

SB

72

<TARGET><BILL>SB 72</BILL><SUBJECT>SB
72</SUBJECT><COMM>SJUD28</COMM></TARGET>

Fiscal Note

State of Alaska
2013 Legislative Session

Bill Version: SB 72
Fiscal Note Number: _____
() Publish Date: _____

Identifier: SB72-DOC-OC-03-15-13
Title: OMBUDSMAN
Sponsor: COGHILL BY REQUEST
Requester: Senate 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)

	FY2014 Appropriation Requested	Included in Governor's FY2014 Request	Out-Year Cost Estimates					
			FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	
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	0.0

Positions

Full-time								
Part-time								
Temporary								

Change in Revenues								
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Estimated SUPPLEMENTAL (FY2013) cost: 0.0

Estimated CAPITAL (FY2014) cost: 0.0

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If yes, by what date are the regulations to be adopted, amended or repealed?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 is the original version of the bill.

Prepared By: Kevin Worley, Director	Phone: (907)465-4641
Division: Department of Corrections - Administrative Services	Date: 03/15/2013 12:00 AM
Approved By: Leslie Houston, Deputy Commissioner	Date: 03/15/13
Department of Corrections	

FISCAL NOTE ANALYSIS

**STATE OF ALASKA
2013 LEGISLATIVE SESSION**

BILL NO. SB 72

Analysis

This bill puts entities that contract with the Department of Corrections to provide prison, halfway house, or other residential type services under the jurisdiction of the State Ombudsman. As a state agency, the Department of Corrections currently works with the Ombudsman to resolve complaints. The addition of residential contract service entities to the jurisdiction of the Ombudsman would not require a substantial adjustment to current practices and, therefore, would not result in additional costs to the Department.

Fiscal Note

State of Alaska
2013 Legislative Session

Bill Version: SB 72
Fiscal Note Number: _____
() Publish Date: _____

Identifier: SB072-DOA-PDA-3-15-13
Title: OMBUDSMAN
Sponsor: COGHILL BY REQUEST
Requester: Senate Judiciary

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)

	FY2014 Appropriation Requested	Included in Governor's FY2014 Request	Out-Year Cost Estimates				
			FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
OPERATING EXPENDITURES	FY 2014	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	***	***	***	***	***	***	***

Fund Source (Operating Only)

None							
Total	***	***	***	***	***	***	***

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues	***	***	***	***	***	***	***
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Estimated SUPPLEMENTAL (FY2013) cost: 0.0

Estimated CAPITAL (FY2014) cost: 0.0

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:

Not applicable, initial version.

Prepared By: <u>Quinlan Steiner</u>	Phone: <u>(907)334-4414</u>
Division: <u>Public Defender Agency</u>	Date: <u>03/15/2013 02:24 PM</u>
Approved By: <u>Curtis Thayer, Deputy Commissioner</u>	Date: <u>03/15/13</u>
<u>Department of Administration</u>	

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. SB072

Analysis

This bill places the Alaska Bar Association under the jurisdiction of the Ombudsman's Office. The bill also purports to prevent the waiver of the attorney-client privilege if such information is provided to the Ombudsman's office and to prevent further disclosure by the Ombudsman's office.

This bill would likely make attorney responses to bar grievances subject to disclosure to the Ombudsman's office should that office conduct an investigation into the Bar Association's action on a grievance filed against an attorney. This would prevent attorneys from fully responding to bar grievances due to the risk that client confidences would be revealed to a third-party in violation of Alaska Code of Professional Conduct.

The failure to respond fully to bar grievances is likely to result in additional expenses surrounding litigation of proper response to bar grievances and increased acceptance of grievances for investigation. The Agency cannot predict the fiscal impact of this legislation and, therefore, submits an indeterminate fiscal note.

Fiscal Note

State of Alaska
2013 Legislative Session

Bill Version: SB 72
Fiscal Note Number: _____
() Publish Date: _____

Identifier: SB072-DOA-OPA-3-15-13.xls
Title: OMBUDSMAN
Sponsor: COGHILL BY REQUEST
Requester: Senate Judiciary

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)

	FY2014 Appropriation Requested	Included in Governor's FY2014 Request	Out-Year Cost Estimates				
			FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
OPERATING EXPENDITURES							
Personal Services	***	***	***	***	***	***	***
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	***	***	***	***	***	***	***

Fund Source (Operating Only)

None							
Total	***	***	***	***	***	***	***

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2013) cost: 0.0

Estimated CAPITAL (FY2014) cost: 0.0

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:

Not applicable, Initial version

Prepared By: Richard Allen, Director	Phone: (907)269-3504
Division: Office of Public Advocacy	Date: 03/15/2013 03:15 PM
Approved By: Curtis Thayer, Deputy Commissioner	Date: 03/15/13
Department of Administration	

FISCAL NOTE ANALYSIS

STATE OF ALASKA
2013 LEGISLATIVE SESSION

BILL NO. SB072

Analysis

This bill places the Alaska Bar Association under the jurisdiction of the Ombudsman's Office. The bill also purports to prevent the waiver of the attorney-client privilege if such information is provided to the Ombudsman's office and to prevent further disclosure by the Ombudsman's office.

This bill would likely make attorney responses to bar grievances subject to disclosure to the Ombudsman's office should that office conduct an investigation into the Bar Association's action on a grievance filed against an attorney. This would prevent attorneys from fully responding to bar grievances due to the risk that client confidences would be revealed to a third-party in violation of Alaska Code of Professional Conduct.

The failure to respond fully to bar grievances is likely to result in additional expenses surrounding litigation of proper response to bar grievances and increased acceptance of grievances for investigation. The Office of Public Advocacy would need, on a case by case basis, to retain counsel to meet the ethical and legal demands of complying with and responding to Ombudsman's inquiries, investigations and hearings and, therefore, submits an indeterminate fiscal note.



Chapter 55. Office of the Ombudsman

Article

1. Organization (§§ 24.55.010 - 24.55.090)
2. Jurisdiction and Initiation of Investigations (§§ 24.55.100 - 24.55.140)
3. Investigations (§§ 24.55.150 - 24.55.170)
4. Procedure and Reports After Investigation (§§ 24.55.180 - 24.55.190)
5. Miscellaneous (§§ 24.55.220 - 24.55.290)
6. General Provisions (§§ 24.55.300 - 24.55.340)

Legislative history reports. -- For conference committee letter of intent and analysis of ch. 53, SLA 1975 (FCCS HCS CSSB 1), see 1975 Senate Journal, pp. 601-603.

Article 1. Organization.

Section	Section
10. Office of the ombudsman	50. Removal
20. Appointment of the ombudsman	60. Compensation
30. Qualification; prohibition against political activity	70. Staff and delegation
40. Term of office	80. Office facilities and administration
	90. Procedure

Sec. 24.55.010. Office of the ombudsman. There is created in the legislative branch of the state the office of the ombudsman. (§ 1 ch 32 SLA 1975)

Sec. 24.55.020. Appointment of the ombudsman. (a) A candidate for appointment as the ombudsman shall be nominated by the ombudsman selection committee composed of three members of the senate appointed by the president of the senate and three members of the house of representatives appointed by the speaker of the house. One member of the minority party caucus in each house shall be appointed to the selection committee.

(b) The ombudsman selection committee shall examine persons to serve as ombudsman regarding their qualifications and ability and shall place the name of the person selected in nomination. The appointment is effective if the nomination is approved by a roll call vote of two-thirds of the members of the legislature in joint session and approved by the governor. However, the governor may veto the appointment and return it, with a statement of objections, to the legislature. Upon receipt of a veto message the legislature shall meet immediately in joint session and reconsider approval of the vetoed appointment. The vetoed appointment becomes effective by an affirmative vote of two-thirds of the membership of the legislature in joint session. The vote on the appointment and on reconsideration of a vetoed appointment shall be entered in the journals of both houses.

(c) The appointment of the ombudsman becomes effective if, while the legislature is in session, the governor neither approves nor vetoes it within 15 days, Sundays excepted, after its delivery to the governor. If the legislature is not in session and the governor neither approves nor

vetoes the appointment within 20 days, Sundays excepted, after its delivery to the governor, the appointment becomes effective. (§ 1 ch 32 SLA 1975)

Sec. 24.55.030. Qualifications; prohibitions against political activity. (a) A person may not serve as ombudsman

(1) within one year of the last day on which the person serviced as a member of the legislature;

(2) while the person is a candidate for or holds any other national, state, or municipal office; nor may the ombudsman become a candidate for national, state or municipal office until one year has elapsed from the date the ombudsman vacates the office of ombudsman;

(3) while the person is engaged in any other occupation for which the person receives compensation;

(4) unless the person is at least 21 years of age and is a qualified voter who has been a resident of the state for at least three years.

