

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672

6928 HOUSE JUDICIARY

73

ALASKA LEGISLATURE

High court proposes salary legislation

Justices seek law to curb political bickering over judges, commissioners' pay

By MATT KOHLMAN

ASSOCIATED PRESS

JUNEAU — Legislation that would have an independent commission set salaries for the governor, lieutenant governor, legislators, commissioners and judges has been proposed by the state's highest court.

The Alaska Supreme Court requested the legislation to end political bickering over pay raises, said Arthur Snowden, director of the Alaska Court System.

Under the proposal, the Public Officers Compensation Commission would be created to take the place of an advisory commission that recommends pay increases to the Legislature. Its suggestions often have gone unheeded by the Legislature out of fear of

voter backlash.

"The old salary commission has made a recommendation on legislative salaries over three years ago and no one's acted upon it," Snowden said Tuesday. "I would think the Legislature would like to get these type of salaries out of politics."

The Legislature last year approved the first wage hike since 1985 for state judges. The judiciary had argued for years that better salaries were needed to attract and retain the best judges.

"Over the last five years, we've lost 20 percent of our judiciary because of seemingly endless politics around this state," Snowden said.

Rep. David Finkelstein, D-Anchorage, said the Legislature likely will favor the new pro-

posal.

"We have to set the judges' salaries and we have to set our own," he said. "We are not particularly good at setting either. When you set your own salary how can you do it objectively?"

Sen. Paul Fischer, R-Soldotna, also expects legislators to endorse the measure. Fischer was one of five senators to oppose judicial raises last session.

He said, however, that he is leery about filling the proposed seven-member board mainly with people in high management positions.

"We'll get raises," Fischer said. "That's the bottom line. The Legislature knows that. They're not going to give you a cut."

Gov. Walter J. Hickel has not

yet studied the proposal and has no position on it, Hickel spokesman Ed Wicher said.

But Wicher said the administration is "not overjoyed" with the prospect of adding another commission to the state payroll while it tries to reduce the 162 boards already formed.

Snowden noted that the federal government and more than half the states have similar commissions.

House Bill 129 and Senate Bill 113 would set up a governor-appointed panel that would submit salaries, expenses and allowances to the Legislature every two years. The pay scales would become law within 60 days unless the Legislature passed a bill disapproving the orders.

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HB

130

ALASKA LEGISLATURE

Committees

JUDICIARY
LABOR & COMMERCE
BUDGET SUBCOMMITTEE-
ADMINISTRATION



JUNEAU

BOX V
JUNEAU ALASKA 99811
(907) 465-2647

ANCHORAGE

BOX 10-1776
ANCHORAGE ALASKA 99510
(907) 562-1776

Kevin "Pat" Parnell
Representative
University-Midtown, Anchorage

MEMORANDUM
February 19, 1991

TO: Representative Jerry Mackie, Chair
House Community & Regional Affairs Committee

FROM: Representative Kevin "Pat" Parnell *Kevin Pat Parnell*

SUBJECT: HB 130, relating to Municipal Ombudsman immunity

HB 130 provides immunity for a municipal ombudsman and staff in the same fashion as has been granted to the state ombudsman in Alaska statute 24.55.250 and 24.55.260. In order for an ombudsman to guarantee that the confidentiality laws are not violated and the citizens can continue to enjoy their right to speak freely to their ombudsman, it is necessary to establish the privilege for a municipal ombudsman and their staff not to testify in court regarding matters involving an ombudsman's official duties.

The bill:

1. protects a municipal ombudsman and staff from civil action for anything done, said or omitted in performing the ombudsman's duties.
2. allows a municipal ombudsman and staff to claim immunity and therefore may decline to testify as a witness or to withhold confidential files to protect the citizen's privacy, yet retains, at their discretion, the option to testify.

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

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



Alaska State Legislature

House of Representatives
Community & Regional Affairs

AGENDA

House Community & Regional Affairs Committee

Wednesday, February 20, 1991, 1:30 p.m.

Capitol Building, Room 124

I. *HB 130 - Municipal Ombudsman's Immunity

Rep. Pat Parnell
Duncan Fowler, Juneau Ombudsman
Michael Mills, Municipal Ombudsman,
Anchorage
Joe Evans, Assemblyman, Anchorage
Assembly

II. *HB 81 - Publication of Municipal Foreclosure
Lists

Rep. Bert Sharp

Next Committee meeting: Thursday, February 21, 1:30 p.m.

HB 54 - Distribution of National
Forest Receipts

Monday, February 25, 1:30 p.m.

HB 51 - Approp: Child Care Grant
Program



State of Alaska
ombudsman

Duncan C. Fowler

February 19, 1991

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

RE: HB 130, Municipal Ombudsmen

Dear Representative Mackie:

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

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

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

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

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

Reply to:

P.O. Box 102636
Anchorage, AK 99510-2636
(907) 277-8848
(800) 478-2824

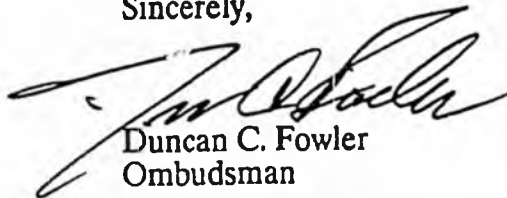
P.O. Box WO
Juneau, AK 99811-3000
(907) 485-4970
(800) 478-4970

P.O. Box 74358
Fairbanks, AK 99707-4358
(907) 452-4001
(800) 478-3257

February 19, 1991

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Duncan C. Fowler".

Duncan C. Fowler
Ombudsman

DCF:pjc

ALASKA LEGISLATURE

Committees

JUDICIARY
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BUDGET SUBCOMMITTEE-
ADMINISTRATION



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Kevin "Pat" Parnell
Representative
University-Midtown, Anchorage

MEMORANDUM

TO: Representative *Dave* Dave Donley, Chair
House Judiciary Committee

FROM: Representative Kevin "Pat" Parnell *Pat*

DATE: February 20, 1991

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

I respectfully request that you consider scheduling an early hearing for HB 130, relating to immunity of a municipal ombudsman and staff, and privilege of a municipal ombudsman and staff not to testify about certain matters.

If you have any questions please let me know.

RECEIVED MAR 7 1991

**Municipality
of
Anchorage**



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

OFFICE OF THE MUNICIPAL MANAGER

March 1, 1991

Representative Dave Donley, Chair
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

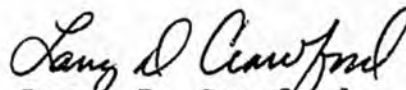
RE: HB 130, Municipal Ombudsman's Immunity

Dear Representative Donley:

Enclosed is the Municipality of Anchorage Administration's position paper on HB 130, an Act relating to immunity of a municipal ombudsman and staff and privilege of a municipal ombudsman and staff not to testify about certain matters.

The Administration opposes HB 130, however, if this legislation is to go forward, we recommend the amendments outlined in the attached position paper.

Sincerely,


Larry D. Crawford
Municipal Manager

Position Paper on HB 130

The Administration of the Municipality of Anchorage opposes HB 130, "An Act relating to immunity of a municipal ombudsman and staff and privilege of a municipal ombudsman and staff not to testify about certain matters." If this legislation is to go forward, at the minimum, the Administration recommends adoption of the following amendments:

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

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

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

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

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

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

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

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

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

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

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

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Annotations

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effective August 1, 1979)

Annotations

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ce may be considered in fashioning a
y seized evidence is reliable, when the
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and when it is clear that the evidence
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. 633 P2d 292 (Alaska App. 1982).

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

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

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

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

This rule, which permits evidence illegally obtained to be used under certain circumstances in perjury prosecutions, applies to such evidence regardless of the basis for determining that it was illegally obtained. *Wortham v. State*, Op. No. 69, 641 P2d 223 (Alaska Op. No. 1982).

