

HB

169

<TARGET><BILL>HB 169</BILL><SUBJECT>HB
169</SUBJECT><COMM>HSTA27</COMM></TARGET>

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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MEMORANDUM

March 23, 2011

SUBJECT: Confidential memos and the Alaska Rules of Professional Conduct (HB 169; Work Order No. 27-LS0559A)

TO: Representative Max Gruenberg

FROM: Lisa Moritz Kirsch 
Legislative Counsel

At the hearing in the House State Affairs Committee yesterday, you requested a legal opinion on the effect of the changes proposed in HB 169 on attorney-client confidentiality required by the Alaska Rules of Court. After reviewing the Rules of Professional Conduct contained in the Alaska Rules of Court, I continue to hold the opinion I expressed at the hearing, that the passage of HB 169 would not require a court rule change.

HB 169 adds new recipients to the list of legislators who may receive certain confidential written analyses of proposed regulations from legislative legal. This list currently appears in AS 24.20.105(e), the existing statute governing review of proposed regulations by legislative counsel.¹ The new recipients would be legislators who sponsored recently enacted legislation being implemented by the proposed regulations or members of a standing committee or the Legislative Council if that committee or council requested a review of proposed regulations.² In the bill, the amended subsection AS 24.20.105(e) reads:

(e) In conducting its review under this section, the assigned attorney may consult with the Department of Law, the committee or

¹ The legislators and executive agencies currently on the list of recipients for these regulation review memos are: the Department of Law, the agency that proposed the regulations, the members of the Administrative Regulations Review Committee, the President of the Senate, and the Speaker of the House.

² These new recipients would only receive a memo if the review was conducted under AS 24.20.105. In the situation Representative Johansen raised yesterday, where an individual legislator made a request for an opinion on proposed regulations under AS 24.20.100, the resulting opinion would only go to the legislator who requested it, and the fact that a particular legislator requested an opinion would remain confidential and legislative legal could not alert the sponsor of any newly enacted statute.

council that requests the review under (b)(2) of this section, and the state agency proposing the regulation change. With respect to proposed regulations that implement newly enacted legislation as described in (b)(1) of this section, the assigned attorney may also consult with the prime sponsor of the legislation if the prime sponsor is a member of the legislature at the time of the review. If the assigned attorney determines that the proposed regulations fail [ACTION FAILS] to meet the standards set out in (d) of this section, the assigned attorney shall notify, in writing, the Department of Law, the state agency, the Administrative Regulation Review Committee, the president of the senate, [AND] the speaker of the house of representatives, and the committee or council, if any, that requested the review under (b)(2) of this section. If the review involves proposed regulations that implement newly enacted legislation as described in (b)(1) of this section and the prime sponsor of that legislation is a member of the legislature at the time of the review, the assigned attorney shall also notify the prime sponsor, in writing, if the proposed regulations fail to meet the standards set out in (d) of this section. If, after performing a review requested under (b)(2) of this section, the assigned attorney determines that the proposed regulations meet the standards set out in (d) of this section, the assigned attorney shall communicate that determination to the requester.

The applicable court rule that applies to the keeping of confidences by attorneys appears in the Rules of Professional Conduct. It reads:

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal a client's confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.

(b) A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain:
 - (A) death;
 - (B) substantial bodily harm; or

- (C) wrongful execution or incarceration of another;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 - (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (6) to comply with other law or a court order.
- (c) A lawyer must act competently to safeguard a client's confidences and secrets against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client, or by any other persons who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. When transmitting a communication that includes a client's confidence or secret, the lawyer must take reasonable precautions to prevent this information from coming into the hands of unintended recipients.

Under existing AS 24.20.105(g), legislative legal is generally required to keep review information confidential. It reads:

(g) Except as provided in this section, the Legislative Affairs Agency may not release any information regarding its review of a proposed regulation under this section.

The specific exceptions to this general rule of confidentiality in the existing and proposed statute do two things. First, the exceptions in AS 24.20.105(e) trigger the exception in Rule 1.6 of the Rules of Professional Conduct. Under Rule 1.6(b)(6), an attorney may release a document to comply with other law or a court order. Second, the exceptions of AS 24.20.105(e) act as a narrowly defined waiver of the attorney-client confidentiality between legislative legal counsel and the legislators. For these reasons, HB 169 does not conflict with the Rules of Professional Conduct in the Alaska Rules of Court, and the bill will not necessitate a court rule change.

