

SB

120

STATE OF ALASKA
THE LEGISLATURE

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Mary Van Nimwegen

SB 120

Senate CEIRA

2/28/91

SENATE COMMITTEE REPORT
FIRST COMMITTEE OF REFERRAL

DATE: 2/13/91

FURTHER: Judiciary

Date of 5-Day Notice: 2/21/91
(in accordance with Uniform Rule 23)

DATE TURNED INTO OFFICE: _____

C&RA Committee considered SB 120

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
- attached amendment(s) new title
- _____ letter of intent adopted

do pass

do not pass

no recommendation

individual recommendations

further referral to _____

ATTACHES NEW FISCAL NOTE(S):

Department(s)/Date:

Department(s)/Date:

fiscal note(s) _____

zero fiscal note(s) _____
Dept. C&RA

appropriation-no fiscal note

Governor's bill w/fiscal note

SIGNING DO PASS:

OTHER RECOMMENDATIONS:

Arthur Sturgis
Irene Pearce

Arthur Sturgis
Chair: Signature and Recommendation



STATE OF ALASKA
OFFICE OF THE GOVERNOR

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>E. J. R. [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.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. SB 120

Revision Date: _____ Department Affected: Community & Regional Affairs
 Title: "An Act relating to immunity of a municipal ombudsman and staff..." BRU: Local Government Assistance
 Component: Training and Development
 Sponsor: Collins, Pearce
 Requestor: _____ COMPONENT SERIAL NO.

	6	7	2
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
----------------	--	--	--	--	--	--

REVENUE						
----------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Prepared By: Remond Henderson Remond Henderson Phone: 465-4708
 Division: Administrative Services Director Date: 2/19/91
 Approved by Commissioner: Edgar Blatchford Edgar Blatchford
 Agency: Community & Regional Affairs Date: 2-17-91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).



Official Business

Alaska State Legislature

SENATE

SENATOR VIRGINIA COLLINS

P.O. Box V
State Capitol
Juneau, Alaska 99811

SPONSOR STATEMENT

Senate Bill 120

Senate Bill 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."

This bill would extend to the municipal ombudsman the same immunity and the same privilege not to testify about certain matters that are given to the Office of the State Ombudsman. Similar provisions are also granted to the Long Term Care Ombudsman within the Older Alaskans Commission.

There is currently only one municipal ombudsman in Alaska. Several communities have contracted with the state ombudsman to provide ombudsman services to the respective communities. Those contractual ombudsmen are protected under the statutes for the State Ombudsman's Office. Yet the one municipal ombudsman, performing the same function as those whose services have been contracted, does not have the same protection.

Due to the nature of the work of an ombudsman, this immunity and privilege not to testify has been shown in Alaska and in other states to be beneficial and, in many cases, necessary to the performance of the duties of the office.

Immunity from civil action and the privilege not to testify are two elements commonly found in model ombudsman legislation such as that proposed by the International Bar Association's Ombudsman Committee, the American Bar Association, and the Harvard Journal on Legislation.

Senate Bill 120 is supported by the Office of the State Ombudsman as well as the Office of the Ombudsman for the Municipality of Anchorage. There is a zero fiscal note.

Thank you for your time. Your support of Senate Bill 120 would be appreciated.

Position Paper

ANCHORAGE MUNICIPAL OMBUDSMAN

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)

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)

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STATE OMBUDSMAN LEGISLATION IN THE UNITED STATES

BERNARD FRANK*

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I. INTRODUCTION

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

1975]

STATE OMBUDSMAN LEGISLATION

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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

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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.⁷⁹ 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.⁸⁰ 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.⁸¹ 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.⁸² 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^{82a}—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.⁸³ 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.

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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)(6) (Supp. 1974).

