

HB

127

<TARGET><BILL>HB 127</BILL><SUBJECT>HB
127</SUBJECT><COMM>HFIN28</COMM></TARGET>

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HB 127
Fiscal Note Number: _____
() Publish Date: _____

Identifier: HB127-CS(JUD)DOC-OC-03-24-14
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House Judiciary

Department: Department of Corrections
Appropriation: Administration and Support
Allocation: Office of the Commissioner
OMB Component Number: 694

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2015 Request	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

This note reflects the changes made in House Judiciary.

Prepared By: April Wilkerson, Director
Division: Department of Corrections - Administrative Services
Approved By: Leslie Houston, Deputy Commissioner
Agency: Department of Corrections

Phone: (907)465-4641
Date: 03/24/2014 04:00 PM
Date: 03/24/14

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. CSHB 127 (JUD)

Analysis

This legislation has no impact on the Department of Corrections.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HB 127
Fiscal Note Number: _____
() Publish Date: _____

Identifier: HB127-LEG-OMB-03-25-14
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House Finance

Department: Alaska Legislature
Appropriation: Legislative Council
Allocation: Ombudsman
OMB Component Number: 790

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015 Appropriation Requested	Included in Governor's FY2015 Request	Out-Year Cost Estimates				
			FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues

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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 (separate supplemental appropriation required)
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 (separate capital appropriation required)
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? Yes
If yes, by what date are the regulations to be adopted, amended or repealed? 12/31/14

Why this fiscal note differs from previous version:

This fiscal note is updated for FY15, as the initial version was prepared in 2013. Also, the committee substitute for HB 127 removed multiple sections of the bill, so some of the regulation changes discussed in the initial fiscal note will not be needed. The discussion of new regulations that will result from this legislation has therefore been updated to reflect the changes made in House State Affairs and House Judiciary.

Prepared By:	Beth Leibowitz, Assistant Ombudsman	Phone:	(907)465-5311
Division:	Office of the Ombudsman	Date:	03/25/2014 03:30 PM
Approved By:	Jennifer Christensen, Acting Ombudsman	Date:	03/25/14
Agency:	Office of the Ombudsman		

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. CSHB 127 (JUD)

Analysis

CSHB 127(JUD) allows for the Ombudsman to receive step increases on the salary schedule for Range 26 set out in AS 39.27.011. The Ombudsman does not intend to implement any step increase in FY15, and thus no additional funds are requested for FY15. Any subsequent step increases will be handled through the normal personal services budgeting process for the Ombudsman's Office.

CSHB 127(JUD) will necessitate new regulations specific to the handling of any attorney-client privileged material provided to the ombudsman by an agency under investigation by the ombudsman, and reenactment of the ombudsman's procurement regulations.

The initial version of HB 127 would have expressly provided the ombudsman with jurisdiction to investigate the Alaska Bar Association as a state agency. It would also have provided the ombudsman with jurisdiction over certain contractors performing services for state agencies. The provisions regarding the ombudsman's jurisdiction are not in the committee substitute for HB 127, and therefore there will be no new regulations regarding changes in the ombudsman's jurisdiction.

The initial version of HB 127 also contained provisions changing the ombudsman's procedure for issuing investigative reports; those provisions are not in the committee substitute. However, the ombudsman still anticipates enacting new regulations pertaining to procedures for the ombudsman's investigative reports.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HB 127
Fiscal Note Number: _____
() Publish Date: _____

Identifier: HB127CS(JUD)-DOA-OPA-03-26-2014
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House Finance

Department: Department of Administration
Appropriation: Legal and Advocacy Services
Allocation: Office of Public Advocacy
OMB Component Number: 43

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015 Appropriation Requested	Included in Governor's FY2015 Request	Out-Year Cost Estimates					
			FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES								
Personal Services								
Travel								
Services								
Commodities								
Capital Outlay								
Grants & Benefits								
Miscellaneous								
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? N/A
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Updated for new committee substitute that clarifies the Ombudsmans duties related to certain records.