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

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

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

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

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

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

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

ARTICLE V. PRIVILEGES

Rule 501. Privileges Recognized Only as Provided.

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

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

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

(Added by SCO 364 effective August 1, 1979)

Rule 502. Required Reports Privileged by Statute.

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

(Added by SCO 364 effective August 1, 1979)

Rule 503. Lawyer-Client Privilege.

(a) Definitions. As used in this rule:

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

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

(3) A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

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

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

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO. HB 130

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

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Expenditures/Revenues: (Thousands of Dollars)

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

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

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

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

THE HOME RULE CHARTER

For
The Municipality of Anchorage, Alaska

by
Anchorage Area
Charter Commission



September 16, 1975

PREAMBLE

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

ARTICLE I NAME AND BOUNDARIES

Section 1.01 Name

The municipality shall be known as Anchorage.

Section 1.02 Boundaries

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

ARTICLE II BILL OF RIGHTS

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

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



MUNICIPALITY OF ANCHORAGE

ASSEMBLY MEMORANDUM

HB 130

No. AN 250-91

Meeting Date: March 5, 1991

From: Assembly Members Evans and Flynn

Subject: Assembly Resolution No. 91- 45 Supporting State
Legislation to Provide Municipal Ombudsmen and Staff
Immunity and Privilege Not to Testify

The attached resolution endorses current legislation being considered in both the House and Senate of the Alaska State Legislature which would provide the Anchorage Municipal Ombudsman and staff immunity from civil actions for performing the duties or responsibilities of an ombudsman, and privilege not to testify in court regarding the exercise of official duties of an ombudsman.

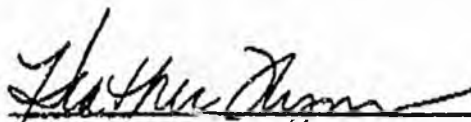
These two provisions are granted to the Alaska State Ombudsman who, under contract, serves certain local communities. The legislation is also consistent with the ideals of the Alaska State Constitution pertaining to citizens' accessibility to their government. Citizens seeking the aid of the Anchorage Ombudsman should have the same right to confidentiality they enjoy when they approach the Alaska State Ombudsman with a concern.

The Anchorage Ombudsman prepared a position paper on the legislation which was provided to the Assembly and the Administration on February 15, and was also sent to the sponsors of the state legislation in Juneau.

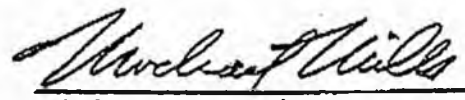
Passage of this resolution will make clear that Anchorage wishes the Legislature to pass this legislation. We recommend the resolution be approved.

Respectfully submitted,

Prepared by:



Joe Evans and Heather Flynn
Assembly Members



Michael P. Mills
Ombudsman

Attachment: Assembly Resolution
Senate Bill 120
House Bill 130

Post-It™ brand fax transmittal memo 7671		# of pages > 2
To <i>Edith</i>	From <i>Mike Mills</i>	
Co. <i>House Judiciary</i>	Co. <i>Ombudsmen</i>	
Dept. <i>HB 130</i>	Phone # <i>343-4733</i>	
Fax # <i>465-2299</i>	Fax # <i>343-4780</i>	

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

ANCHORAGE, ALASKA
AR NO. 91-45

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

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

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

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

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

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

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

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

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

PASSED AND APPROVED by the Anchorage Assembly this _____ day of _____, 1991.

Chair

ATTEST:

Municipal Clerk



**STATE OF ALASKA
OFFICE OF THE GOVERNOR
BILL ANALYSIS**

DEPARTMENT DCRA	DIVISION MRAD	BILL NUMBER HB 130	SPONSOR Representative Parnell
SHORT TITLE OF BILL An Act relating to immunity of a municipal ombudsman and staff...			
DEPARTMENT POSITION The department has no position.			
PREPARED BY Patrick Poland, Deputy Director	DATE 2/19/91	COMMISSIONER'S SIGNATURE <i>[Signature]</i>	DATE 2-23-91

SUMMARY

OTHER AGENCIES AFFECTED BY BILL None	CONSTITUENT GROUP(S) AFFECTED BY BILL Unknown
ORGANIZATIONAL SUPPORT FOR BILL Unknown	ORGANIZATIONAL OPPOSITION TO BILL Unknown

FISCAL IMPACT: NONE FISCAL NOTE ATTACHED

BACKGROUND/LEGISLATIVE INTENT

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

ANALYSIS OF BILL/PROGRAM EFFECTS

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

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

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

AMENDMENTS PROPOSED

None

PLEASE ATTACH A SEPARATE SHEET FOR ADDITIONAL COMMENTS OR ANALYSIS.

Post-it™ brand fax transmittal memo 7671 # of pages > 1	
To <i>EASH</i>	From <i>Miko Mills</i>
Co. <i>House Judiciary</i>	Co. <i>Ombudsman</i>
Dept. <i>HB 130</i>	Phone # <i>343-4733</i>
Fax # <i>465-2299</i>	Fax # <i>343-4780</i>

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

ANCHORAGE, ALASKA
AR NO. 91-45

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

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

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

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

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

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

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

NOW, THEREFORE, the Anchorage Municipal Assembly resolves:

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

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

Jim Kufity
Chair

ATTEST:

Lizanne Ferguson
Municipal Clerk
Deputy

UNANIMOUSLY APPROVED ON MARCH 5, 1991

Position Paper

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

A. Confidentiality / Privilege Not To Testify

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

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

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

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

B. Immunity From Civil Action

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

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

SUMMARY

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

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

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

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

Appendix

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

HOUSE COMMITTEE REPORT

(7) Date Referred: February 11, 1991 FURTHER REFERRALS: Judiciary

Date of Committee Action: 2-20-91

The COMMUNITY AND REGIONAL AFFAIRS Committee considered: HB 130

HOUSE BILL NO. 130 MUNICIPAL OMBUDSMAN'S IMMUNITY

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

- RECOMMENDATIONS: the same title
 be replaced with _____ a new title
 have attached amendments(s)
 do pass
 do not pass
 no recommendations
 individual recommendations
 additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) APPROVES PREVIOUS: (Dept/Date)
 fiscal impact _____ fiscal note(s) _____
 zero fiscal note Dept. of Community & Regional Affairs zero fiscal note(s) _____

SIGNING DO PASS: SIGNING OTHER RECOMMENDATIONS:

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<i>Cheri Davis</i>				
<i>Sam Mat</i>				
<i>Henry W. Baker</i>				
<i>Bettye Davis</i>				
<i>Gail Phillips</i>			X	

Sam Mat

 Chairman's Signature

HOUSE COMMITTEE REPORT

(7)
Date Referred: February 22, 1991

FURTHER REFERRALS:

Date of Committee Action: 3-14-91

The JUDICIARY Committee considered:

HB 130

HOUSE BILL NO. 130

MUNICIPAL OMBUDSMAN'S IMMUNITY

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

RECOMMENDATIONS:

be replaced with CS HB 130 (Jud) the same title
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) C + RA

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Daniel Donley
Chairman's Signature

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NUMBER 3

STATE OMBUDSMAN LEGISLATION IN THE UNITED STATES

BERNARD FRANK*

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I. INTRODUCTION

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

1975]

STATE OMBUDSMAN LEGISLATION

439

Q. Section 17. (Ombudsman's Immunities

- (a) NO PROCEEDING, CONCLUSION, RECOMMENDATION, OR REPORT OF THE OMBUDSMAN OR MEMBER OF HIS STAFF SHALL BE REVIEWABLE IN ANY COURT;
- (b) THE OMBUDSMAN AND HIS STAFF SHALL HAVE THE SAME IMMUNITIES FROM CIVIL AND CRIMINAL LIABILITIES AS A JUDGE OF THIS STATE.
- (c) THE OMBUDSMAN AND HIS STAFF SHALL NOT BE COMPELLED TO TESTIFY OR PRODUCE EVIDENCE IN ANY JUDICIAL OR ADMINISTRATIVE PROCEEDING WITH RESPECT TO ANY MATTER INVOLVING THE EXERCISE OF THEIR OFFICIAL DUTIES EXCEPT AS MAY BE NECESSARY TO ENFORCE THIS ACT.