(b) It is essential that the nonpartisan nature, integrity and impartiality of the ombudsman's functions and services be maintained. The ombudsman and members of the staff of the ombudsman may not join, support or otherwise participate in a partisan political organization, faction or activity, including but not limited to the making of political contributions. However, this subsection does not restrict the ombudsman or members of the staff of the ombudsman from expressing private opinion, registering as to party, or voting. (§ 1 ch 32 SLA 1975)

Sec. 24.55.040. Term of office. (a) The term of office of the ombudsman is five years. An ombudsman may be reappointed but may not serve for more than three terms.

(b) If the term of an ombudsman expires without the appointment of a successor under this chapter, the incumbent ombudsman may continue in office until a successor is appointed. If the ombudsman dies, resigns, becomes ineligible to serve, or is removed or suspended from office, the person appointed as acting ombudsman under AS 24.55.070(a) serves until a new ombudsman is appointed for a full term. (§ 1 ch 32 SLA 1975; am § 1 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment substituted "person appointed as" for "deputy ombudsman becomes" and inserted "under AS 24.55.070(a) serves" in the second sentence of subsection (b).

Sec. 24.55.050. Removal. The legislature, by a concurrent resolution adopted by a roll call vote of two-thirds of the members in each house entered in the journal, may remove or suspend the ombudsman from office, but only for neglect of duty, misconduct, or disability (§ 1 ch 32 SLA 1975)

Sec. 24.55.060. Compensation. The ombudsman is entitled to receive an annual salary equal to Step A, Range 26 on the salary schedule set out in AS 39.27.011(a) for Juneau. (§ 1 ch 32 SLA 1975; am § 5 ch 21 SLA 1987)

Effect of amendments. -- The 1987 amendment substituted "Step A, Range 26 on the salary schedule set out in AS 39.27.011(a) for Juneau" for "that of a superior court judge."

Sec. 24.55.070. Staff and delegation. (a) The ombudsman shall appoint a person to serve as acting ombudsman in the absence of the ombudsman. The ombudsman shall also appoint assistants and clerical personnel necessary to carry out the provisions of this chapter.

(b) The ombudsman may delegate to the assistants any of the ombudsman's duties except those specified in AS 24.55.190 and 24.55.200, however, during the ombudsman's absence from the principal business offices, the ombudsman may delegate the duties specified in AS 24.55.190 and 24.55.200 to the acting ombudsman for the duration of the absence. The duties specified in AS 24.55.190 and 24.55.200 shall be performed by the acting ombudsman when serving under AS 24.55.040(b).

(c) The ombudsman and the staff appointed by the ombudsman are in the exempt service under AS 39.25.110 and are not subject to the employment policies under AS 24.10 or AS 24.20. (§ 1 ch 32 SLA 1975; am § 6 ch 21 SLA 1987; am §§ 2, 3 ch 71 SLA 1990)

Effect of amendments. -- The 1987 amendment added "and are not subject to the employment policies under AS 24.10 or AS 24.20" at the end of subsection (c).

The 1990 amendment, in subsection (a), rewrote the first sentence, which formerly read "The ombudsman may appoint a deputy ombudsman"; and in subsection (b), deleted "deputy or" preceding "assistants" and substituted "acting ombudsman" for "deputy ombudsman" and deleted "as acting ombudsman" following "serving" in the second sentence.

Sec. 24.55.080. Office facilities and administration. (a) Subject to restrictions and limitations imposed by the executive director of the Legislative Affairs Agency, the administrative facilities and services of the Legislative Affairs Agency, including computer, data processing, and teleconference facilities, may be made available to the ombudsman to be used in the management of the office of the ombudsman and to carry out the purposes of this chapter.

(b) The salary and benefits of the ombudsman and the permanent staff of the ombudsman shall be paid through the same procedures used for payment of salaries and benefits of other permanent legislative employees.

(c) The ombudsman shall submit a budget for each fiscal year to the Alaska Legislative Council and the council shall annually submit an estimated budget to the governor for information purposes in the preparation of the executive budget. After reviewing and approving, with or without modifications, the budget submitted by the ombudsman, the council shall submit the approved budget to the finance committees of the legislature. (§ 1 ch 32 SLA 1975; am §§ 4, 5 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment rewrote subsection (a); and in subsection (c) substituted "Alaska Legislative Council and the council" for "finance committees for the legislature and" in the first sentence and added the second sentence.