Prepared By:	Richard Allen, Director	Phone:	(907)269-3504
Division:	Office of Public Advocacy	Date:	03/26/2014 08:30 PM
Approved By:	Curtis Thayer, Commissioner	Date:	03/26/14
Agency:	Department of Administration		

FISCAL NOTE ANALYSIS

**STATE OF ALASKA
2014 LEGISLATIVE SESSION**

BILL NO. CSHB127

Analysis

CSHB127 makes adjustments to the compensation schedule for the ombudsman and clarifies the confidential nature of certain records received or generated by the ombudsman. The Office of Public Advocacy does not anticipate a fiscal impact and therefore submits a zero fiscal note.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: HB 127
Fiscal Note Number: _____
() Publish Date: _____

Identifier: HB127CS(JUD)-DOA-PDA-03-26-14
Title: OMBUDSMAN
Sponsor: RLS BY REQUEST
Requester: House Finance

Department: Department of Administration
Appropriation: Legal and Advocacy Services
Allocation: Public Defender Agency
OMB Component Number: 1631

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2015 Request	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015					
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues

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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Updated for new committee substitute that clarifies the Ombudsmans duties related to certain records.

Prepared By: Quinlan Steiner
Division: Public Defender Agency
Approved By: Deput Commissioner Curtis Thayer
Agency: Department of Administration

Phone: (907)334-4414
Date: 03/26/2014 09:30 AM
Date: 03/26/14

FISCAL NOTE ANALYSIS

**STATE OF ALASKA
2014 LEGISLATIVE SESSION**

BILL NO. CSHB 127 (JUD)

Analysis

This bill makes adjustments to the compensation schedule for the ombudsman and clarifies the confidential nature of certain records received or generated by the ombudsman.

This legislation is not expected to have a fiscal impact on the Public Defender Agency. The agency, therefore, submits a zero fiscal note.

**HB 127 (CSHB 127 (JUD))
AMENDMENTS TO THE OMBUDSMAN ACT**

SPONSOR STATEMENT

Prepared by the Office of the Ombudsman
March 26, 2014

The Ombudsman Act (AS 24.55) has not changed much since enactment in 1975, which speaks well for its basic structure. The ombudsman requested and obtained some modifications of the Ombudsman Act in 1990. It has become apparent that the Ombudsman Act would benefit from updates to address several issues that have arisen since 1990.

The following is a brief sectional description of the bill:

- Section 1 of CSHB 127(JUD) provides that the ombudsman may receive a step increase in salary, rather than remaining Step A of Range 26 for the ombudsman's entire term or terms.
- Section 2 clarifies the ombudsman's authority to hire additional staff using a personal services contract pursuant to AS 24.55.060(f).
- Section 3 amends a section on the ombudsman's investigatory authority to refer simply to "agency" instead of "state agency." This brings the section into conformance with the rest of the Ombudsman Act (AS 24.55), which consistently refers to the ombudsman's authority to investigate an administrative "agency."
- Section 4 prevents a general waiver of attorney-client privilege by an agency if it shares its attorney's advice with the Office of the Ombudsman in order to explain the agency's actions.
- Section 5 improves the wording of the ombudsman's existing privilege not to testify or produce records regarding matters brought to the ombudsman's attention in the course of her duties.
- Section 6 modernizes the ombudsman's procurement authority.
- Sections 7 and 8 state that sections 4 and 5 are indirect court rule amendments because they modify evidentiary rules, and that therefore sections 4 and 5 only take effect if the legislation is approved by a two-thirds majority vote of each house, as required by Art. IV, Section 15 of the Constitution of the State of Alaska.