ABA
MODEL
STATUTE

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

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

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

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

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

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

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

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

80. HAWAII REV. STAT. § 96-17 (1968).

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

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

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

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

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C. Section 3. Definitions

AS USED IN THIS ACT,

(a) "AGENCY" MEANS ANY DEPARTMENT, ORGANIZATION, BOARD, COMMISSION, COUNCIL, INSTITUTION OR OTHER GOVERNMENTAL ENTITY OF

[NAME OF STATE], AND ANY OFFICIAL, OFFICER, EMPLOYEE, OR MEMBER THEREOF ACTING OR PURPORTING TO ACT BY REASON OF HIS CONNECTION WITH

[NAME OF STATE], EXCEPT:

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

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

(3) THE GOVERNOR AND HIS PERSONAL STAFF;

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

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

(5) ANY MULTI-STATE GOVERNMENTAL ENTITY.

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

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

COMMENT.

1. ...

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

19. IOWA CODE ANN. § 601G.1-2(a) (Supp. 1974); NEB. REV. STAT. § 81-8.240(1) (Supp. 1969).

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

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

22. NEB. REV. STAT. § 81-8.240(1)(b) (Supp. 1969).

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

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

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

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

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

24. HAWAII REV. STAT. § 96-1(a)(7)(8) (Supp. 1974).

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

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



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

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

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

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

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

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

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

American Bar Association Resolution

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

Be it Resolved, That the American Bar Association recommends:

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

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

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

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

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

A State Statute to Create The Office of Ombudsman

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

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

SECTION 604. Immunity of the Ombudsman.

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

SECTION 605. Ombudsman's privilege not to testify.

The Ombudsman and his staff shall not testify in any court with respect to matters coming to their attention in the exercise or purported exercise of their official duties except as may be necessary to enforce the provisions of this Act.

COMMENT

SECTION 603. Judicial Review.

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

SECTION 604. Immunity of the Ombudsman.

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

SECTION 605. Ombudsman's privilege not to testify.

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

International Bar Association

Ombudsman Committee

Chairman
Bernard Frank (USA)

Vice Chairman
Alex B. Weir (Canada)

November 17, 1978

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

Dear Ms. Forsythe:

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


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

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

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

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

Sincerely,



Handwritten signature of Bernard Frank in cursive script.

Bernard Frank

BF:dc

Enclosures

~~CONFIDENTIAL~~
Communication
Attorney/Chief

MUNICIPALITY OF ANCHORAGE

MEMORANDUM

RECEIVED

JUL 12 1990

DATE: July 6, 1990

TO: Michael Mills, Ombudsman

FROM: Kevin Finnigan, Assistant Municipal Attorney *KF*

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

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

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

Office of the Ombudsman
W

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

SHORT ANSWER

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

FACTS

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

DISCUSSION

AMC 2.60.070(C) states:

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

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

Michael Mills, Ombudsman
July 6, 1990
Page 2

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

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

KF:ld
M/MILLS1

ALASKA STATUTES

LEGISLATURE

Chapter 55. Office of the Ombudsman.

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

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

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

ALASKA STATUTES

Article 4. Older Alaskans Commission.

Sec. 44.21.231. Office of the long term care ombudsman.

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

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

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

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

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

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

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

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES
July 24, 1986

UNITED STATES - ALASKA

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

OMBUDSMAN OFFICES - CONFIDENTIALITY*

The plaintiff sought to compel the testimony of a staff member of the Office of Ombudsman for Alaska at trial. The Office of Ombudsman had investigated a complaint which related to the plaintiff's present legal action. The Office of Ombudsman brought a Motion to Strike the staff member's name from the Witness List and a Protective Order barring the production of witnesses on documents from the office of Ombudsman. The Ombudsman's motion was based primarily on the confidentiality provisions of the statute: AS 24.55.160(b) "The Ombudsman shall maintain confidentiality with respect to all matters and the identities of the complainants or witnesses coming before him except insofar as disclosures may be necessary to enable him to carry out his duties and to support his recommendations."; and on AS 24.55.260 "The Ombudsman and his staff may not testify in a court regarding matters coming to their attention in the exercise or purported exercise of their official duties except as may be

necessary to enforce the provisions of this chapter." The Superior Court granted the Order striking the staff members name from the Witness List and a Protective Order barring the production of witnesses and/or documents from the Ombudsman Office was entered

INTERNATIONAL OMBUDSMAN INSTITUTE: CASES

July 24, 1986

UNITED STATES - IOWA

"Kelly v. Brewer"

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

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

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

27

UNITED STATES - IOWA

"Remmers et al. v. Brewer"

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

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

UNITED STATES -ALASKA

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

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

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

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

UNITED STATES -HAWAII

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

U.S. Federal Court Subpoena*

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

CHAPTER 601G

CITIZENS' AIDE

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

601G.1 Definitions.

As used in this chapter:

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

[C73, 75, 77, 79, 81, §601G.1]

601G.2 Office established.

The office of citizens' aide is established.

[C73, 75, 77, 79, 81, §601G.2]

601G.3 Appointment — vacancy.

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

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

[C73, 75, 77, 79, 81, §601G.3]

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

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

[C73, 75, 77, 79, 81, §601G.4]

601G.5 Term — removal.

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

[C73, 75, 77, 79, 81, §601G.5]

601G.6 Deputy — assistant for penal agencies.

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

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

[C73, 75, 77, 79, 81, §601G.6]

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

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

601G.14 Institutionalized complainants.

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

[C73, 75, 77, 79, 81, §601G.14]

601G.15 Reports critical of agency or officer.

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

[C73, 75, 77, 79, 81, §601G.15]

601G.16 Recommendations to agency.

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

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

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

[C73, 75, 77, 79, 81, §601G.16]

601G.17 Publication of conclusions.

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

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

[C73, 75, 77, 79, 81, §601G.17]

601G.18 Report to general assembly.

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

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

601G.19 Disciplinary action recommended.

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

[C73, 75, 77, 79, 81, §601G.19]

* 601G.20 Immunities.

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

[C73, 75, 77, 79, 81, §601G.20]

601G.21 Witnesses.

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

[C73, 75, 77, 79, 81, §601G.21]

601G.22 Penalties.

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

[C73, 75, 77, 79, 81, §601G.22]

601G.23 Citation.

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

[C73, 75, 77, 79, 81, §601G.23]

*Local Administrative
Regulations*

CITIZENS' AIDE[210]

(OMBUDSMAN)

Chapter 1-6 rescinded and the following chapter 1-8 published 9/16/81 and effective 10/21/81, adopted 9/16/81

CHAPTER 1 ORGANIZATION

1.1(601G) Function
1.2(601G) Operation

CHAPTER 2 PROCEDURES

2.1(601G) Intake methods
2.2(601G) Jurisdiction
2.3(601G) Investigations
2.4(601G) Hearings
2.5(601G) Case disposition after investigation
2.6(601G) Review

CHAPTER 3 DECLARATORY RULINGS

3.1(17A) General
3.2(17A) Petition for declaratory rulings
3.3(17A) Procedure after petition is filed

CHAPTER 4 RULEMAKING

4.1(17A,601G) Commencing rulemaking
4.2(17A,601G) Oral presentations
4.3(17A) Conferences or consultation
4.4(17A) Adoption

4.5(17A) Statement of reasons 4.6(17A) Petition for rulemaking 4.7(17A) Procedure after petition is filed

CHAPTER 5 CONFIDENTIALITY

5.1(601G,68A) Public information
5.2(601G) Private information
5.3(601G) Confidential information
5.4(601G) Request for information in citizens' aide/ombudsman files

CHAPTER 6 PRIVILEGES AND IMMUNITIES

6.1(601G) Privileges and immunities

CHAPTER 7 PENALTIES

7.1(601G) Penalties

CHAPTER 8 FORMS

8.1(601G) Subpoena form
8.2(601G) Patient waiver form
8.3(601G) General information waiver form

CHAPTER 1 ORGANIZATION

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

210—1.2(601G) Operation.