I contacted Steve Van Goor, Bar Counsel at the Alaska Bar Association, and he concurred with my analysis of this issue. He added that the rule on organizations as clients, Rule 1.13 of the Rules of Professional Responsibility, also supports this position. He argued that the legislature is analogous to an organization, and legislators could be

Representative Max Gruenberg

March 23, 2011

Page 4

considered the duly authorized officers of the legislative body with authority to waive confidentiality by legislation.

If you have further questions, feel free to contact us.

LMK:ljw

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Sec. 24.20.065. Examination of regulations and opinions. (a) The legislative council shall annually examine administrative regulations, published opinions of state and federal courts and of the Department of Law, and final decisions adopted under AS 44.62 (Administrative Procedure Act) that rely on state statutes or the common law of the state to determine if

- (1) the courts and agencies are properly implementing legislative purposes;
- (2) there are court or agency expressions of dissatisfaction with state statutes or the common law of the state;
- (3) the opinions, decisions, or regulations indicate unclear or ambiguous statutes;
- (4) the courts have modified or revised the common law of the state.

(b) The legislative council shall prepare a comprehensive report of the annual examination with recommendations and, at the start of each regular session, notify the legislature that the report is available. (§ 1 ch 72 SLA 1963; am § 1 ch 19 SLA 1989; am § 46 ch 21 SLA 1995)

Sec. 24.20.070. Revision of statutes. (a) The legislature may direct the council to revise the laws of the state in the form of a bulk formal revision. At the direction of the legislature and within the limit of appropriations made, the council may enter into contracts for the printing, annotating, indexing, and distribution of a revision of the laws of the state. The council receives sufficient copies of a revision for exchange with other states and jurisdictions. A revision prepared by the council under authority of this section shall be referred to the legislature for enactment or adoption.

(b) Statute revision is a continuing responsibility of the council. The general and permanent acts of each regular and special session of the legislature shall be integrated with and published as annual supplements to or replacement pamphlets for the Alaska Statutes. (§ 7 ch 17 SLA 1960; am § 5 ch 100 SLA 1963)

NOTES TO DECISIONS

Cited in Employment Sec. Comm'n v. Wilson, 461 P.2d 425 (Alaska 1969).

Sec. 24.20.075. Alaska Code Revision Commission. [Repealed, § 33 ch 23 SLA 1995.]

Sec. 24.20.080. Intergovernmental cooperation. The council may encourage and arrange conferences with officials of other states and nations and of other units of government and propose cooperation between this state and other states and nations. The council constitutes the Alaska Commission on Interstate Cooperation in participating in and carrying out the programs of the Council of State Governments as they apply to Alaska. The chairman of the council serves as chairman of the commission. (§ 8 ch 17 SLA 1960; am § 6 ch 126 SLA 1966; am § 1 ch 6 SLA 1972)

Sec. 24.20.090. Assignment of projects. The council may be assigned projects or subjects for study, reporting, or drafting. Assignment shall be by resolution. The council may determine a schedule of priorities for these and other assignments or requests based on feasibility, time, and the availability of funds and staff. (§ 9 ch 17 SLA 1960)

Sec. 24.20.100. Research and drafting services for legislators. Members of the legislature may utilize the research and bill drafting services of the Legislative Affairs Agency. Requests by members of the legislature are confidential. Staff services for members of the legislature shall be accomplished subject only to the priority of assignments determined by the council. (§ 10 ch 17 SLA 1960)

Sec. 24.20.105. Review of proposed regulations. (a) The Legislative Affairs Agency may review each proposed regulation that is subject to AS 44.62.010 — 44.62.30

(Administrative Procedure be conducted by an attorney
(b) Reviews shall be of priority:

- (1) proposed regulation;
- (2) proposed regulation: the Administrative Regulation major policy development
- (c) Under AS 44.62.190 proposed regulation, shall
- (1) Legislative Affairs Agency
- (2) chairs of the standing regulation;

- (3) Administrative Regulation
- (4) legislative council.
- (d) Within available staff: Legislative Affairs Agency: proposed regulations. The
- (1) the legality and constitutionality
- (2) whether the state agency to implement, interpret, and
- (3) whether the proposed

(e) In conducting its review the Department of Law, through this section, and the state attorney determines that this section, the assigned state agency, the Administrative senate, and the speaker of the house notify the Administrative the speaker of the house that may be inconsistent with oversight as a result.

- (g) Except as provided any information regarding
- (h) The process of reviewing state agency's authority Suggestions for changes that are not binding on a state
- (i) No action may be brought a legal review under this
- (j) The provisions of (b), Board of Game or the Board
- (k) In this section, "pro repeal of a regulation. (§

Cross references. — For written notification provided under

Sec. 24.20.110. Meetings legislature and during its state as the chairman and appointment of its members

Add'l relevant Statutes For HB 169

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Article 4. Committees.