**HB 127 (CSHB 127 (JUD))
AMENDMENTS TO THE OMBUDSMAN ACT**

EXPLANATION OF CHANGES

Prepared by the Office of the Ombudsman
March 26, 2014

HB 127 was introduced by the House Rules Committee at the request of the Office of the Ombudsman. The sectional analysis prepared for the initial version of HB 127 in 2013 is enclosed. **However, the current version, CSHB 127(JUD) contains only the following sections from the original bill: §§ 2, 3, 5, 10, 11, 14, and 16.**

The House State Affairs Committee deleted the sections of HB 127 (§§ 6-9) pertaining to informal investigative reports by the ombudsman. Because the ombudsman concluded that the Office of the Ombudsman can improve the investigative report process by adopting new regulations within the scope of the existing statutory structure, the ombudsman did not object to deletion of these sections. The committee also deleted the provision (§ 4) that would have made an executive branch agency's records of communication with the ombudsman during an investigation exempt from the Alaska Public Records Act.

In House State Affairs, the committee substitute deleted the express reference to the Alaska Bar Association (§1), and instead added "instrumentality" to the list of governmental entities defined as agencies for purposes of the ombudsman's jurisdiction (§ 12). As the Bar Association is almost unique in being defined as an "instrumentality of the state" without also being defined as an "authority" or "public corporation," this change in format would have accomplished the same result as the original section that specifically stated that the Alaska Bar Association was an agency for purposes of the Ombudsman Act.

The House State Affairs Committee also removed the proposed ombudsman jurisdiction over contracted juvenile residential facilities (§ 12).

Finally, the House State Affairs committee substitute added several sections that granted the chair of the Administrative Regulation Review Committee a special authority to request ombudsman investigations, and imposed special reporting requirements by the ombudsman to the chair of the Administrative Regulation Review Committee, different than the ombudsman's statutory duty to provide an annual report to the legislature.

The House Judiciary Committee deleted all changes to the ombudsman's jurisdiction – both the addition of "instrumentality" to the definition of "agency" and all additions of private contractors and grantees. All references relevant to the Alaska Bar Association were removed, as were any provisions that would have expanded the ombudsman's jurisdiction to any type of contractor. The House Judiciary Committee also deleted the sections proposing to link the Office of the Ombudsman to the Administrative Regulation Review Committee.

The current bill, CSHB 127(JUD), is simpler than the previous versions. The core statutory updates requested by the ombudsman are in the committee substitute, and the ombudsman therefore supports the current version of the legislation.

INTRODUCTION TO PROPOSED AMENDMENTS TO THE OMBUDSMAN ACT (HB 127)

The Ombudsman Act (AS 24.55.010 – 24.55.340) was enacted in 1975. The ombudsman requested revisions to the statute after the first ten years of operation, and legislation enacting those revisions passed in 1990. After another twenty years of ombudsman work, a number of issues have accumulated and the Ombudsman is asking that the Legislature consider amendments that would allow the ombudsman's office to function more efficiently.

The Office of the Ombudsman, with considerable assistance from Legislative Legal Services, has prepared a bill draft addressing the areas in which the statute falls short of the current needs of the office.

Sectional Analysis of HB 127

Section 1. The Alaska Bar Association was created in AS 08.08.010 as an "instrumentality of the state" in order to license and regulate attorneys. As the state boards licensing other professions are clearly state agencies, the Bar Association looks like a state agency when judged by its function. The Office of the Ombudsman believes that the Bar Association falls within the ombudsman's jurisdiction over the administrative acts of agencies, because the Ombudsman Act defines "agency" very broadly as including "a department, office, institution, corporation, authority, organization, commission, committee, council, or board of a municipality or in the executive, legislative, or judicial branches of the state government, and a department, office, institution, corporation, authority, organization, commission, committee, council, or board of a municipality or of the state government independent of the executive, legislative, and judicial branches." See AS 24.55.330(2). The Bar Association, however, has consistently maintained that it is not a state agency for purposes of the Ombudsman Act.

