawaii statute is preferable, because of its simplicity, to the language of the Nebraska and Iowa statutes, the latter stating, "any instrumentality formed pursuant to an interstate compact and answerable to more than one state."

6. The ABA Model Statute like Iowa does not specify an exclusion for federal agencies because it was deemed superfluous in view of constitutional limitations. However, the Hawaii and Nebraska statutes do contain such an explicit exclusion.<sup>28</sup>

24. HAWAII REV. STAT. § 96-11(a)(7)(8) (Supp. 1974).

25. For example, the Georgia legislature passed in 1974, H.B. 35 amending the Atlanta City Charter providing for an Ombudsman. On opinion of the City Attorney to the effect that the state law was improper, the City Council passed its own Ombudsman ordinance.

26. Letters from Professor L. Harold Levinson to Bernard Frank, Oct. 30, 1973, and Jan. 11, 1974.



# AMERICAN BAR ASSOCIATION

## SECTION OF ADMINISTRATIVE LAW

### CHAIRMAN

Frank M. Wozencraft  
3006 One Shell Plaza  
Houston, TX 77002

### CHAIRMAN-ELECT

Marion Edwyn Harrison  
Suite 500  
1701 Pennsylvania, Ave.  
Washington, DC 20006

### SECRETARY

Willis B. Snell  
1666 K St., N.W.  
Washington, DC 20006

### BUDGET OFFICER

Charles Ellinger Smoot  
2006 Columbia Rd., N.W.  
Washington, DC 20009

### SECTION DELEGATE TO HOUSE OF DELEGATES

Franklin M. Schultz  
Suite 800  
588-17th St., N.W.  
Washington, DC 20006

### COUNCIL MEMBERS

Louis J. Hector  
Miami, FL

Nell B. Kabschnick  
Washington, DC

Jack L. Lahr  
Washington, DC

Jerro S. Williams  
Austin, TX

Frederick Davis  
Columbia, MO

Harbert E. Forrest  
Washington, DC

Carroll L. Gilliam  
Washington, DC

Victor G. Rosenblum  
Chicago, IL

William F. Cottrell  
Chicago, IL

Roger C. Cramton  
Ithaca, NY

Joel E. Hoffman  
Washington, DC

Richard E. Wiley  
Washington, DC

### LAST RETIRING

#### CHAIRMAN

John T. Miller, Jr.  
Washington, DC

### CHAIRMAN, DIVISION OF STATE ADMINISTRATIVE LAW

Geoffrey C. Hazard, Jr.  
New Haven, CT

### Chairman, Legislative

Activity Committee  
William H. Allen  
Washington, DC

### Editor-in-Chief

Administrative  
Law Review  
Daniel J. Baum  
Toronto, Canada

You will find attached a Model Ombudsman Statute for State Governments (pages 1-15), the American Bar Association resolution on the Ombudsman (page 16), and a recommended bibliography on the Ombudsman (pages 17-19).

The Ombudsman Committee, Section of Administrative Law, American Bar Association, concluded several years ago that a uniform State Ombudsman Act was not needed in this country but that a Model Ombudsman Statute would serve a very useful purpose.

At the request of the Ombudsman Committee, Yale Legislative Services undertook to prepare a Model Ombudsman Statute for State Governments. Edward G. Grossman, a student at Yale University Law School, acted as project co-ordinator and prepared a first draft of a Model Ombudsman Statute for State Governments. The Model Statute as prepared by Yale Legislative Services was reviewed by a special committee of the Ombudsman Committee and the comments of the committee members are reflected in the final draft of the Model Statute attached hereto. The Model Statute draws heavily on Professor Walter Gellhorn's Unofficial Model Ombudsman Statute. Professor Gellhorn, who is a member of the special committee, gave his consent to the use of his Unofficial Model Ombudsman Statute as a base to prepare the Model Ombudsman Statute for State Governments.

The Model Ombudsman Statute for State Governments meets the twelve (12) essentials of an Ombudsman Statute set forth in the resolution adopted by the House of Delegates of the American Bar Association in 1969 as recommended by the Ombudsman Committee then headed by Professor Kenneth Culp Davis and amended in 1971.

This Model Ombudsman Statute for State Governments is issued by the Ombudsman Committee, Section of Administrative Law, American Bar Association, but represents a joint work product of the Yale Legislative Services and the Ombudsman Committee, Section of Administrative Law, American Bar Association. The bibliography was prepared by Mr. Grossman.