Sec. 24.55.090. Procedure. (a) The ombudsman shall, by regulations adopted under the Administrative Procedure Act (AS 44.62), establish procedures for receiving and processing complaints, conducting investigations, reporting findings, and ensuring that confidential information obtained by the ombudsman in the course of an investigation will not be improperly disclosed.

(b) The ombudsman may not charge fees for the submission or investigation of complaints. (§ 1 ch 32 SLA 1975; am § 6 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment divided the section into subsections; substituted the language beginning "reported findings, and ensuring that confidential information" for "and related findings" at the end of subsection (a); and deleted "However" from the beginning of subsection (b).

Article 2. Jurisdiction and Initiation of Investigations.

Section

100. Jurisdiction

110. Investigation of complaints

120. Investigation on the ombudsman's motion

Section

130. Notice to complainant

140. Notice to the agency

Sec. 24.55.100 Jurisdiction. (a) The ombudsman has jurisdiction to investigate the administrative acts of agencies.

(b) The ombudsman may exercise the ombudsman's powers without regard to the finality of an administrative act. (§ 1 ch 32 SLA 1975)

Sec. 24.55.110. Investigation of complaints. The ombudsman shall investigate any complaint that is an appropriate subject for investigation under AS 24.55.150, unless the ombudsman reasonably believes that

- (1) there is presently available an adequate remedy for the grievance stated in the complaint;
 - (2) the complaint relates to a matter that is outside the jurisdiction of the ombudsman;
 - (3) the complaint relates to an administrative act of which the complainant has had knowledge for an unreasonable length of time before the complaint was submitted;
 - (4) the complainant does not have a sufficient personal interest in the subject matter of the complaint;
 - (5) the complaint is trivial or made in bad faith;
 - (6) the resources of the ombudsman's office are insufficient for adequate investigation.
- (§ 1 ch 32 SLA 1975)

Sec. 24.55.120. Investigation on the ombudsman's motion. The ombudsman may investigate the administrative act of an agency on the ombudsman's own motion if the ombudsman reasonably believes that it is an appropriate subject for investigation under AS 24.55.150. (§ 1 ch 32 SLA 1975)

Sec. 24.55.130. Notice to complainant. (a) If the ombudsman decides not to investigate a complaint, the ombudsman shall inform the complainant of that decision and shall state the reasons.

(b) If the ombudsman decides to investigate a complaint, the ombudsman shall notify the complainant of the decision.

(c) Notice given under this section may be oral but the ombudsman shall state in writing the reasons for not investigating a complaint if requested by the complainant. (§ 1 ch 32 SLA 1975; am § 7 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment added subsection (c).

Sec. 24.55.140. Notice to the agency. If the ombudsman decides to investigate a complaint, the ombudsman shall notify the agency of the intention to investigate unless the ombudsman believes that advance notice will unduly hinder the investigation or make it ineffectual. Notice given under this section may be oral or written, at the discretion of the ombudsman. (§ 1 ch 32 SLA 1975; am § 8 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment added the second sentence.

Article 3. Investigations.

Section
150. Appropriate subjects for investigation

Section
160. Investigative procedures
170. Powers

Sec. 24.55.150. Appropriate subjects for investigation. (a) An appropriate subject for investigation by the ombudsman is an administrative act of an agency which the ombudsman has reason to believe might be

- (1) contrary to law;
- (2) unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law;
- (3) based on a mistake of fact;
- (4) based in improper or irrelevant grounds;
- (5) unsupported by an adequate statement of reasons;
- (6) performed in an inefficient or discourteous manner; or
- (7) otherwise erroneous.

(b) The ombudsman may investigate to find a appropriate remedy. (§ 1 ch 32 SLA 1975)

Sec. 24.55.160. Investigation procedures. (a) In an investigation, the ombudsman may

- (1) make inquiries and obtain information considered necessary;
- (2) enter without notice to inspect the premises of an agency, but only when agency personnel are present;
- (3) hold private hearings; and
- (4) notwithstanding other provisions of law, have access at all times to records of every state agency, including confidential records, except sealed court records, production of which may only be compelled by subpoena, and except for records of active criminal investigations and records that could lead to the identity of confidential police informants.

(b) The ombudsman shall maintain confidentiality with respect to all matters and identities of the complainants or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations. However, the ombudsman may not disclose a confidential record obtained from an agency. (§ 1 ch 32 SLA 1975; am § 9 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment added paragraph (a)(4), making related grammatical changes; and added the second sentence in subsection (b).