The Bar Association's argument that it is not a state agency is partially supported by the Alaska Supreme Court's multi-factor test for determining whether an entity is a state agency. Upon applying the factors listed in *Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast*, 715 P.2d 707 (Alaska 1986), it is not clear whether or not the Bar Association is a state agency, because roughly half of the factors indicate that it is a state agency, while the others indicate that it is not. This jurisdictional question can be resolved by either litigation or legislative decision. The ombudsman considers litigation to be a poor use of both the ombudsman's resources and those of the Bar Association, and therefore asks that the Legislature settle this matter one way or the other.

The ombudsman does not necessarily advocate for inclusion of the Bar Association within the ombudsman's jurisdiction, but would like this long-standing issue resolved as efficiently as possible. (For additional discussion of the relevant case law and the history of this issue, see **Appendix A**).

Section 2. The purpose of this amendment is to allow the ombudsman to receive step increases. The ombudsman is now the only head of a legislative agency who cannot receive step increases. Previously, the salary of the Victims' Rights Advocate was also frozen at Step A, Range 26, but in 2012, the legislature revised compensation for the Victims' Rights Advocate (AS 24.65.060) to allow the Victims' Rights Advocate to receive step increases. This section would provide parity in the statutory salary provision for the ombudsman as compared to other legislative agency heads. Looking ahead, the change would allow the legislature some flexibility in setting the salary of a newly appointed ombudsman. Also, this section deletes the wording "for Juneau" from AS 24.55.060, so that the Ombudsman's salary will

be set based on the Ombudsman's actual location. Presently, the pay scale for legislative employees is the same for Juneau and Anchorage, but if that eventually changes to provide Juneau employees with a geographic differential then this amendment would avoid an unintentional windfall to an Anchorage-based ombudsman.

Section 3. The Office of the Ombudsman currently hires individuals, such as retired former ombudsman staff, under personal services contracts. The ombudsman has received an opinion from the legislative personnel office that this practice is permissible for the Office of the Ombudsman. However, the existing statutes are somewhat ambiguous, or at least difficult to interpret, and the Ombudsman would like any doubt on this subject removed.

Section 4. The ombudsman's opinions and recommendations as provided to an agency are made confidential in AS 24.55.180 and AS 24.55.190, so that an agency may consider and respond without public embarrassment. The problem is that those measures are rendered futile if the emails and other communications between the ombudsman and the agency prior to the ombudsman's report are available for publication. During an investigation, the ombudsman's questions to agency staff and requests for records may reveal the nature of the allegations and the ombudsman's potential criticisms of the agency, often to the same extent as the ultimate report of opinions and recommendations. The amendment to AS 24.55.160(b) extends the confidentiality provided to the preliminary and final ombudsman reports to encompass the communications that lead up to those reports.

Section 5. Executive branch personnel sometimes provide the ombudsman with the opinions offered by an assistant attorney general. This is often in the agency's interest, because reliance on the advice of their attorney may explain conduct that otherwise appears to be without an adequate explanation. However, sharing this material with the ombudsman's office has the potential to create an unintentional waiver of privilege. This legislation aims to preserve an agency's ability to communicate frankly with the ombudsman without causing harm to the agency's ability to protect itself in litigation against non-state entities.

Sections 6-9. When the Office of the Ombudsman opened in 1975, nearly every closing letter was counted as an "investigation" issued by the Ombudsman under AS 24.55.190 ("The ombudsman shall report the opinion and recommendations of the ombudsman to an agency..."). Reports under AS 24.55.190 are a non-delegable duty of the Ombudsman, which means that the reports cannot be signed by an assistant ombudsman. Since 1975, the office has evolved to the point where the Ombudsman cannot, as a practical matter, review every closing letter. The office has developed a practice of staff discontinuing investigations with suggestions to an agency, in cases where there may be improvements that an agency can undertake but the issue is not significant enough to warrant the Ombudsman's resources for a full report under AS 24.55.190. The proposed changes, particularly a new AS 24.55.185, provide a clear statutory path for the ombudsman's staff to handle these "gray area" complaints. If this legislation is enacted, the ombudsman anticipates undertaking a regulations project to further define implementation of the "informal reports" provision.