The Ombudsman Committee extends its appreciation to Yale Legislative Services and to Edward G. Grossman.

Bernard Frank, Chairman  
Ombudsman Committee  
Section of Administrative Law  
American Bar Association  
931 Hamilton Mall

American Bar Association Resolution

The following Resolution dealing with the establishment of an Ombudsman was adopted by the American Bar Association at the Midyear Meeting of the House of Delegates in 1969:

*Be it Resolved*, That the American Bar Association recommends:

1. That state and local governments of the United States should give consideration to the establishment of an ombudsman authorized to inquire into administrative action and to make public criticism.

2. That each statute or ordinance establishing an ombudsman should contain the following twelve essentials: (1) authority of the ombudsman to criticize all agencies, officials, and public employees except courts and their personnel, legislative bodies and their personnel, and the chief executive and his personal staff; (2) independence of the ombudsman from control by any other officer, except for his responsibility to the legislative body; (3) appointment by the legislative body or appointment by the executive with confirmation by a designated proportion of the legislative body, preferably more than a majority, such as two-thirds; (4) independence of the ombudsman through a long term, not less than five years, with freedom from removal except for cause, determined by more than a majority of the legislative body, such as two-thirds; (5) a high salary equivalent to that of a designated top officer; (6) freedom of the ombudsman to employ his own assistants and to delegate to them, without restraints of civil service and classification acts; (7) freedom of the ombudsman to investigate any act or failure to act by any agency, official, or public employee; (8) access of the ombudsman to all public records he finds relevant to an investigation; (9) authority to inquire into fairness, correctness of findings, motivation, adequacy of reasons, efficiency, and procedural propriety of any action or inaction by any agency, official, or public employee; (10) discretionary power to determine what complaints to investigate and to determine what criticisms to make or to publicize; (11) opportunity for any agency, official, or public employee criticized by the ombudsman to have advance notice of the criticism and to publish with the criticism an answering statement; (12) immunity of the ombudsman and his staff from civil liability on account of official action.

3. That for the purpose of determining the workability of the ombudsman idea within the Federal government, the Federal government should experiment with the establishment of an ombudsman or ombudsmen for limited geographical area or areas, for a specific agency or agencies or for a limited phase or limited phases of Federal activity.

4. That establishment of a Federal government-wide ombudsman program should await findings based upon the experimentation recommended.

*Be it Further Resolved*, That the Section of Administrative Law is authorized to present the views of the Association and to encourage the establishment of ombudsmen in accordance with the provisions of this Resolution, by all necessary and appropriate means.

## A State Statute to Create The Office of Ombudsman

226

*Harvard Journal on Legislation**SECTION 603. Judicial review.*

No proceeding or decision of the Ombudsman may be reviewed in any court, unless it contravenes the provisions of this Act.

*SECTION 604. Immunity of the Ombudsman.*

The Ombudsman has the same immunities from civil and criminal liability as a judge of this state.

*SECTION 605. Ombudsman's privilege not to testify.*

The Ombudsman and his staff shall not testify in any court with respect to 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 Act.

### COMMENT

*SECTION 603. Judicial Review.*

This section prevents an agency or official from securing judicial review of the Ombudsman's recommendations. Since the Ombudsman has no power to revise agency actions, it is unlikely that anyone would be held to have standing to object to his recommendations. However, since the institution is new in this country, one cannot be certain how the law will develop. This provision is included to guarantee that the Ombudsman will not be frequently involved in litigation when an agency disagrees with his appraisal of its actions.

*SECTION 604. Immunity of the Ombudsman.*

The Ombudsman is given the immunities from civil and criminal prosecution that are enjoyed by a state judge. The most significant of these is immunity from liability for defamation arising out of statements made in the exercise of his duties.

*SECTION 605. Ombudsman's privilege not to testify.*

The purpose of this section is to encourage people to cooperate with the Ombudsman, without fear that he will divulge information disclosed to him in confidence. This section also protects the Ombudsman and his staff from the embarrassment and interruption of having to testify in regard to cases they have investigated. However, since the Ombudsman may need recourse to the courts to perform his duties under this act, this privilege is not withheld from him. Its most likely use is to enforce his subpoena power under section 403. He may also testify in regard to the penalty for

*International Bar Association**Ombudsman Committee*

*Chairman*  
Bernard Frank (USA)

*Vice Chairman*  
Alex B. Weir (Canada)