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

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

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

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

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

CHAPTER 6 PRIVILEGES AND IMMUNITIES

210—6.1(601G) Privileges and immunities.

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

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

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

CHAPTER 7 PENALTIES

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

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

CHAPTER 8 FORMS

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

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

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

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

H B

1 3 6



February 26, 1991

Representative Georgianna Lincoln, Co-Chair
House HESS Committee
PO Box V
Juneau, Ak. 99811

Re: House Bill 136

Dear Representative Lincoln,

The purpose of this letter is to request that the committee pass House Bill 136: An act giving children of divorce legal access to grandparents and others who are important in the child(rens) lives.

Research is showing that when children are denied access to their biological parents, grandparents, and other loved ones, serious developmental psychological problems often occur. Many of these children do not do well in school, have low self esteem, have a high incidence of drug and alcohol abuse, and are involved in crime.

We support this bill because we believe it is good public policy to provide emotional as well as monetary support for children.

Sincerely,

Steven P. Strube
Steven P. Strube, President

P.O. Box 521155
Big Lake, AK 99652

TO: PATTI BEARDMAN;
HOUSE HESS COMM.

PLEASE DISTRIBUTE
TO COMMITTEE MEMBERS

THANKS,
STEVE
STAUBE

HB 136

Three years ago, I was divorced and the custody and legal guardianship of an eight year old was a major issue. I thought my agonies over the the pending hearing and its unknown were the epitome of anxieties. I have since learned that that was one of the minor issues, the pain comes later.

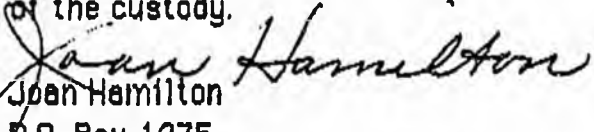
Prior to the divorce, the father called faithfully every Wednesday. Since the final decree, my son has heard from him at the most six times. Last year, the father asked for a Christmas list, my son thoughtfully completed a list and sent it his father. When my son had not received anything by mid-January, he called his father. His father's response was, "YOU SENT YOUR LIST TOO LATE, SO YOU'RE NOT GETTING ANYTHING THIS YEAR."

This Christmas, the father sent an airplane ticket, made all the arrangements on times and dates for a visit. On the day my son was to be in Anchorage, the weather closed in. My son called his father to let him know and to make alternate plans. The father had not been in Anchorage and was not expected to be there for hours. I watched my son's face change to pain as he realized that his father would not have been at the airport to meet him nor had he made other arrangements. It is March 7th and my son still has not heard from his father. My son does not know what happened.

I have crawled with my son in his experience of rejection and betrayal. I have held my 11 year old child sob in the depth of sorrow and confusion. The source of the suffering is avoidable. Rejection is difficult lesson to learn for all of us, but it seems that rejection from a parent is an unimaginable sorrow.

At the temporary custody battles, the parent goes through hell. We do not foresee that the innocent child shoulders the worst hell. All of the custody proceedings accommodate the battling parents. There are no provisions for the emotional and psychological protection of the child.

I know now why children of divorced are high risks for social pathology. The child is used and used again to hurt the other parent regardless of the psychological agony the child must endure. There must be specific guidelines and deterrents to protect the abuse of a child who is the object of the custody.


Joan Hamilton

P.O. Box 1275

Bethel, Alaska 99559

(h) 543-3454 or (w) 543-3455

 FAX TRANSMITTAL MEMO
 TO: Hous Assess Cmte
 DEPT: _____ FAX #: members
 FROM: _____ PHONE: _____
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NATIONAL
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 (Western Regional Office)

P.O. Box 210294
 Anchorage, Alaska 99501-0294

Refer To:0006.091

March 6, 1991

Representative Georgiana Lincoln
 Chairperson, Health, Ed. & Social Services
 P.O. Box V
 Juneau, Alaska 99811

Madam Chairman,

My name is Emil Portschteller, Jr. I am here today representing the National Center For Families And Children. I would like to thank each of you for the opportunity to provide information regarding House bill No. 134, and I would like to offer thanks that each of you has exhibited the refreshing responsibility to address key issues of families and children in Alaska.

We are currently in the process of establishing a informational clearinghouse, national library and computer information network dealing with a broad scope of family and children related subject areas.

One of the very most alarming issues that we are encountering more and more frequently is the highly unstable circumstances and general position that families and children in Alaska are faced with. We find ever increasing evidence that in Alaska we have perhaps the most destabilized society of any of the 50 U.S. States. We base this not on the indicators of drug involvement in our state, although certainly this is a factor in the general destabilization, but rather on the extremely high rates of family disruption, disfunction, dissolution, and family child separation.

As we referenced to the Senate Health and Social Services Committee yesterday in discussion of Senate Bill No. 100, we feel that before the legislature and representatives of this committee pursue changes in existing legislation or initiate entirely new legislation regarding family, marriage, and children we recommend strongly establishing as a basic premise and top priority for this legislature and this committee that the family unit is yet the basis or cornerstone for our state's society.

When considering legislation affecting families, marriages, and children we must clearly place our focus on the present and future welfare of families, marriages, and children and not an emphasis on further entrenching power fiefdoms in the judiciary and its affiliates. In simpler terms we must afford every option to families and children as there "cases" enter into and "progress" through the legal arena and we must not continue to concentrate the power of the judiciary.

We feel this proposed legislation HB No. 136 not only further concentrates the power of the judiciary but the legislation clearly puts the judiciary in the drivers seat in regard to making decisions affecting families and children as opposed to quite simply implementing the laws derived in the legislature. We feel this bill must not go forth as proposed.

We feel there is an imperative existing in Alaska that bespeaks ever so loudly of the need for virtual total revision of the statutes dealing with family, marriage, and children. We are in the process of drawing together interested professionals, legislators, and members of the public to a general conference on statute revision. In the interim we have developed several option recommendations for the committee regarding this proposed legislation. HB 136

(1) LINE 5 The court shall award custody on the basis of the best interests of the child. In determining the best interests of the child the court shall consider all relevant factors including those factors enumerated in AS 25.24.150(c).

Recommendation:

Here we have one of the key flaws in our child related law... Child custody is such a very delicate and far ranging issue that it demands input from private sector sources wholly unaffiliated with the judiciary to achieve the best possible objective input and decisions and determinations. It is terribly wrong to place the judiciary in the position of acting as the professional sector representative in determining custody. The judiciary should be permitted only to implement existing statutory requirements. The judiciary should not should not be given the authority to make DETERMINATION as to what is "In the best interest of the child". The court should implement STATUTE which requires professional private sector determination. In other words do not permit the judiciary in effect to pass law, but rather require the judiciary to simply implement statute. The judiciary is not in a position to make professional determination of the best interests of a child. Our judiciary in this state is dramatically ill equipped in training and education to function as professional sector representative. The judiciary is in strong position to function in the implementation of statute. This is a key distinction needed in family and child law in Alaska.

Proposed amendment:

Delete: In determining the best interests of the child the court shall consider all relevant factors including those factors enumerated in AS 25.24.150(c).