Section 6 amends AS 24.55.180 to maintain the requirement that the ombudsman (or her staff) consult with an agency prior to issuing a critical opinion, whether formal or informal; however, for an informal opinion, the consultation be done via email or even verbally. The provision of a preliminary report –

usually a fairly cumbersome document sent to the director and/or commissioner – is reserved for investigations that are proceeding to an ombudsman's formal report issued under AS 24.55.190.

Section 7 outlines the process for the office of the ombudsman to provide an informal report to an agency.

Sections 8 and 9 make the necessary amendments to AS 24.55.190 to harmonize it with the new statute, AS 24.55.185.

Section 10. This section updates the ombudsman's testimonial privilege to match the privilege granted to the Office of Victims' Rights when that office was created in 2001. It removes any ambiguity regarding the protected status of the ombudsman's documents. It also clarifies that the privilege extends to administrative hearings as well as to court proceedings.

Section 11. The procurement statute, AS 24.55.275, contains language that matched a prior version of the executive branch procurement code (AS 36.30). The provisions of AS 36.30 have been comprehensively revised since then, and AS 24.55.275 is now a poor fit for the office of the ombudsman. The amendments bring the ombudsman's procurement procedures into line with the rest of the legislative branch, while still allowing for the ombudsman's relative autonomy.

Sections 12-13. Since enactment of the original Ombudsman Act in 1975, more services previously thought of as state government functions have been shifted from state agency employees to contractors. The proposed amendments expand the ombudsman's jurisdiction to encompass a portion of the contracted services. The intent is to provide the ombudsman with jurisdiction when a contractor performs services of the same custodial nature as those already performed by the Department of Corrections (and the Division of Juvenile Justice). In particular, an Alaska inmate should be able to complain to the ombudsman whether he is held in a facility owned by the Division of Institutions or in a contractor's facility that is absorbing the overflow from the Division of Institutions. According to the contracts DOC has entered into with private prisons, Alaska inmates are supposed to be able to access the same grievance process as they would while housed in a state facility; while the contracts only address DOC's internal grievance process, the extension of the ombudsman's jurisdiction is a logical corollary.

The ombudsman does not anticipate that this expansion in the ombudsman's jurisdiction would require more staff. First, the effective date of this provision is delayed until 2015. Second, some of these issues, in practice, already take up ombudsman staff time, including time spent referring the issue to the relevant department and then following up on the referral. For example, the ombudsman's staff received multiple serious complaints related to medical care at the Hudson, Colorado, contract facility, but many of these complaints proved unsupported. Because the ombudsman did not have direct access to Hudson personnel and records, these complaints were actually open longer than necessary.

The expansion of jurisdiction also encompasses contractors who have been authorized to determine eligibility for state programs, a task probably carried out by state agency personnel when the legislature created the Office of the Ombudsman. An example would be contractors who make eligibility determinations for the Alaska Temporary Assistance Program on behalf of the Division of Public

Assistance. An agency should not be able to use out-sourcing to avoid the ombudsman's review of how the agency provides or denies access to a state program.

Sections 14 and 16. Two sections of this bill (§ 5 and § 10) are indirect amendments of the court rules. Sections 14 and 16 state that the changes to the court rules are not effective without a two-thirds majority vote of each house of the legislature.

Section 15. The ombudsman's prospective jurisdiction over certain private contractors is delayed until 2015, to allow time for the ombudsman to work with affected agencies and their contractors and to avoid unjust surprise to contractors who have never had to consider the possibility of an ombudsman investigation.