November 17, 1978

Ms. Karla L. Forsythe  
Ombudsperson  
Municipality of Anchorage  
Office of the Ombudsman  
Pouch 6-650  
Anchorage, Alaska 99502

Dear Ms. Forsythe:

Thank you for the copy of the letter to Peter Freeman. You raised two points:

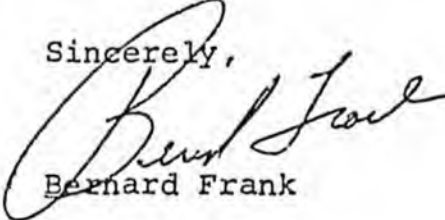
1. Confidentiality of communications between complainants and your office. This problem, please note pages 439 to 441 inclusive from my article on "State Ombudsman Legislation in the United States", Section 17, pages 13-14, of the Model Ombudsman Statute, and pages 47-48 of my article on the Nebraska Public Counsel. This problem was discussed at one of the workshops at the Dayton conference. The problem with local government is that the only item on the subject is a local ordinance and then the immunity extends only in those courts which are subject to the jurisdiction of the local governments. You will not have immunity in the state courts and certainly not in the federal courts. However, if I were you I would do what I could on the local level and you will note there are sections on immunity in the Flint Charter, page 20, and the Detroit Charter, Section 4-315. The state statute might be necessary to protect you in the state courts but this would, of course, not preclude being subpoenaed for a federal court. Your only hope there would be to have a federal statute to cover this subject. There remains a great deal of work in this particular area. I would suggest that you write to William P. Angrick, II, Office of the Citizens' Aide, 515 East Twelfth Street, Des Moines, Iowa, 50319, because his office has been involved in several cases involving freedom from subpoena in a federal court. The early part of this year, a Federal Judge upheld the confidentiality of the Iowa Ombudsman records on the basis that there was no federal interest involved and the state policy should prevail as reflected in the Statute granting immunity.

Ms. Karla L. Forsythe  
Page 2  
November 17, 1978

2. With respect to provisions containing non-retaliation sections, I would refer you to page 44 of the Nebraska article, Section 13(e) of the Model Statute, and page 432 of the University of Miami article. Offhand, I found only a section on this in the Nebraska statute.

If you wish to discuss this further, please contact me.

Sincerely,



Handwritten signature of Bernard Frank in cursive script.

Bernard Frank

BF:dc

Enclosures

~~CONFIDENTIAL~~  
Communication  
Attorney/Clerk

## MUNICIPALITY OF ANCHORAGE

## MEMORANDUM

RECEIVED

JUL 12 1990

DATE: July 6, 1990

TO: Michael Mills, Ombudsman

FROM: Kevin Finnigan, Assistant Municipal Attorney *KF*

THRU: James E. Ramsey, Deputy Municipal Attorney *JR*

THRU: Richard D. Kibby, Municipal Attorney *RDK*

SUBJECT: MOA v. Robert H. Stafford  
Superior Court Case No. 3AN-89-7397 Civil

Office of the Ombudsman *W*

You have asked whether AMC 2.60.120(C) provides authority to exempt the Ombudsman from honoring a subpoena to testify at a trial.

SHORT ANSWER

AMC 2.60.120(C) does not provide a recognizable privilege exempting the Ombudsman from honoring a subpoena and testifying at trial. ||

FACTS

Mr. Stafford has advised the Ombudsman and his assistant that he would be issuing them a subpoena to appear and testify at his upcoming trial. Mr. Stafford had previously filed a complaint with the Ombudsman's office concerning alleged improprieties by an employee at the Parks and Recreation Department. The Ombudsman's office made an initial inquiry into the matter but did not investigate the matter because of pending litigation.

DISCUSSION

AMC 2.60.070(C) states:

The Ombudsman shall protect the confidentiality of complainants or witnesses coming before them except insofar as disclosure may be necessary to enable the Ombudsman to carry out his duties.

The above provision does not provide a privilege from honoring a subpoena or testifying in court. Instead, AMC 2.60.070(C) prohibits the Ombudsman from voluntarily disclosing information ||

Michael Mills, Ombudsman  
July 6, 1990  
Page 2

obtained from complainants and witnesses except insofar as disclosure may be necessary to enable the Ombudsman to carry out his duties. The State Ombudsman is afforded protections not given to the Municipal Ombudsman. AS 24.55.260 states that "the ombudsman and the staff of the ombudsman's office 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." Based on AS 24.55.260, the State Ombudsman may refuse to testify as a witness. Alaska Rule of Court 501 recognizes certain privileges from testifying in court. Among those recognized are privileges provided in enactments of the Alaska Legislature. Alaska Rule of Court 501 thus would recognize the privilege of the State Ombudsman pursuant AS 24.55.260 from testifying as provided by state law. No such protection is recognized for the Municipal Ombudsman.