Insert: The court in initiating custody award shall consider all relevant factors including those factors enumerated in AS 25.24.150(c). Custody award shall be made based on implementation of PRIVATE SECTOR determination of custody that is in the best interests of the child which includes the specific input of the child(ren) whenever possible.

(2) LINE 7-8-9 In a custody Determination under this section, the court shall provide for visitation by a grandparent or other person if that is in the best interests of the child.

Recommendation:

is good

The basic thrust in the proposed amendment of providing for avenue for contact by grandparents with a child(ren). However, two problems exist in the wording and the general approach to this subject area. The first problem area is quite similar to that noted in the first recommendation and amendment we have offered. The amendment to the proposed existing legislation leaves the judiciary once again in the drivers seat as to determination. We must restate here that the judiciary should function to implement statute and not make determination. The second problem area with the line 7-9 proposed amendment to the existing statute is that as written it fails to give any to say nothing of adequate recognition to the fact that grandparents are, based on statistical information, frequently the perpetrators of marriage and family disfunction and dissolution, and child family separation. One of the cases serving as best example of this is that of Carolyn Smith v. Smith in Houston, Texas. It has become a landmark in this particular area of family and child law. Therefore in addressing whether there is an indication of a need for grandparents to play a role in contact with the child(ren) we feel strongly that such determination should not be left to the judiciary but rather to the private sector professional community (and clergy).

Proposed Amendment:

Delete: In a custody Determination under this section, the court shall provide for visitation by a grandparent or other person if that is in the best interests of the child.

Insert: In a custody determination under this section the court shall provide for visitation by a grandparent or other person if that is determined to be in the best interests of the child to include the direct input of the child(dren) whenever possible.

W

(3) LINE 11-12 A divorce may be granted for an incompatibility of temperament that has caused irremedial breakdown of the marriage.

Recommendation:

Our state statutes addressing dissolution and divorce already provide for many ways out of marriage and often out of marriages that can be saved and strengthened if our judiciary and support service sector had the proper tools.

Line 11-12 is definitely the groundwork for an easy way out. However if the negative attitude toward marriage unity or lack thereof is so deeply entrenched in the minds of our lawmakers that we must retain this section then we recommend at least the one following amendment:

Proposed Amendment:

Delete: A divorce may be granted for an incompatibility of temperament that has caused irremedial breakdown of the marriage.

Insert: A divorce may be granted for an incompatibility of temperament that has caused irremedial breakdown of the marriage, except where mental incapacity has been documented to be affecting the marriage partner seeking the divorce.

(4) LINES 16-19 support, and visitation are just as between the spouses and in the best interests of the children of the marriage; in determining whether the parents' agreement on visitation is in the best interests of the children under this paragraph, the court shall also consider whether the agreement should include visitation by grandparents and other persons;

Recommendation:

The first and gut level response to this proposed amendment is that it is yet another attempt at encroachment by the judiciary on the rights and responsibilities of parents.

Second, we see some of the same problems with this amendment that we described in previous discussion and recommendations.

Proposed Amendment:

Delete: support, and visitation are just as between the spouses and in the best interests of the children of the marriage; in determining whether the parents' agreement on visitation is in the best interests of the children under this paragraph, the court shall also consider whether the agreement should include visitation by grandparents and other persons;

Insert: support, and visitation are just as between the spouses, and in the best interests of the children of the marriage as achieved through private sector determination and report; the court may direct that visitation by grandparents and or others shall be considered in the achievement of determination as to whether the parents' agreement on visitation is in the best interests of the children under this paragraph;

We would like once again to thank the committee for the opportunity to provide input on this proposed legislation. I will be glad to provide a written copy of our position on this legislation and our proposed amendments.

Sincerely


Emil Partscheller, Jr.

EPJR/e

cc: Senate Family Law Review Task Force Committee
Coghill

Lt. Governor

Alaska Family Support Group
Governor's Commission On Children And Youth
Rep. Terry Martin
Rep. Randy Phillips
Rep. Ron Larson
Rep. Ramona Barnes

5

ALASKA STATE LEGISLATURE

ELECTIVE DISTRICT 1

HYDER
KETCHIKAN
KUPREANOF
MEYERS CHUCK
PETERSBURG
SAXMAN
WRANGELL



IN KETCHIKAN

352 FRONT ST.
KETCHIKAN, AK 99901
PHONE 225-9449

DURING SESSION

P.O. BOX V
STATE CAPITOL BUILDING
JUNEAU, AK 99811
PHONE 465-3424

Representative Cheri L. Davis

MEMORANDUM

TO: Rep. Dave Donley
Chair, House Judiciary Committee

FROM: Rep. Cheri Davis *CD*

DATE: March 13, 1991

RE: Scheduling of House Bill 136

Please accept this memorandum as my request for House Bill 136, "An act allowing a grandparent to petition a court for visitation rights with a grandchild and requiring a court to consider nonspousal visitation rights when reviewing a dissolution agreement," to be heard in your committee.

Attached, is a draft Committee Substitute that I would like the Judiciary Committee to consider. This CS will narrow the scope of the bill to grandparents visitation rights only.

The intent of this bill is to keep foremost the best interests of the children and to insure grandparents have the right to petition for visitation in the event there is no marriage, and thus, no divorce.

If you have any questions about this bill, please do not hesitate to contact me.

Thank you.

CS FOR HOUSE BILL NO. 136 ()
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES C.DAVIS, Gruenberg

A BILL
FOR AN ACT ENTITLED

1 "An Act allowing a grandparent to petition a court for visitation rights with a grandchild;
2 and requiring a court to consider nonspousal visitation rights when reviewing a dissolution
3 agreement."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 * Section 1. AS 25.20.060(a) is amended to read:

6 (a) If there is a dispute over child custody, ether parent may petition the superior court
7 for resolution of the matter under AS 25.20.060 - 25.20.130. The court shall award custody on
8 the basis of the best interests of the child. In determining the best interests of the child, the court
9 shall consider all relevant factors including those factors enumerated in AS 25.24.150(c). In a
10 custody determination under this section, the court shall provide for visitation by a
11 grandparent or other person if that is in the best interests of the child.

12 * Sec. 2. AS 25.20 is amended by adding a new section to read:

13 Sec. 25.20.065. VISITATION RIGHTS OF GRANDPARENT. (a) Except as provided
14 in (c) of this section, a child's grandparent may petition the superior court for an order

1 establishing reasonable rights of visitation between the grandparent and child if

2 (1) the grandparent has established or attempted to establish ongoing personal
3 contact with the child;

4 (2) the child's custodian has denied the grandparent reasonable opportunity to visit
5 the child; and

6 (3) visitation by the grandparent is in the child's best interest.

7 (b) After a decree or final order relating to child custody is entered under AS 25.20.060
8 or AS 25.24.160 or relating to an adoption under AS 25.23, a grandparent may petition under this
9 section only if

10 (1) the grandparent did not request the court to grant visitation rights during the
11 pendency of proceedings under AS 25.20.060, AS 25.23, or AS 25.24; or

12 (2) there has been a change in circumstances relating to the custodial parent or
13 the minor child that justifies reconsideration of the grandparent's visitation rights.

14 (c) This section does not apply to a

15 (1) stepgrandparent;

16 (2) paternal grandparent of a child born out of wedlock unless the child has been
17 legitimated by the father under AS 25.20.050(a).