APPENDIX A

The Ombudsman's jurisdiction and the Alaska Bar Association

Why the Bar Association's status is unclear

The Ombudsman Act gives an exceptionally broad definition of "agency" for purposes of the ombudsman's jurisdiction. See AS 24.55.330. However, the definition does not specifically include the phrase "instrumentality of the state," which is the term used to define the Bar Association in its enabling statute. See AS 08.08.010. Our office turned to the criteria adopted by the Alaska Supreme Court for answering whether an entity is a "state agency" for a given purpose. The criteria, as stated in *Alaska Commercial Fishing & Agriculture Bank v. O/S Alaska Coast*, 715 P.2d 707 (Alaska 1986) ("CFAB"), are:

- Language in the statute creating the entity, including whether it is expressly located within a department;
- Whether the Governor appoints the directors of the entity, and whether any commissioners or other state officials are statutorily appointed to the board;
- Whether the entity is required to report to the governor and/or the Legislature;
- Whether Legislative Audit audits or may audit the entity;
- Whether the Legislature can dissolve the entity, and, conversely, whether the entity must obtain legislative approval prior to dissolution;
- The degree to which funding is provided by the Legislature;
- Whether the entity can dispose of its own income or whether revenue must be deposited in the state's general fund;
- Whether the entity is clearly performing a government function.

Three of these factors are unequivocally on the "state agency" side of the scale: the Bar Association must report annually to the Legislature under AS 08.08.085; Legislative Audit audits the Bar Association; and its existence or dissolution depends on the Legislature. A fourth factor – performance of a governmental function – also makes the Bar Association look more like a state agency, because it is performing an occupational licensing and regulatory function, just like the boards regulating other occupations under Title 8 of the Alaska Statutes. The Alaska Supreme Court appears to have considered the Bar Association's function to be governmental, as of the court's decision in *Sullivan v. Alaska Bar Association*, 551 P.2d 531 (Alaska 1976): "The Bar Association, which was created by the State Legislature, acts as an *administrative arm of the judiciary* for the admission of lawyers to practice law before the courts of the State of Alaska" (Italics added).

On the other hand, the Bar Association does not receive legislative appropriations, and it disposes of its own income. Although three members of its Board of Governors are appointed by the Governor, nine members are elected by the attorney membership. The language creating the Bar Association refers to it as an "instrumentality of the state" but does not locate it within the executive branch, or even clearly place it within the judicial branch.

In short, the multi-factor test used by the Alaska courts offers support for both sides of the argument and does not clarify whether the Bar Association is a state agency for purposes of the ombudsman's office.

History of jurisdictional dispute

In 1983, then-Ombudsman Jack Chenoweth described the jurisdictional dispute over ombudsman investigations of the Alaska Bar Association:

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

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

See March 31, 1983 letter from Ombudsman Jack Chenoweth to Rep. Jerry Ward. The Bar Association appeared to be on the verge of "sunsetting" without renewal in 1980, and the ombudsman discontinued the pending investigations. Eventually, legislation renewed the Bar Association. Apparently, one version of that legislation specifically included the Bar Association within the ombudsman's jurisdiction, but that wording did not make it into the enacted law. (Rep. Ward sponsored legislation during the 1983 session (HB 293) that would have expressly placed the Bar Association within the ombudsman's jurisdiction; but this provision did not pass).

Jack Chenoweth's position in 1983 actually states the ombudsman's current viewpoint quite adequately:

The matter deserves clarification by legislation. Please understand that I am not committed to making the association subject to our jurisdiction. The legislature could as well conclude that the association was not subject to our jurisdiction. I have enough "business" from complainants dissatisfied with agencies, boards, commissions and other entities for which there is no jurisdictional challenge.

In 1993, then-Ombudsman Duncan Fowler drafted an office policy regarding complaints against the Bar Association, and stated the basic problem for our office: in order to assert what we believe is our statutory jurisdiction, we would expect to engage in prolonged litigation with the Bar Association, a commitment for which our office has often lacked resources. Ombudsman Policy & Procedure 6000 states in relevant part:

This office believes that complaints alleging error or omission by the Alaska Bar Association are jurisdictional; the Bar Association's officers believe just as strongly that its activities are outside our jurisdiction.