Please contact this office if we may be of further assistance.

KF:ld  
M/MILLS1

ALASKA STATUTES

LEGISLATURE

Chapter 55. Office of the Ombudsman.

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. (§ 1 ch 32 SLA 1975)

Sec. 24.55.250. Immunity of the ombudsman. A civil action may not be brought against the ombudsman or a member of the ombudsman's staff for anything done, said or omitted in performing the ombudsman's duties or responsibilities under this chapter. (§ 1 ch 32 SLA 1975)

Sec. 24.55.260. Ombudsman's privilege not to testify. The ombudsman and the staff of the ombudsman 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. (§ 1 ch 32 SLA 1975)

## ALASKA STATUTES

Article 4. Older Alaskans Commission.Sec. 44.21.231. Office of the long term care ombudsman.

(a) The office of the long term care ombudsman is established in the commission.

(b) The ombudsman shall be hired by the commission. A member of the commission who has a financial interest in a long term care facility in the state, or who has any other conflict of interest, may not participate in the hiring of the ombudsman. The ombudsman is a full-time position in the classified service.

(c) The ombudsman may not have a financial interest in a long term care facility in the state. The commission shall adopt regulations to ensure that the ombudsman, and employees and volunteers of the office, do not have a conflict of interest or an appearance of a conflict of interest. (§ 2 ch 108 SLA 1988)

Sec. 44.21.235. Confidentiality. (a) Records obtained or maintained by the ombudsman are confidential, are not subject to inspection or copying under AS 09.25.110 — 09.25.120 and, except as provided in (b) of this section, may be disclosed only at the discretion of the ombudsman.

(b) The identity of a complainant or an older Alaskan on whose behalf a complaint is made may not be disclosed without the consent of the identified person or the person's legal guardian, unless required by court order. (§ 2 ch 108 SLA 1988)

Sec. 44.21.236. Immunity from liability. (a) A person who, in good faith, makes a complaint described in AS 44.21.232 is immune from civil or criminal liability that might otherwise exist for making the complaint.

(b) The ombudsman, or an employee, volunteer, or other representative of the office, is immune from civil or criminal liability for the good faith performance of official duties. (§ 2 ch 108 SLA 1988)

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES  
July 24, 1986

## UNITED STATES - ALASKA

"Kimberly Shinn v. Charles Dexter, et al."  
4FA -81-1736-Civ. (Alaska S.C.) Order June 8, 1982

## OMBUDSMAN OFFICES - CONFIDENTIALITY\*

The plaintiff sought to compel the testimony of a staff member of the Office of Ombudsman for Alaska at trial. The Office of Ombudsman had investigated a complaint which related to the plaintiff's present legal action. The Office of Ombudsman brought a Motion to Strike the staff member's name from the Witness List and a Protective Order barring the production of witnesses on documents from the office of Ombudsman. The Ombudsman's motion was based primarily on the confidentiality provisions of the statute: AS 24.55.160(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."; and on AS 24.55.260 "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." The Superior Court granted the Order striking the staff members name from the Witness List and a Protective Order barring the production of witnesses and/or documents from the Ombudsman Office was entered

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES  
July 24, 1986

## UNITED STATES - IOWA

"Kelly v. Brewer"

RC Civil No. 73-177-2, order filed April 28, 1975

IOWA CITIZENS' AIDE\* U.S. FEDERAL COURT SUBPOENA\* OMBUDSMAN -  
CONFIDENTIALITY\*

The Iowa Citizens' Aide (Ombudsman) Mr. Thomas R. Mayer was served with a Federal Court subpoena. Mr. Mayer has tried to resist attempts to have his Ombudsman office used as a means of discovery for litigation. The only possible solution to the present dilemma facing State Ombudsmen in the United States would be Federal legislation granting immunity from Federal subpoena. The court ruling requiring a member of the Ombudsman's staff to testify in court was not appealed since an accord was worked out between the plaintiff's counsel and the Ombudsman's counsel enabling the testimony to be given "in camera" if the subpoena was withdrawn.

