

# LEGAL SERVICES

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## MEMORANDUM

August 15, 2023

**SUBJECT:** Proposed regulations regarding ethics complaint defense for certain executive branch officers (Work Order No. 33-LS0950)

**TO:** Senator Bill Wielechowski  
Attn: David Dunsmore

**FROM:** Noah Klein   
Legislative Counsel

You requested an opinion addressing regulations recently proposed by the Department of Law (department) relating to state-provided defense of ethics complaints for certain public officials under the Executive Branch Ethics Act. The proposed regulations provide:

9 AAC 52.140 is amended by adding new subsections to read:

(f) If a person brings a complaint alleging a violation under AS 39.52.110 - 39.52.190 or this chapter by the governor or the lieutenant governor, the Department of Law may provide legal representation if the attorney general certifies that the representation is in the public interest. For complaints against the attorney general, the governor may certify that representation by the Department of Law is in the public interest. For the purpose of this subsection, "public interest" includes whether the action taken is within the scope of the official's duties.

(g) Notwithstanding the certification under (f) of this section, the governor, lieutenant governor, or attorney general may decline representation by the Department of Law and hire private counsel.

(h) Information received by the Department of Law that is related to the defense of a complaint under this section is confidential and not subject to disclosure, absent a court order or a release of information.<sup>1</sup>

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<sup>1</sup> Available at

<https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=142995>.

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These proposed regulations are similar to regulations proposed by the department in 2019.<sup>2</sup> Both sets of proposed regulations provide the governor, lieutenant governor, and attorney general with representation by the department against complaints under the Executive Branch Ethics Act upon determination by the department or governor that the representation "is in the public interest." The 2019 proposed regulations specify that the public interest determination is made in the attorney general's or governor's sole discretion, and the current proposed regulations require the attorney general or governor to "certify" that the defense is in the public interest. The current proposed regulations also define public interest to include "whether the action taken is within the scope of the official's duties." Finally, both sets of proposed regulations require the department to keep information related to the department's defense of a complaint against the governor, lieutenant governor, or attorney general confidential, but the current proposed regulations also expressly provides that such information is not subject to disclosure.

Despite the differences between the current and 2019 proposals, the same concerns identified in the 2019 memorandum to your office also apply to the current proposal, notably (1) a concern that the state defending against ethics complaints for the three positions violates the public purpose requirement in art. IX, sec. 6 of the Alaska Constitution; (2) a constitutional separation of powers concern because the proposed regulations appear broader than the regulatory authority delegated under the Executive Branch Ethics Act; (3) a conflict of interest concern identified by Attorney General Dan Sullivan in 2009 because the department would simultaneously be responsible for promoting the purposes of the Executive Branch Ethics Act while zealously defending certain officials against the Act's provisions;<sup>3</sup> and (4) a public disclosure concern because the new confidentiality requirements would conflict with statutes that make certain parts of ethics complaint proceedings public.

Please call with any questions or concerns.

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<sup>2</sup> Available at

<https://aws.state.ak.us/OnlinePublicNotices/Notices/Attachment.aspx?id=119338>.

<sup>3</sup> 2009 Op. Alaska Att'y Gen., 2009 WL 2421354 at \*6 (Aug. 5, 2009).