Complaints against the bar association should be called to the attention of the ombudsman promptly so that there can be a review of the matter.... The first case accepted against the bar association would require, as a prerequisite to resolution, this

office to request that the court enforce a request, subpoena or deposition issued against a bar association officer; moreover, the case would almost surely have to be resolved by the state supreme court. We haven't the money now to retain attorneys to drive home our point. If there is a very strong case, I would try, so let me know what comes in. However, for the moment you may discretionarily decline. In your letter of decline, please explain that the history of the office leads to the conclusion that we would be unable to investigate the bar association without taking on a major court case.

If we do in fact have jurisdiction, this "wait for the big case" approach is a disservice to complainants. If the Legislature concludes that we do not have jurisdiction, then complaints against the Bar Association can be declined immediately, without discussion of whether a given complaint is the one that will be worth litigating.

Number of Complaints Received Regarding the Bar Association

Our current case management software tracks complaints received from December 1999 through the present date. Assistant Ombudsman Beth Leibowitz found 11 complaints against the Bar Association during that period, with results as follows:

Declined as premature: 2

(Complaint either not raised with Bar Association or Bar Association not given reasonable time to respond to the complainant)

Resolved: 1

(Complainant said he had not received paperwork to file a complaint about an attorney; the ombudsman investigator asked the Bar Association staff to send another packet).

Declined due to lack of merit on its face: 1

Declined due to jurisdictional dispute: 7

Out of the seven complaints declined due to lack of clarity over our jurisdiction, six complaints alleged that the Bar Association had failed to adequately investigate a complaint about attorney competence – these were generally complaints by criminal defendants regarding their court-appointed counsel. The seventh complaint involved a client's effort to collect on a fee arbitration award ordered by the Bar Association.

If our office had undisputed jurisdiction to investigate Bar Association complaints, the number of complaints in this category would probably rise gradually, as individuals realized that our office was reviewing these complaints.

Problems and limitations on the ombudsman's exercise of jurisdiction

We believe that many of the complaints regarding the Bar's response to grievances about attorneys would still be declined by the ombudsman due to lack of resources. This is because grievances alleging poor quality of representation would tend to become evaluations of whether the attorney met minimal standards of competence, and our office is not in a position to supply expertise on what are essentially attorney malpractice claims. This is especially so in the area of criminal defense – some of our staff are attorneys, but our previous practice has been in civil cases, not criminal defense or prosecution.

The other issue is that some of the Bar Association's functions are directly supervised by the Alaska Supreme Court. As our office does not have jurisdiction over judicial decisions, we are mindful that the line between the Bar Association's administrative decisions and the court's orders may not always be

completely clear. For example, attorney suspension or disbarment must be approved by the court. Although the Bar Association has a fairly elaborate administrative process for attorney discipline, the Bar Association by itself cannot suspend or disbar an attorney. *See* Alaska Bar Rule 16. Similarly, in *Sullivan v. Alaska Bar Association*, 551 P.2d 531 (Alaska 1976), the court concluded that even though admission procedures were “delegated” to the Bar Association, the court “ultimately reserves the authority to determine whether or not an applicant should be admitted to the bar.” The Bar Association had refused to waive the application deadline for an applicant who requested permission to sit for the bar exam at the last minute. The court did not require the applicant to exhaust appeals within the Bar Association, nor did the court offer any deference to the Bar Association’s decision. The court ordered the Bar Association to allow the applicant to sit for the exam, based on the court’s inherent authority over admission (licensing) of attorneys.

In other words, some complaints about Bar Association “administrative actions” may actually be decisions that should be made by the justices of the Alaska Supreme Court, and, as judicial decisions, are not within the ombudsman’s jurisdiction regardless of the Bar Association’s status.