27

## UNITED STATES - IOWA

"Remmers et al. v. Brewer"

U.S. District Court, Southern District of Iowa, Judgment delivered  
January 4, 1978 36 pagesCITIZEN'S AIDE FOR CORRECTION\* U.S. FEDERAL COURT SUBPOENA\* OMBUDSMAN -  
CONFIDENTIALITY\*

A prison ombudsman was subpoenaed to testify in United States District Court regarding Remmers v. Brewer. Litigation was to determine the status of a prison religion. The state was trying to prove no such religion existed, and the prison ombudsman's testimony was to provide proof through information gathered in the course of his duties. The Citizen's Aide objected, based on Iowa Code which stated that information gathered by the prison ombudsman was confidential. He wished to protect the confidentiality, credibility, and physical safety of the prison ombudsman and other staff while in the prisons. On November 29, 1977 a magistrate granted the motion to quash, because no serious federal interest overrode his statutory immunity from subpoena. The state's interest in protecting the confidentiality of the Ombudsman outweighed the defendant's need for the prison ombudsman's testimony. An appeal to the District Court was dismissed because "the state interest in the efficient operation of its administrative agencies as embodied in the Citizen's Aide concept would clearly be adversely affected by compelling Cornell (the prison ombudsman) to testify."

## UNITED STATES -ALASKA

"Patricia v State of Alaska (Department of Health and Social Services, et al.)"

1985 Annual Report of Alaska Ombudsman, App. F 6pages, 161-167

Ombudsman-Non-Compellibility\* Ombudsman Statute, A.S., s24.55.260\*

The Ombudsman for the State of Alaska sought to quash a subpoena which had been issued requiring an employee of his office to provide a deposition, and for a further order enforcing the privilege of the Alaska Statute and barring any production of witnesses from The Office of the Ombudsman in the action. An employee of The Office of the Ombudsman, in the course of his employment, had investigated a complaint by the plaintiff against the State of Alaska, Department of Health and Social Services. The complainant had alleged that the department's hiring, practises contravened the State Personnel Act and Personnel Rules. The employee had completed the investigation and drafted a report which was issued to Ms. Williams and signed by the Ombudsman, Frank Flavin. Ms. Williams ultimately filed an action against The Department of Health and sought through the subpoena, information obtained during the course of the investigation. The Court reviewed the provisions of -The Ombudsman Act- regarding the confidentiality of the Ombudsman and the protection afforded him and members of his staff from testifying in respect to matters coming to their attention during the course of their investigation and concluded that the privilege was such that it should be recognized and accordingly ordered that the subpoena be quashed and a protective order issued. In coming to this conclusion, the Court viewed the privilege necessary in order to protect the confidentiality of information obtained by the Ombudsman, encourage co-operation on an investigation, and keep the Ombudsman out of vexatious litigation. In addition, the Court held that the plaintiff would have to establish the special need for the information. Finally, it concluded that the adverse impact in compelling testimony would be substantial. For all the above reasons the Court recognized the privilege from testifying and quashed the subpoena.

## UNITED STATES -HAWAII

"Jake Lapin v. William C. Plowden, Jr., and Joshua C. Agsalud Re: Civil No. 84-0143, order filed April 10, 1984"

U.S. Federal Court Subpoena\*

The State Ombudsman, Herman S. Doi, was served with a Federal Court subpoena which was issued at the request of a Plaintiff in a civil suit. A motion to quash the subpoena was filed to resist the attempt to have the Ombudsman testify and produce records in court pursuant to the subpoena. The motion was based on the premise that court may quash or modify the subpoena if it is unreasonable and oppressive. The memorandum in support of the motion cited section 96-9(b), Hawaii Revised Statutes (HRS), the Ombudsman is required to maintain secrecy in respect to all matters and identities of complainants and witnesses - section 96-17, HRS, the Ombudsman and his staff shall not testify in any court- and that the court should decide the issue by balancing State and Federal interest under Rule 501, Federal Rules of Evidence. Hawaii's interest, to protect the statutory privilege granted the Ombudsman, an officer of the legislature, prevailed and the subpoena was quashed by the magistrate hearing the motion. Plaintiff appealed the decision of the magistrate by filing a "Motion to Set Aside the Magistrate's Order Granting Motion to Quash Subpoena Pursuant to Rule 501" which motion was granted.