Opinions of attorney general. -- Insofar as the ombudsman has a legitimate governmental interest in access and he is not the "public," the ombudsman may be allowed access to personnel files, but only upon his assurance that the contents of the files will not, under any circumstances except an order of a court of competent jurisdiction, become public in whole or in part. February 28, 1984, Op. Atty' Gen.

Sec. 24.55.170. Powers. (a) Subject to the privileges that witnesses have in the courts of this state, the ombudsman may compel by subpoena, at a specified time and place, the

- (1) appearance and sworn testimony of a person who the ombudsman reasonably believes may be able to give information relating to a matter under investigation; and
- (2) production by a person of a record or object that the ombudsman reasonably believes may relate to the matter under investigation.

(b) If a person refuses to comply with a subpoena issued under (a) of this section, the superior court may, on application of the ombudsman, compel obedience by proceedings for contempt in the same manner as in the case of disobedience to the requirements of a subpoena issued by the court or refusal to testify in the court. (§ 1 ch 32 SLA 1975; am § 10 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment made stylistic changes is subsection (a).

Opinions of attorney general. -- Insofar as the ombudsman has a legitimate governmental interest in access and he is not the "public," the ombudsman may be allowed access to personnel files, but only upon his assurance that the contents of the files will not, under any circumstances except an order of a court of competent jurisdiction, become public in whole or in part. February 28, 1984, Op. Atty' Gen.

Article 4. Procedure and Reports After Investigation.

Section	Section
180. Consultation	200. Publication of recommendations
190. Procedure after investigation	210. Notice to the complainant

Sec. 24.55.180. Consultation. Before giving an opinion or recommendation that is critical of an agency or person, the ombudsman shall consult with that agency or person. The ombudsman may make a preliminary opinion or recommendation available to the agency or person for review, but the preliminary opinion or recommendation is confidential and may not be disclosed to the public by the agency or person. (§ 1 ch 32 SLA 1975; am § 11 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment made a stylistic change in the first sentence and added the second sentence.

Sec. 24.55.190. Procedure after investigation. (a) The ombudsman shall report the opinion and recommendations of the ombudsman to an agency if the ombudsman finds, after investigation, that

- (1) a matter should be further considered by the agency;
- (2) an administrative act should be modified or cancelled;
- (3) a statute or regulation on which an administrative act is based should be altered;
- (4) reasons should be given for an administrative act;
- (5) any other action should be taken by the agency;
- (6) there are no grounds for action by the agency; or
- (7) the agency's act was arbitrary or capricious, constituted an abuse of discretion, or was otherwise erroneous or not in accordance with the law.

(b) The ombudsman may request the agency to notify the ombudsman, within a specified time, of any action taken on the recommendations.

(c) The report provided under (a) of this section is confidential and may not be disclosed to the public by the agency. The ombudsman may disclose the report under AS 24.55.200 only after providing notice that the investigation has been concluded

- (1) to the agency; and
- (2) if the investigation was conducted in response to a complaint, to the complainant under AS 24.55.210. (§ 1 ch 32 SLA 1975; am § 12 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment added subsection (c).

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

Sec. 24.55.210. Notice to the complainant. After a reasonable time has elapsed, the ombudsman shall notify the complainant of the actions taken by the ombudsman and by the agency. (§ 1 ch 32 SLA 1975)

Article 5. Miscellaneous.

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

Sec. 24.55.220. Misconduct by agency personnel. If the ombudsman believes there is a breach of duty or misconduct by an officer or employee of an agency in the conduct of the officer's or employee's official duties, the ombudsman shall refer the matter to the chief executive officer of the agency or, when appropriate, to a grand jury or to another appropriate official or agency. (§ 1 ch 32 SLA 1975)

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

Sec. 24.55.240. Judicial review. A proceeding or decision of the ombudsman may be reviewed in superior court only to determine if it is contrary to the provisions of this chapter. (§ 1 ch 32 SLA 1975)

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

Sec. 24.55.260. Ombudsman's privilege not to testify. The ombudsman and the staff of the ombudsman may not testify in a court regarding matters coming to their attention in the exercise of their official duties except as may be necessary to enforce the provisions of this chapter. (§ 1 ch 32 SLA 1975)

Sec. 24.55.270. Letters to or from ombudsman. A letter to the ombudsman from a person held in custody by an agency shall be forwarded immediately, unopened, to the ombudsman. A letter from the ombudsman to a person held in custody by an agency shall be delivered immediately, unopened, to the person. (§ 1 ch 32 SLA 1975)

Sec. 24.55.275. Contract procedures. The ombudsman shall adopt by regulation procedures consistent with AS 36.30 to be followed by the office of the ombudsman in contracting for services. However, the procedure for requests for proposals does not apply to contracts for investigations under AS 24.55.100. (§ 4 ch 144 SLA 1982; am § 23 ch 106 SLA 1986)

Effect of amendments. -- The 1986 amendment, effective January 1, 1988, substituted "AS 36.30" for "AS 24.34" in the first sentence.