Section

- 182. Review of administrative regulations by standing committees of the legislature
- 184. Termination of interim committee membership

ernor. The lieutenant governor
f the 2006 general election on
ereby giving 2006 General Elec-
No. 1 an actual effective date of
ossible, however, that § 2, 2006
ot Measure No. 1 will be inter-
ility section, in which case sub-
pply until the first day of the
ion of the 25th Alaska State

Sec. 24.05.182. Review of administrative regulations by standing committees of the legislature.

(a) A standing committee of the legislature furnished notice of a proposed action under AS 44.62.190 shall review the proposed regulation, amendment of a regulation, or repeal of a regulation before the date the regulation is scheduled by the department or agency to be adopted, amended, or repealed.

ces. — 72 Am. Jur. 2d, States,
ndencies, § 58.
§ 50.

(b) A standing committee conducting a review of a regulation under (a) of this section shall determine whether the regulation properly implements legislative intent.

(c) A standing committee shall conduct preliminary reviews under this section while the legislature is in session and during the interim between legislative sessions.

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(d) If a standing committee determines that a regulation, amendment to a regulation, or repeal of a regulation does not properly implement legislative intent, the standing committee's findings shall be transmitted to the Administrative Regulation Review Committee. (§ 4 ch 1 SLA 1982)

Revisor's notes. — Enacted as AS 24.99.001. Renumbered as AS 24.37.010 in 1982. Renumbered again in 1985.

Cross references. — For provisions related to the Administrative Regulation Review Committee, see AS 24.20.400 — 24.20.460.

Sec. 24.05.184. Termination of interim committee membership. When a member of the legislature who serves on a committee created during a between-session interim by either house or its presiding officers, the legislative council or the Legislative Budget and Audit Committee, files a declaration of candidacy for an elective office other than that of member of either house of the legislature, and the member has not resigned from membership on the interim committee, the member's interim committee membership terminates on the date of filing. (§ 5 ch 11 SLA 1975)

ces. — 72 Am. Jur. 2d, States,
ndencies, §§ 37, 38.
§ 41.

Revisor's notes. — Formerly AS 24.05.087. Renumbered in 1985.

Article 5. Legislative Space.

Section

- 190. Control of legislative space

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or a special session of the
sion shall administer the
f the house in accordance
1 ch 100 SLA 1963)

Sec. 24.05.190. Control of legislative space. (a) The state capitol, with the exception of the capitol space now occupied by the Office of the Governor, and space occupied in any other state building by the legislature or its agencies is under the control of and subject to assignment by the Legislative Affairs Agency as directed by the legislature. The Legislative Affairs Agency is responsible for the equitable allocation of parking spaces at the capitol according to the needs of the legislature and other agencies occupying capitol offices.

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standing committees to
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needed, by the presiding
e of joint committees to

(b) Access to legislative space during sessions is generally governed by the uniform rules of the legislature and by (a) of this section. During a session of the legislature a person not a member or an authorized employee of the legislature or its agencies may not, without the invitation of the presiding officer or the house, enter upon the floor of either house while it is sitting, or enter upon the floor of either house during a recess or when adjourned for the day, without the invitation of a member of that house. (§ 21 ch 157 SLA 1959; am § 5 ch 47 SLA 1961; am § 3 ch 126 SLA 1966; am § 1 ch 10 SLA 1976)

959; am § 1 ch 143 SLA

Sec. 24.05.200. [Renumbered as AS 24.20.061.]

Sec. 24.20.105. Review of proposed regulations.

(a) The Legislative Affairs Agency may review each proposed regulation that is subject to AS 44.62.010 - 44.62.300 (Administrative Procedure Act). A review of proposed regulations under this section must be conducted by an attorney employed by that agency.

(b) Reviews shall be conducted under (a) of this section in the following order of priority:

- (1) proposed regulations that would implement newly enacted legislation;
- (2) proposed regulations requested in writing to be reviewed by a standing committee, the Administrative Regulation Review Committee, or the legislative council as implicating major policy development.

(c) Under AS 44.62.190(a)(7), the notice of proposed action, along with a copy of the proposed regulation, shall be furnished electronically by the state agency to the

- (1) Legislative Affairs Agency;
- (2) chairs of the standing committees with jurisdiction over the subject of the proposed regulation;
- (3) Administrative Regulation Review Committee;
- (4) legislative council.