CHAPTER 601G

CITIZENS' AIDE

- 601G.1 Definitions.
- 601G.2 Office established.
- 601G.3 Appointment — vacancy.
- 601G.4 Citizen of United States and resident of Iowa.
- 601G.5 Term — removal.
- 601G.6 Deputy — assistant for penal agencies.
- 601G.7 Prohibited activities.
- 601G.8 Closed files.
- 601G.9 Powers.
- 601G.10 No charge for services.
- 601G.11 Subjects for investigations.
- 601G.12 Complaints investigated.
- 601G.13 No investigation — notice to complainant.
- 601G.14 Institutionalized complainants.
- 601G.15 Reports critical of agency or officer.
- 601G.16 Recommendations to agency.
- 601G.17 Publication of conclusions.
- 601G.18 Report to general assembly.
- 601G.19 Disciplinary action recommended.
- \* 601G.20 Immunities.
- 601G.21 Witnesses.
- 601G.22 Penalties.
- 601G.23 Citations.

601G.1 Definitions.

As used in this chapter:

1. "Person" means an individual, aggregate of individuals, corporation, partnership, or unincorporated association.
2. "Agency" means all governmental entities, departments, boards, commissions, councils or institutions, and any officer, employee or member thereof acting or purporting to act in the exercise of official duties, but it does not include:
  - a. Any court or judge or appurtenant judicial staff.
  - b. The members, committees, or permanent or temporary staffs of the Iowa general assembly.
  - c. The governor of Iowa or the governor's personal staff.
  - d. Any instrumentality formed pursuant to an interstate compact and answerable to more than one state.
3. "Officer" means any officer of an agency.
4. "Employee" means any employee of an agency.
5. "Administrative action" means any policy or action taken by an agency or failure to act pursuant to law.

[C73, 75, 77, 79, 81, §601G.1]

601G.2 Office established.

The office of citizens' aide is established.

[C73, 75, 77, 79, 81, §601G.2]

601G.3 Appointment — vacancy.

The citizens' aide shall be appointed by the legislative council with the approval and confirmation of a constitutional majority of the senate and with the approval and confirmation of a constitutional majority of the house of representatives. The legislative council shall fill a vacancy in this office in the same manner as the original appointment. If the appointment or vacancy occurs while the general assembly is not in session, such appointment shall be reported to the senate and the house of representatives within thirty days of their convening at their next regular session for approval and confirmation.

The citizens' aide shall employ and supervise all employees under the citizens' aide's direction in such positions and at such salaries as shall be authorized by the legislative council. The legislative council shall hear and act upon appeals of aggrieved employees of the office of the citizens' aide.

[C73, 75, 77, 79, 81, §601G.3]

601G.4 Citizen of United States and resident of Iowa.

The citizens' aide shall be a citizen of the United States and a resident of the state of Iowa, and shall be qualified to analyze problems of law, administration and public policy.

[C73, 75, 77, 79, 81, §601G.4]

601G.5 Term — removal.

The citizens' aide shall hold office for four years from the first day in July of the year of approval by the senate and the house of representatives, and until a successor is appointed by the legislative council, unless the citizens' aide can no longer perform the official duties, or is removed from office. The citizens' aide may at any time be removed from office by constitutional majority vote of the two houses of the general assembly or as provided by chapter 66. If a vacancy occurs in the office of citizens' aide, the deputy citizens' aide shall act as citizens' aide until the vacancy is filled by the legislative council.

[C73, 75, 77, 79, 81, §601G.5]

601G.6 Deputy — assistant for penal agencies.

The citizens' aide shall designate one of the members of the staff as the deputy citizens' aide, with authority to act as citizens' aide when the citizens' aide is absent from the state or becomes disabled. The citizens' aide may delegate to members of the staff any of the citizens' aide's authority or duties except the duty of formally making recommendations to agencies or reports to the governor or the general assembly.

The citizens' aide shall appoint an assistant who shall be primarily responsible for investigating complaints relating to penal or correctional agencies.

[C73, 75, 77, 79, 81, §601G.6]

84 Acts, ch 1046, §1

plaint, whether or not it has been investigated, the citizens' aide shall without delay inform the complainant of the fact, and if appropriate, shall inform the administrative agency involved. The citizens' aide shall on request of the complainant, and as appropriate, report the status of the investigation to the complainant.

[C73, 75, 77, 79, 81, §601G.13; 82 Acts, ch 1026, §2]

#### 601G.14 Institutionalized complainants.

A letter to the citizens' aide from a person in a correctional institution, a hospital, or other institution under the control of an administrative agency shall be immediately forwarded, unopened to the citizens' aide by the institution where the writer of the letter is a resident. A letter from the citizens' aide to such a person shall be immediately delivered, unopened to the person.