18 * Sec. 3. A.S 25.24.220(d) is amended to read:

19 (d) If the petition is filed by both spouses under AS 25.24.200(a), the court shall examine
20 the petitioners or petitioner present and consider whether

21 (1) the spouses fully understand the nature and consequences of their action;

22 (2) the written agreements between the spouses concerning child custody, child
23 support, and visitation are just as between the spouses and in the best interests of the children
24 of the marriage; in determining whether the parents' agreement on visitation is in the best
25 interests of the children under this paragraph, the court shall also consider whether the
26 agreement should include visitation by grandparents and other persons;

27 (3) the written agreements between the spouses relating to the division of
28 property, including retirement benefits, spousal maintenance, and the allocation of obligations are
29 just; the spousal maintenance and division of property must fairly allocate the economic effect
30 of dissolution and take into consideration the factors listed in AS 25.24.160(a)(2) and (4);

31 (4) the written agreements constitute the entire agreement between the parties; and

1 (5) the conditions in AS 25.24.200(a) have been met.

2 * Sec. 4. AS 25.24.230 is amended by adding a new subsection to read:

3 (i) Notwithstanding AS 25.24.220(g), the court may, in addition to granting the relief
4 sought by the petitioning spouses, provide in a decree of dissolution for visitation rights of a
5 grandparent or another person who is not a petitioning spouse.

NATIONAL CENTER FOR FAMILIES & CHILDREN

A Clearinghouse For FAMILIES And CHILDREN For Information About Interaction With Legal, Governmental, And Private Sector Sources.

Dedicated to Strengthening and Supporting The FAMILY Offering Hope and Guidance for CHILDREN

(National Office) P.O. Box 1445 Palmer, Alaska 99645 (907) 744-3011

(Western Regional Office) P.O. Box 210594 Anchorage, Alaska 99521-0594

Refer To:0007.091

April 17,

John B. 'Jack' Coghill, Lt. Governor P.O. Box AA Juneau, Alaska 99811

Lt. Governor Goghill,

I would like to bear upon your long term experience in government and as a parent and grandparent in requesting your observations and possibly assistance in addressing House Bill 136.

Probably to most observers of this bill the bill presents the state with an opportunity to establish avenue for a contact arrangement between children and grandparents in the event of some form of discord or dissolving of family unit.

Mr. Steve Strube formerly with the Alaska Family Support Group has spoken strongly in support of the bill as a mechanism for grandparents to access grandchildren. We support the general position that contact between children and granparents should have a vehicle in state law. However HB 136 is a ruse promulgated by the judiciary. We are asked to believe the core of the bill is contact between children and grandparents. We suggest very strongly that this is not the true core of the bill. Contact by children with grandparents or "extended family" in general or in theory is a good idea and it strikes a warm cord with most of us. There are many cases that speak loudly against an automatic avenue for this contact.

However this bill placates the family and children movement in this state by dangling out a legislative carrot on a very long stick as an enticement to support contact by grandparents. The movement and ultimately individuals and families and children will if this bill passes be in receipt of the other end of that proverbial stick (shaft) by the further entrenchment of judicial sector powers in family law... The judiciary in this state has a nationwide reputation for being enept when addressing family law. Certainly our "social statistics" bear this out.

Handwritten notes and stamps including 'F A M I L I E S & C H I L D R E N M E M O', 'DEPT: M-SLO', 'FAX #: 376-3704', and a box for 'NO. OF PAGES' with the number 8.

Handwritten mark or signature at the bottom right corner.

Lt. Governor Coghill
Page (2)

Determination should NEVER be in the realm of the judges. Our laws are the determining factors in our society. Statutory implementation should be the only lifeblood for the judiciary, not the emotional blood and guts of the families and children in this state.

At the risk of appearing like our worst nightmare of a politician, I ask for your support on the original bill and the judiciary committee substitute unless they include the changes enclosed for your consideration.

Throughout the original bill there is implication, at least, that "we the public, government etc." are concerned about the best interest(s) of the child(ren) in this state. Yet where, anywhere, in the original bill or the substitute is there first priority emphasis on the needs, desires, yes even basic input from the child(ren). Need I say this is not present. This is also powerful indicator of how little understanding our legislators have of the very mandate we all have to incorporate the child(ren) into the decision making about the child's own future. We must no longer view and treat and relegate children as property.

Our office is of the strong opinion that you are able to see through the facade of this proposed legislation. We ask for your assistance in ensuring key revision of this bill to emphasize the contact without the bill being used as a vehicle for further strengthening the Judiciary in the area of family law. Our state judiciary is realistically wholly illiterate in the area of family law. Certainly the initial review and findings of the Senate Family Law Review task Force is ample substantiation of the above contention. Lets bring forth a bill that is an open up front contact avenue without the added baggage of influence from the judiciary.

Lt. Governor Coghill
Page (3)

Thanks so much for your seasoned enlightened consideration.

Sincerely

Emil

Emil Portscheller, Jr.

EPJR/e

Enclosure: Letter to Rep. Lincoln/HB 136

cc: Senate Family Law Review Task Force
Lt. Governor Coghill
Alaska family Support Group
Governor's Commission On Children And Youth
Rep. Terry Martin
Rep. Randy Phillips
Rep. Ron Larson
Rep. Ramona Barnes

D&L YOUNG

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FOR
FAMILIES & CHILDREN

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(National Office)

P.O. Box 1645 Palmer, Alaska 99645
(907) 744-3011

(Western Regional Office)

P.O. Box 210594
Anchorage, Alaska 99521-0594

Refer To:0006.091

March 6, 1991

Representative Georgiana Lincoln
Chairperson, Health, Ed. & Social Services
P.O. Box V
Juneau, Alaska 99811

Madam Chairman,

My name is Emil Portschteller, Jr. I am here today representing the National Center For Families And Children. I would like to thank each of you for the opportunity to provide information regarding House bill No. 136, and I would like to offer thanks that each of you has exhibited the refreshing responsibility to address key issues of families and children in Alaska.

We are currently in the process of establishing a informational clearinghouse, national library and computer information network dealing with a broad scope of family and children related subject areas.

One of the very most alarming issues that we are encountering more and more frequently is the highly unstable circumstances and general position that families and children in Alaska are faced with. We find ever increasing evidence that in Alaska we have perhaps the most destabilized society of any of the 50 U.S. States. We base this not on the indicators of drug involvement in our state, although certainly this is a factor in the general destabilization, but rather on the extremely high rates of family disruption, disfunction, dissolution, and family child separation.

As we referenced to the Senate Health and Social Services Committee yesterday in discussion of Senate Bill No. 100, we feel that before the legislature and representatives of this committee pursue changes in existing legislation or initiate entirely new legislation regarding family, marriage, and children we recommend strongly establishing as a basic premise and top priority for this legislature and this committee that the family unit is yet the basis or cornerstone for our state's society.

(4)

When considering legislation affecting families, marriages, and children we must clearly place our focus on the present and future welfare of families, marriages, and children and not an emphasis on further entrenching power fiefdoms in the judiciary and its affiliates. In simpler terms we must afford every option to families and children as there "cases" enter into and "progress" through the legal arena and we must not continue to concentrate the power of the judiciary.

We feel this proposed legislation HB No. 136 not only further concentrates the power of the judiciary but the legislation clearly puts the judiciary in the drivers seat in regard to making decisions affecting families and children as opposed to quite simply implementing the laws derived in the legislature. We feel this bill must not go forth as proposed.

We feel there is an imperative existing in Alaska that bespeaks ever so loudly of the need for virtual total revision of the statutes dealing with family, marriage, and children. We are in the process of drawing together interested professionals, legislators, and members of the public to a general conference on statute revision. In the interim we have developed several option recommendations for the committee regarding this proposed legislation (HB136):

(1) LINE 5 The court shall award custody on the basis of the best interests of the child. In determining the best interests of the child the court shall consider all relevant factors including those factors enumerated in AS 25.24.150(c).