(d) Within available staff resources and priorities set by the legislative council, the Legislative Affairs Agency shall assign one or more attorneys to conduct a review of proposed regulations. The review shall evaluate

- (1) the legality and constitutionality of the proposed regulation;
- (2) whether the state agency has statutory authority to adopt the proposed regulation to implement, interpret, make specific, or otherwise carry out a statute; and
- (3) whether the proposed regulation is consistent with the applicable statutes.

(e) In conducting its review under this section, the assigned attorney may consult with the Department of Law, the committee or council that requests the review under (b)(2) of this section, and the state agency proposing the regulation change. If the assigned attorney determines that the proposed action fails to meet the standards set out in (d) of this section, the assigned attorney shall notify, in writing, the Department of Law, the state agency, the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives.

(f) In addition to the review specified in (d) of this section, the assigned attorney shall notify the Administrative Regulation Review Committee, the president of the senate, and the speaker of the house of representatives of any provision of the proposed regulation that may be inconsistent with legislative intent and appropriate for additional legislative oversight as a result.

(g) Except as provided in this section, the Legislative Affairs Agency may not release any information regarding its review of a proposed regulation under this section.

(h) The process of review of a proposed regulation under this section does not affect a state agency's authority to complete its proposed action regarding the regulation. Suggestions for changes to a proposed regulation made by the Legislative Affairs Agency are not binding on a state agency.

(i) No action may be brought for the failure of the Legislative Affairs Agency to conduct a legal review under this section.

(j) The provisions of (b) - (i) of this section do not apply to proposed regulations of the Board of Game or the Board of Fisheries.

(k) In this section, "proposed regulation" means a proposed adoption, amendment, or repeal of a regulation.

History -

(Sec. 2 ch 164 SLA 2004)

Cross References -

For provision exempting written notification provided under (e) of this section from the general right to inspect public records, see AS 40.25.120(a)(11).

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
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REP. BOB LYNN
REP. WES KELLER
REP. LANCE PRUITT
REP. LINDSEY HOLMES
REP. MAX GRUENBERG



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TO: Representative Bob Lynn, Chair
House State Affairs Committee

A handwritten signature in black ink that reads "Carl Gatto".

FROM: Representative Carl Gatto, Chair
House Judiciary Committee

DATE: March 8, 2011

RE: Request for a hearing of HB 169

Enclosed is the committee packet for HB 169, "*an Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date*" also called "LAA Review of Proposed Regulations." I have included a sponsor statement, the original version of the bill, and a memo from Legal Services.

I would appreciate a hearing before the State Affairs Committee at your earliest convenience. I appreciate your time and look forward to your reply.

Please contact my staff member, Sarah Munson at 465-4990, with any questions or comments regarding this request.

Thank you for your consideration.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
REPRESENTATIVE CARL GATTO, CHAIR

COMMITTEE MEMBERS:
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Sponsor Statement
HB 169

"An Act relating to the review of proposed regulations by the Legislative Affairs Agency; and providing for an effective date."

HB 169 closes gaps in the regulation review statutes. The Legislative Affairs Agency (LAA) attorneys review proposed regulations, including those from newly enacted legislation and at the request of a standing committee, the Administrative Regulations Review Committee, and the Legislative Council. However, if the attorney finds that the proposed regulations fail to meet statutory standards, the only legislative entities they are allowed to notify are the Administrative Regulation Review Committee, the Speaker of the House, and the President of the Senate. Additionally, LAA cannot currently notify anyone if the regulation meets statutory standards.

HB 169 allows LAA to notify the committee or council that requested the review that the regulations do not meet statutory standards. In addition, if the proposed regulation implements newly passed legislation, LAA would be able to consult with and notify the prime sponsor of that legislation, if the prime sponsor is still a sitting legislator. Finally, HB 169 allows LAA to notify the requester of the review if the attorney determines that the regulations meet statutory standards.

HB 169 is a simple fix to two minor problems in an otherwise functioning review system. It will give the benefits of the review process to those who need it most.