[C73, 75, 77, 79, 81, §601G.14]

#### 601G.15 Reports critical of agency or officer.

Before announcing a conclusion or recommendation that criticizes an agency or any officer or employee, the citizens' aide shall consult with that agency, officer or employee, and shall attach to every report sent or made under the provisions of this chapter a copy of any unedited comments made by or on behalf of the officer, employee, or agency.

[C73, 75, 77, 79, 81, §601G.15]

#### 601G.16 Recommendations to agency.

If, having considered a complaint and whatever material the citizens' aide deems pertinent, the citizens' aide finds substantiating facts that:

1. A matter should be further considered by the agency;
2. An administrative action should be modified or canceled;
3. A rule on which an administrative action is based should be altered;
4. Reasons should be given for an administrative action; or
5. Any other action should be taken by the agency, the citizens' aide shall state the recommendations to the agency. If the citizens' aide requests, the agency shall, within twenty working days notify the citizens' aide of any action taken on the recommendations or the reasons for not complying with them.

If the citizens' aide believes that an administrative action has occurred because of laws of which results are unfair or otherwise objectionable, the citizens' aide shall notify the general assembly concerning desirable statutory change.

[C73, 75, 77, 79, 81, §601G.16]

#### 601G.17 Publication of conclusions.

The citizens' aide may publish the conclusions, recommendations, and suggestions and transmit them to the governor, the general assembly or any of its committees. When publishing an opinion adverse to an administrative agency or official the citizens' aide shall, unless excused by the agency or official affected, include with the opinion any unedited reply made by the agency.

Any conclusions, recommendations, and suggestions so published may at the same time be made available to the news media or others who may be concerned.

[C73, 75, 77, 79, 81, §601G.17]

#### 601G.18 Report to general assembly.

The citizens' aide shall by April 1 of each year submit an economically designed and reproduced report to the general assembly and to the governor concerning the exercise of the citizens' aide functions during the preceding calendar year. In discussing matters with which the citizens' aide has been concerned, the citizens' aide shall not identify specific persons if to do so would cause needless hardship. If the annual report criticizes a named agency or official, it shall also include unedited replies made by the agency or official to the criticism, unless excused by the agency or official affected.

[C73, 75, 77, 79, 81, §601G.18; 82 Acts, ch 1026, §3]

#### 601G.19 Disciplinary action recommended.

If the citizens' aide believes that any public official, employee or other person has acted in a manner warranting criminal or disciplinary proceedings, the citizens' aide shall refer the matter to the appropriate authorities.

[C73, 75, 77, 79, 81, §601G.19]

#### \* 601G.20 Immunities.

No civil action, except removal from office as provided in chapter 66, or proceeding shall be commenced against the citizens' aide or any member of the staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent, nor shall the citizens' aide or any member of the staff be compelled to testify in any court with respect to any matter involving the exercise of the citizens' aide's official duties except as may be necessary to enforce the provisions of this chapter.

[C73, 75, 77, 79, 81, §601G.20]

#### 601G.21 Witnesses.

A person required by the citizens' aide to provide information shall be paid the same fees and travel allowances as are extended to witnesses whose attendance has been required in the district courts of this state. Officers and employees of an agency shall not be entitled to such fees and allowances. A person who, with or without service of compulsory process, provides oral or documentary information requested by the citizens' aide shall be accorded the same privileges and immunities as are extended to witnesses in the courts of this state, and shall also be entitled to be accompanied and advised by counsel while being questioned.

[C73, 75, 77, 79, 81, §601G.21]

#### 601G.22 Penalties.

A person who willfully obstructs or hinders the lawful actions of the citizens' aide or the citizens' aide's staff, or who willfully misleads or attempts to mislead the citizens' aide in the citizens' aide's inquiries, shall be guilty of a simple misdemeanor.

[C73, 75, 77, 79, 81, §601G.22]

#### 601G.23 Citation.

This chapter shall be known and may be cited as the "Iowa Citizens' Aide Act".