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

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.²⁵

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.²⁶

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.²⁷ 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.²⁸

24. HAWAII REV. STAT. § 96-1(a)(7)(B), (Supp. 1974).

25. For example, the Georgia legislature passed in 1974, H.B. 85 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.



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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
Allentown, Pennsylvania 18105

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

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*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 obstruction under section 607. ||

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:

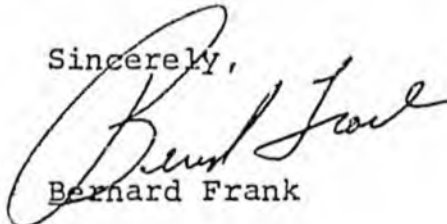
1. Confidentiality of communications between complainants and your office. This problem, please note pages 439 to 441 inclusive from my article on "State Ombudsman Legislation in the United States", Section 17, pages 13-14, of the Model Ombudsman Statute, and pages 47-48 of my article on the Nebraska 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,

A handwritten signature in cursive script, appearing to read "Bernard Frank", is written over the typed name.

Bernard Frank

BF:dc

Enclosures

~~CONFIDENTIAL~~
Communication
Attorney/Client

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

RECEIVED

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

JUL 12 1990

Office of the Ombudsman *me*

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 pages

CITIZEN'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. Aagsalud 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 Duces Tecum", which motion was denied on the grounds of mootness because the court dismissed the case for Plaintiff's lack of standing.



State of Alaska
ombudsman

Duncan C. Fowler

Reply to:

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Anchorage, AK 99510-2836
(907) 277-8848
(800) 478-2624

FEB 26 1991

J
 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 26, 1991

Senator Steve Frank, Chairman
Community and Regional Affairs Committee
Alaska State Legislature
Post Office Box V
Juneau, Alaska 99811-3100

RE: SB 120, Municipal Ombudsmen

Dear Senator *Frank*:

Please consider this letter to be in support of SB 120. 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 SB 120. 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. SB 120 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.

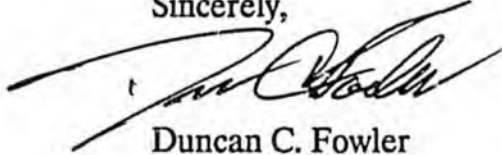
There are several practical effects of such provisions. Ombudsmen, by the nature of their work, continually deal with situations where two persons are in disagreement. Some citizens believe the way to resolve disagreements is in the courts. If possible, they would sue the ombudsman if they disagreed 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.

In summary, I do support the passage of SB 120. 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", written in a cursive style.

Duncan C. Fowler
Ombudsman

DCF:pjc
cc: Senator Virginia Collins



State of Alaska
Ombudsman

Duncan C. Fowler

February 26, 1991

FEB 27 1991

Senator Steve Frank, Chairman
Community and Regional Affairs Committee
Alaska State Legislature
Post Office Box V
Juneau, Alaska 99811-3100

Reply to:

P.O. Box 102636
Anchorage, AK 99510-2636
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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

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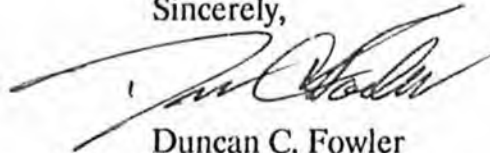
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February 26, 1991

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Duncan C. Fowler
Ombudsman

DCF:pjc
cc: Senator Virginia Collins



Official Business

Alaska State Legislature

SENATE

SENATOR VIRGINIA COLLINS

P.O. Box V
State Capitol
Juneau, Alaska 99811

FEB 15 1991

MEMORANDUM

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

FROM: Senator Virginia Collins *VM*

DATE: February 14, 1991

RE: Senate Bill 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."

I respectfully request that you schedule the above-referenced bill for hearing at your earliest convenience.

This bill would extend to the municipal ombudsman the same immunity and the same privilege not to testify about certain matters that are currently given to the Office of the State Ombudsman.

There is currently only one municipal ombudsman in Alaska. Several communities have contracted with the state ombudsman to provide ombudsman services to the respective communities. Those contractual ombudsman are protected under the statutes for the state office. Yet the one municipal ombudsman, performing the same function as those whose services have been contracted, does not have the same protection.

Due to the nature of the work of an ombudsman, this immunity and privilege not to testify has been shown in Alaska and in other states to be beneficial and, in many cases, necessary to the performance of the duties of the office.

Please contact Marveen at 465-2828 if you have any questions.