Recommendation:

Here we have one of the key flaws in our child related law... Child custody is such a very delicate and far ranging issue that it demands input from private sector sources wholly unaffiliated with the judiciary to achieve the best possible objective input and decisions and determinations. It is terribly wrong to place the judiciary in the position of acting as the professional sector representative in DETERMINING custody and or visitation. The judiciary should be permitted ONLY to implement existing statutory requirements. The judiciary should not SHOULD NOT be given the authority to make DETERMINATION as to what is "In the best interest of the child(ren)". The court should implement STATUTE which requires professional private sector determination. In other words do not permit the judiciary in effect to pass law by making determination. The judiciary is not in a position to make professional determination of the best interests of a child. Our judiciary in this state is dramatically ill equipped in training and education to function as professional sector representative. The judiciary is in strong position to function in the implementation of statute. This is a key distinction needed in family and child law in Alaska.

Proposed amendment:

Delete: In determining the best interests of the child the court shall consider all relevant factors including those factors enumerated in AS 25.24.150(c).

Insert: The court in initiating custody award shall consider all relevant factors including those factors enumerated in AS 25.24.150(c). Custody award shall be made based on implementation of PRIVATE SECTOR determination of custody that is in the best interests of the child which includes the specific input of the child(ren) whenever possible.

(2) LINE 7-8-9 In a custody Determination under this section, the court shall provide for visitation by a grandparent or other person if that is in the best interests of the child.

Recommendation:

The basic thrust in the proposed amendment of providing for avenue for contact by grandparents with a child(ren) is good. However, two problems exist in the wording and the general approach to this subject area. The first problem area is quite similar to that noted in the first recommendation and amendment we have offered. The amendment to the proposed existing legislation leaves the judiciary once again in the drivers seat as to determination. We must restate here that the judiciary should function to implement statute and not make determination. The second problem area with the line 7-9 proposed amendment to the existing statute is that as written it fails to give any to say nothing of adequate recognition to the fact that grandparents are frequently the perpetrators of marriage and family disfunction and dissolution, and child family separation. One of the cases serving as best example of this is that of Carolyn Smith v. Smith in Houston, Texas. It has become a landmark in this particular area of family and child law. Therefore in addressing whether there is an indication of a need for grandparents to play a role in contact with the child(ren) we feel strongly that such determination should not be left to the judiciary but rather to the private sector professional community (and clergy).

Proposed Amendment:

Delete: In a custody Determination under this section, the court shall provide for visitation by a grandparent or other person if that is in the best interests of the child.

Insert: In a custody determination under this section the court shall provide for visitation by a grandparent or other person if that is determined to be in the best interests of the child to include the direct input of the child(dren) whenever possible. Determination shall be accomplished in the private sector professional community and or with the clergy.

(3) LINE 11-12 A divorce may be granted for an incompatibility of temperament that has caused irremedial breakdown of the marriage.

Recommendation:

Our state statutes addressing dissolution and divorce already provide for many ways out of marriage and often out of marriages that can be saved and strengthened if our judiciary and support service sector had the proper tools.

Line 11-12 is definitely the groundwork for an easy way out. However if the negative attitude toward marriage unity or lack thereof is so deeply entrenched in the minds of our lawmakers that we must retain this section then we recommend at least the one following amendment:

Proposed Amendment:

Delete: A divorce may be granted for an incompatibility of temperament that has caused irremedial breakdown of the marriage.

Insert: A divorce may be granted for an incompatibility of temperament that has caused irremedial breakdown of the marriage except where mental incapacity has been documented to be affecting the marriage partner seeking the divorce.

(4) LINES 16-19 support, and visitation are just as between the spouses and in the best interests of the children of the marriage; in determining whether the parents' agreement on visitation is in the best interests of the children under this paragraph, the court shall also consider whether the agreement should include visitation by grandparents and other persons;

Recommendation:

The first and gutt level response to this proposed amendment is that it is yet another attempt at encroachment by the judiciary on the rights and responsibilities of parents.

Second, we see some of the same problems with this amendment that we described in previous discussion and recommendations.

Proposed Amendment:

Delete: support, and visitation are just as between the spouses and in the best interests of the children of the marriage; in determining whether the parents' agreement on visitation is in the best interests of the children under this paragraph, the court shall also consider whether the agreement should include visitation by grandparents and other persons;

Insert: support, and visitation are just as between the spouses, and in the best interests of the children of the marriage as achieved through private sector determination and report; the court may direct that visitation by grandparents and or others shall be considered in the achievement of determination as to whether the parents' agreement on visitation is in the best interests of the children under this paragraph;

We would like once again to thank the committee for the opportunity to provide input on this proposed legislation. I will be glad to provide a written copy of our position on this legislation and our proposed amendments.

Sincerely

Emil Portscheller, Jr.

EPJR/e

cc: Senate Family Law Review Task Force Committee
Lt. Governor Jack Goghill
Alaska family Support Group
Governor's Commission On Children And Youth
Rep. Terry Martin
Rep. Randy Phillips
Rep. Ron Larson
Rep. Ramona Barnes

ALASKA STATE LEGISLATURE

ELECTIVE DISTRICT 1

HYDER
KETCHIKAN
KUPREANOF
MEYERS CHUCK
PETERSBURG
SAXMAN
WRANGELL



HOME

P.O. BOX 5723
KETCHIKAN, AK 99901
PHONE 225-6304

DURING SESSION

P.O. BOX V
STATE CAPITOL BUILDING
JUNEAU, AK 99811
PHONE 465-3424

A-22-91

Representative Cheri L. Davis

Good afternoon.

Current Alaska Statutes allow grandparents to petition the court to allow visitation with their grandchildren in the event of a divorce.

House Bill 136 allows a child's grandparent the right to petition the superior court for an order establishing reasonable rights of visitation between the grandparent and the child, even if no divorce or dissolution has taken place.

Grandparents often provide the support children need, especially when there is instability in the child's home.

Furthermore, in the event of a divorce, this bill will allow the court to consider visitation by grandparents and other persons in addition to the parent's visitation agreement.

The intent of this bill is to keep foremost the best interests of the children and to insure grandparents have the right to petition the courts for visitation rights.

FISCAL NOTE

No. 1

Bill Version: HB 136

(H) Publish Date: 3/8/91

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Revision Date: _____ Department Affected: Alaska Court System
 Title: An Act relating to divorce, dis- BRU: Trial Courts
solution, and child custody Components: _____
 Sponsor: C. Davis
 Requestor: House HESS COMPONENT SERIAL NO.

000	000	000	768
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EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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

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

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0


POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

 No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel  Phone: 264-8228
 Division: Alaska Court System Date: 03/04/91

Approved by: Arthur H. Snowden, II, Administrative Director  Date: 03/04/91
 Agency: Alaska Court System

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

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 8, 1991

FURTHER REFERRALS:

Date of Committee Action: 4-22-91

The JUDICIARY Committee considered:

HB 136

HOUSE BILL NO. 136

MISC. DIVORCE AND CHILD CUSTODY LAWS

"An Act relating to divorce, dissolution, and child custody."

RECOMMENDATIONS:

be replaced with _____

CSHB 136 (JUD)

the same title

a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): _____ (Dept)

APPROVES PREVIOUS: _____ (Dept/Date)

fiscal impact _____

fiscal note(s) _____

zero fiscal note _____

zero fiscal note(s) AK. Court System

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Larry Martin</i>	✓				
<i>Mark C. Stanley</i>	X				
<i>Kevin Pat. Puhell</i>	✓				
<i>J. Ellis</i>	✓				
<i>Daniel Doulley</i>	✓				
<i>R. K. Gumbay</i>	✓				

Daniel Doulley
CHAIRMAN'S SIGNATURE

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 13, 1991

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 3-7-91

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered:

HB 136

HOUSE BILL NO. 136

MISC. DIVORCE AND CHILD CUSTODY LAWS

"An Act relating to divorce, dissolution, and child custody."