[C73, 75, 77, 79, 81, §601G.23]

# CITIZENS' AIDE[210]

(OMBUDSMAN)

Chapter 1 A rescinded and the following chapter 1 B published 9/16/81 and effective 10/21/81, adopted 9/16/81

<p><b>CHAPTER 1</b> <b>ORGANIZATION</b></p> <p>1.1(601G) Function 1.2(601G) Operation</p>	<p>4.5(17A) Statement of reasons 4.6(17A) Petition for rulemaking 4.7(17A) Procedure after petition is filed</p>
<p><b>CHAPTER 2</b> <b>PROCEDURES</b></p> <p>2.1(601G) Intake methods 2.2(601G) Jurisdiction 2.3(601G) Investigations 2.4(601G) Hearings 2.5(601G) Case disposition after investigation 2.6(601G) Review</p>	<p><b>CHAPTER 5</b> <b>CONFIDENTIALITY</b></p> <p>5.1(601G,68A) Public information 5.2(601G) Private information 5.3(601G) Confidential information 5.4(601G) Request for information in citizens' aide/ombudsman files</p>
<p><b>CHAPTER 3</b> <b>DECLARATORY RULINGS</b></p> <p>3.1(17A) General 3.2(17A) Petition for declaratory rulings 3.3(17A) Procedure after petition is filed</p>	<p><b>CHAPTER 6</b> <b>PRIVILEGES AND IMMUNITIES</b></p> <p>6.1(601G) Privileges and immunities</p>
<p><b>CHAPTER 4</b> <b>RULEMAKING</b></p> <p>4.1(17A,601G) Commencing rulemaking 4.2(17A,601G) Oral presentations 4.3(17A) Conferences or consultation 4.4(17A) Adoption</p>	<p><b>CHAPTER 7</b> <b>PENALTIES</b></p> <p>7.1(601G) Penalties</p>
	<p><b>CHAPTER 8</b> <b>FORMS</b></p> <p>8.1(601G) Subpoena form 8.2(601G) Patient waiver form 8.3(601G) General information waiver form</p>

## CHAPTER 1 ORGANIZATION

**210—1.1(601G) Function.** The citizens' aide/ombudsman office was created pursuant to chapter 601G, The Code, and is charged with the responsibility to accept and investigate complaints and render an objective opinion or recommendation on a complaint from a member of the public about an action or inaction of an agency of the state or local government in Iowa, and by doing so, resolving citizens' complaints and improving administrative processes and procedures.

**210—1.2(601G) Operation.**

1.2(1) Location. The office of the citizens' aide/ombudsman is located at 515 E. 12th Street, Des Moines, Iowa 50319. The phone number is area code (515) 281-3592. Office hours

5.4(5) The citizens' aide/ombudsman will provide open access to the files, at the written request of the governor, the general assembly or standing committee of the general assembly pursuant to Iowa Code section 601G.8.

These rules are intended to implement Iowa Code chapter 601G as amended by 1982 Iowa Acts, chapter 1026.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/82]

[Filed 11/5/82, Notice 6/23/82—published 11/24/82, effective 12/29/82]

#### CHAPTER 6 PRIVILEGES AND IMMUNITIES

##### 210—6.1(601G) Privileges and immunities.

6.1(1) No civil action, except removal from office, as provided in chapter 66, The Code, or proceeding shall be commenced against the citizens' aide/ombudsman or any member of his/her staff for any act or omission performed pursuant to the provisions of this chapter unless the act or omission is actuated by malice or is grossly negligent.

6.1(2) The citizens' aide/ombudsman or any member of his/her staff shall not be compelled to testify in any court with respect to any matter involving the exercise of his/her official duties except as may be necessary to enforce the provisions of chapter 601G, The Code.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/81]

#### CHAPTER 7 PENALTIES

210—7.1(601G) Penalties. Any person who willfully obstructs or hinders the lawful actions of the citizens' aide/ombudsman or a member of the citizens' aide/ombudsman's staff or who willfully misleads or attempts to mislead the citizens' aide/ombudsman in his/her inquiries shall be guilty of a simple misdemeanor. The citizens' aide/ombudsman shall refer all violations of this section to the county attorney in the county where the obstruction or hinderance occurred.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/81]

#### CHAPTER 8 FORMS

210—8.1(601G) Subpoena form. Citizens' aide/ombudsman form number CA/O-1 is a subpoena/subpoena duces tecum form.

210—8.2(601G) Patient waiver form. Citizens' aide/ombudsman form number CA/O-2 is an authorization for medical or hospital information form.

210—8.3(601G) General information waiver form. Citizens' aide/ombudsman form number CA/O-3 is an authorization for release of information form.

[Filed 8/26/81, Notice 7/22/81—published 9/16/81, effective 10/21/81]