Sec. 24.55.280. Time for judicial review of agency action. This chapter in no way extends the time limit in which judicial review of agency action must be sought. (§ 1 ch 32 SLA 1975)

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

Article 6. General Provisions.

Section

300. Administrative Procedure Act
310. Conflict of interest
320. Municipalities

Section

330. Definitions
340. Short title

Sec. 24.55.300. Administrative Procedure Act. The administrative acts of the ombudsman are not subject to the provisions of the Administrative Procedure Act (AS 44.62), except as provided in AS 24.55.090. (§ 1 ch 32 SLA 1975)

Sec. 24.55.310. Conflict of interest. The ombudsman, the acting ombudsman and their professional staff are subject to AS 39.50 (conflict of interest). (§ 1 ch 32 SLA 1975; am § 13 ch 71 SLA 1990)

Effects of amendments. -- The 1990 amendment substituted "acting ombudsman" for "deputy ombudsman."

Sec. 24.55.320. Municipalities and school districts. A municipality or school district may elect to become subject to the jurisdiction of the ombudsman appointed under this chapter. If a municipality or school district so elects, it shall notify the ombudsman of that election and shall thereafter be considered an agency for the purposes of this chapter. If a municipality or school district subjects itself to the jurisdiction of the ombudsman, the municipality or school district shall pay its pro rata share of the cost of the operation of the office of the ombudsman based on the number of complaints or the case load emanating from that municipality or school district, as prescribed by the ombudsman. If a municipality or school district elects to remove itself from the jurisdiction of the ombudsman, it shall notify the ombudsman of that election and shall not thereafter be considered an agency for the purposes of this chapter. A municipality that elects to become subject to the jurisdiction of the ombudsman or to remove itself from that jurisdiction must do so by ordinance. A school district that elects to become subject to the jurisdiction of the ombudsman or to remove itself from that jurisdiction must do so by resolution. (§ 1 ch 32 SLA 1975; am § 14 ch 71 SLA 1990)

Effect of amendments. -- The 1990 amendment inserted "or school district" after "municipality" throughout the section; deleted "by ordinance" before "elect to become" in the first sentence; deleted "shall do so by ordinance" before "shall notify" in the fourth sentence; and added the final two sentences.

Sec. 24.55.330. Definitions. In this chapter

(1) "administrative act" means an action, omission, decision, recommendation, practice, policy, or procedure of an agency, but does not include the preparation or presentation of legislation or the substantive content of a judicial order, decision or opinion;

(2) "agency" includes 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; it also includes an officer, employee or member or an "agency" acting or purporting to act in the exercise of official duties, but does not include the governor, lieutenant governor, a member of the legislature, justice of the supreme court, judge of the court of appeals, a superior court judge, district court judge, magistrate, member of a city council or borough assembly, elected city or borough mayor, or a member of an elected school board.

(3) "record" means a document, paper, memorandum, book, letter, file, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card, or other item developed or received under law or in connection with

the transaction of official business, but does not include an attorney's work product, material that is confidential as a privileged communication between an attorney and client under rules adopted by the supreme court, or confidential oil and gas geological and geophysical data. (§ 1 ch 32 SLA 1975; am § 25 ch 12 ch SLA 1980; am § 88 ch 74 SLA 1985; am § 15 ch 71 SLA 1990)

Effect of amendments. -- The 1985 amendment, effective January 1, 1986, repealed paragraph (3), which defined "municipality."

Sec. 24.55.340. Short title. This chapter may be cited as The Ombudsman Act. (§ 1 ch 32 SLA 1975)



February 13, 2013

**INTRODUCTION TO PROPOSED AMENDMENTS
TO THE OMBUDSMAN ACT**

The Ombudsman Act (AS 24.55.010 – 24.55.340) was enacted in 1975. The ombudsman requested revisions to the statute after the first 10 years of operation, and legislation enacting those revisions passed in 1990. After another 20 years of ombudsman work, a number of issues have accumulated and the Ombudsman is asking that the Alaska 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 Proposed Legislation

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 before it goes out. 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 the changes to the court rules cannot be 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.