Sarah Munson
(907) 465-4990
27-LS0559\A
03/08/11

LEGAL SERVICES

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MEMORANDUM

February 18, 2011

SUBJECT: Review of Proposed Regulations by the Legislative Affairs Agency
(Work Order No. 27-LS0559\A)

TO: Representative Carl Gatto
Chair of the House Judiciary Committee

FROM: Terri Lauterbach
Legislative Counsel



Enclosed is a draft of a bill you requested to "fix some flaws" in AS 24.20.105, as we discussed after the meeting of the Administrative Regulation Review Committee (ARRC) on Tuesday.¹

Section 1. This section of the bill accomplishes several things:

(1) The new language on page 1 allows the reviewing attorney in LAA to consult with the prime sponsor of the relevant bill if the attorney is reviewing proposed regulations that implement newly enacted legislation. You only asked specifically for the prime sponsor to get copies of memos denoting possible legal flaws determined in these kinds of reviews, but I thought it was probably in keeping with your goal to also add this consultation aspect as well. Let me know if I erred in this regard and I can remove the language. Also, please note that I have limited this consultation requirement to situations when the prime sponsor is still a member of the legislature. In addition to the logistics that may be difficult when the prime sponsor is no longer a member, it seems to me in keeping with the confidential nature of these reviews that only sitting legislators be included in the review process under AS 24.20.105.

(2) The first two lines on page 2 allow LAA review memos to be sent to a standing committee or to the Legislative Council if they have requested a review of some proposed regulations because of their "major policy implications." Under current law,

¹ Although I drafted the enclosed bill, Lisa Kirsch's name appears in the upper right-hand corner of page 1. This has been done so that, if you introduce the bill, legislators and staff will have a full-time attorney to call with questions or amendments related to the bill. As I mentioned at the ARRC meeting, I am only half-time. Lisa Kirsch reviewed proposed regulations under AS 24.20.105 for most of the past three years, and is knowledgeable about the issues addressed in this bill draft. Feel free to call either one of us about the draft.

Representative Carl Gatto
February 18, 2011
Page 2

these entities can request a review and that request is given priority status under AS 24.20.105(b)(2), but the law, through an oversight in the original legislation, does not allow them to get the memo that could result from the review. Current law allows these memos to go only to the Department of Law, the state agency proposing the regulations, the ARRC, the senate president, and the speaker of the house. (See AS 24.20.105(e) and the restriction on LAA's disclosure under AS 24.20.105(g).)

(3) Lines 3 - 7 on page 2 allow LAA review memos to be sent to the prime sponsor of the relevant legislation if a review of proposed regulations that implement newly enacted legislation shows legal problems of the type described in AS 24.20.105(d). As with the consultation requirement for prime sponsors described above in (1), I have limited this memo-sharing requirement to prime sponsors who are still sitting legislators.

(4) Lines 7 - 10 on page 2 require LAA to communicate to a standing committee or the Legislative Council the results of a review that was requested by either of them in situations where the reviewer has not found legal flaws. Currently, AS 24.20.105 only allows LAA to communicate with respect to reviews where legal flaws are perceived, and that makes sense with respect to the vast number of reviews, as the relevant entities would normally be interested only if the reviewing attorney sees problems. However, with respect to a review requested under AS 24.20.105(b)(2), it seems to me that it would make sense for LAA to be able to respond that a review has been completed but that no problems were found. I have deliberately not required this communication to be in writing so that a phone call could suffice; the requester, of course, could always request that the "no problems" response be in writing.

Sec. 2. This section clarifies that the new provisions of section 1 apply to any reviews ongoing in LAA at the time the bill takes effect even if the notice of proposed regulations was issued before the effective date of the bill.

Sec. 3. This section gives the bill an immediate effective date. There are no impediments I can think of that would keep LAA from immediately being able to implement any of the new provisions of section 1.

TML:LMK:ljw
11-115.ljw

Enclosure

FISCAL NOTE

STATE OF ALASKA
2011 LEGISLATIVE SESSION

Fiscal Note Number _____
 Bill Version HB 169
 () Publish Date _____

Identifier (file name) HB169-LEG-COU-03-10-2011 Dept. Affected Legislature
 Title "LAA Review of Proposed Regulations" Appropriation Legislative Council
 Allocation Legal and Research Services
 Sponsor House Judiciary Committee
 Requester House State Affairs & House Judiciary Committees OMB Component Number 2028

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information						
		FY 2012	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
OPERATING EXPENDITURES								
Personal Services								
Travel								
Contractual								
Supplies								
Equipment								
Grants & Claims								
Miscellaneous								
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES								
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CHANGE IN REVENUES								
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF								
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2011) cost _____

POSITIONS

Full-time								
Part-time								
Temporary								

Why this fiscal note differs from previous version

Initial Version

Prepared by Shane Miller, Finance Manager
 Division Administrative Services Division
 Approved by Pamela Varni, Executive Director
Legislative Affairs Agency

Phone 465-6626
 Date/Time 3/10/11 1:22 PM
 Date 3/10/2011

Analysis

This fiscal note has zero impact on the Legislative Affairs Agency.