RECOMMENDATIONS:

be replaced with _____ the same title

[] a new title

[] have attached amendments(s)

[] do pass

[] do not pass

[] no recommendations

individual recommendations

[] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

[] fiscal impact _____

[] fiscal note(s) _____

zero fiscal note AKCOURT SYSTEM

[] zero fiscal note(s) _____

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

	Check appropriate column:	Do Not Pass	No Rec	Amend
<i>Cheri Davis</i>				
	<i>Mary Miller</i>			X
	<i>Mark Hanley (HANLEY)</i>		X	
	<i>Bettye Davis (DAVIS)</i>			X
<i>J. G. Gonzales (GONZALES)</i>				
<i>Patricia Carney (CARNEY)</i>				
	<i>Denjama Lincoln (LINCOLN)</i>			X

Denjama Lincoln
CO-Chairman's Signature

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

Bill No. HB 136

Revision Date: _____ Department Affected: Alaska Court System
 Title: An Act relating to divorce, dis- BRU: Trial Courts
olution, and child custody Components: _____
 Sponsor: C. Davis
 Requestor: House HESS COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

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

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

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

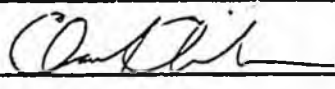
POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

 No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel  Phone: 264-8228
 Division: Alaska Court System Date: 03/04/91

Approved by: Arthur H. Snowden, II, Administrative Director  Date: 03/04/91
 Agency: Alaska Court System

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

H B

1 3 7

STEVE COWPER, GOVERNOR

COMMERCIAL FISHERIES ENTRY COMMISSION

P.O. BOX KB
JUNEAU, ALASKA 99811-0302
PHONE: (907) 465-4081

October 29, 1990

Glen A. Wilber
Vice-President
Alaska Underwater Harvesters Association
3311 Halibut Point Rd.
Sitka, Ak. 99835

Dear Mr. Wilber:

Thank you for your letter of Sept. 25, 1990, and the petition from concerned citizens and members of the Alaska Underwater Harvesters Association. Your petition asks us to "to issue an immediate "moratorium" on the issuance of any new permits for the harvest of sea cucumbers in Alaska and that a study be conducted into the possibility of future "limited entry".

We must deny your request for the moratorium as we lack the statutory authority to implement a simple moratorium. Under the existing limited entry statutes, the only way we can restrict the number of participants in a fishery is by committing to a full-scale, salmon-type limited entry program.

As the State's limited entry program can be relatively expensive to implement (due to the initial allocation process), we must necessarily be conservative in using the program. We usually do not undertake a limitation unless we are convinced that the program is appropriate, will serve the purposes of the statute, and will produce substantial benefits. At this point, we do not feel that we can draw such conclusions in this fishery.

As you may be aware, we recently directed our research staff to conduct a study into the possibility of using the existing limited entry program in the Southeastern Alaska diving fisheries. There are many issues to consider. We would like to see the results of our staff's study and hear the thoughts of the Board of Fisheries on appropriate management measures before we contemplate any full-scale limitation proposals.

1125

RECEIVED

SEP 27 1990

COMMERCIAL FISHERIES
ENTRY COMMISSION

September 25, 1990

Entry Commission
Alaska Commercial Fisheries
8800-109 Glacier Highway
Juneau, Alaska 99801

Dear Sirs:

Please accept the enclosed petition from concerned citizens and members of the Alaska Underwater Harvesters Associated based in Sitka, Alaska. In this petition we ask that the commission issue an immediate "moratorium" on the issuance of any new permits for the harvest of sea cucumbers in Alaska and that a study be conducted into the possibility of future "limited entry".

If you have any questions, please feel free to contact me by correspondence (3311 Halibut Point Rd., Sitka, AK 99835) or phone (907-747-3177). Thank you for your assistance.

Sincerely,

Glenn A. Wilber
Vice President
Alaska Underwater Harvesters Association

Enclosure: Petition With 75 Signatures

747 322-8

Response
Deadline
10/29/90

STEVE COWPER, GOVERNOR

COMMERCIAL FISHERIES ENTRY COMMISSION

P.O. BOX KB
JUNEAU, ALASKA 99811-0302
PHONE: (907) 465-4081

October 29, 1990

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Vice-President
Alaska Underwater Harvesters Association
3311 Halibut Point Rd.
Sitka, Ak. 99835

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As you may be aware, we recently directed our research staff to conduct a study into the possibility of using the existing limited entry program in the Southeastern Alaska diving fisheries. There are many issues to consider. We would like to see the results of our staff's study and hear the thoughts of the Board of Fisheries on appropriate management measures before we contemplate any full-scale limitation proposals.

In the meantime, we are hopeful that the interim management measures in the sea cucumber fishery will be adequate and will discourage those who might seek to enter the fishery on a speculative basis. Hopefully, the new plan will "buy time" so that other potential management measures can be considered more carefully.

Even though we lack the power to act, we are sympathetic toward your request for a moratorium on new entrants and we might consider using such authority if we had it. Representative Ben Grussendorf has indicated that he wants to explore the need for new legislation to provide the Commission with the authority to implement a simple moratorium in such situations. We plan to work with Representative Grussendorf to help in every way that we can.

Again, thank you for your letter and petition. We share your concerns about the fishery. Your continued help as we investigate these issues will be greatly appreciated. If you have further questions or thoughts on these matters, please do not hesitate to contact us.

By Direction of the

COMMERCIAL FISHERIES ENTRY COMMISSION

Bruce Twomley, Chairman
Phil Smith, Commissioner
Rich Listowski, Commissioner

By: 

cc: All Petitioners
The Honorable Ben Grussendorf
State House of Representatives
✓ Doug Rickey, Aide to Rep. Grussendorf
Eric Jordan, Chair - Sitka Advisory Committee

1125

RECEIVED

SEP 27 1990

COMMERCIAL FISHERIES
ENTRY COMMISSION

September 25, 1990

Entry Commission
Alaska Commercial Fisheries
8800-109 Glacier Highway
Juneau, Alaska 99801

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If you have any questions, please feel free to contact me by correspondence (3311 Halibut Point Rd., Sitka, AK 99835) or phone (907-747-3177). Thank you for your assistance.

Sincerely,

Glenn A. Wilber
Vice President
Alaska Underwater Harvesters Association

Enclosure: Petition With 75 Signatures

747 322-8

Response
Deadline
10/29/90

WE THE UNDERSIGNED PETITION THE STATE OF ALASKA LIMITED ENTRY COMMISSION AS CONCERNED CITIZENS AND MEMBERS OF THE ALASKA UNDERWATER HARVESTERS ASSOCIATION. IN THIS PETITION WE ASK THAT THE COMMISSION ISSUE AN IMMEDIATE "MORATORIUM" ON THE ISSUANCE OF ANY NEW PERMITS FOR THE HARVEST OF SEA CUCUMBERS IN ALASKA AND THAT A STUDY BE CONDUCTED INTO THE POSSIBILITY OF FUTURE "LIMITED ENTRY".

PRINTED NAME	SIGNATURE	ADDRESS	DATE
JAMES A WEIS	James A. Weis	Box 6042 SITKA AK.	5-10-
Kayla Perala	Kayla Perala	405 Dearmond ^{SITKA}	5-
Michael S Wolf	Michael S Wolf	Box 6266 sitka	5-
David Whillier	David Whillier	General Delivery ^{SITKA}	5-
Jennifer Carlson	Jennifer Carlson	414 Dearmond St. ^{SITKA}	5-
WAYNE CARLSON	Wayne Carlson	414 DEARMOND ST ^{SITKA}	5-
Susan C. Weis	Susan C. Weis	410 Andrews AK 998.	
Dyane Lebeck	Dyane Lebeck	410 Andrews AK, 998	
Gary Wolf	GARY WOLF	P.O. Box 6266 SITKA	
Florence L. Smith	Florence L. Smith	101 Sharon Dr. SITKA	

SEP 27 1990

YES
ON