

**LAI-ON-THE-TABLE**  
**MUNICIPALITY OF ANCHORAGE**  
**ASSEMBLY MEMORANDUM**



No. AM \_\_\_\_-2024

Meeting Date: March 19, 2024

1     **From:           Assembly Chair Constant**

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3     **Subject:        Response to Mayoral veto of AO 2024-25: AN ORDINANCE OF**  
4     **THE ANCHORAGE MUNICIPAL ASSEMBLY AMENDING ANCHORAGE**  
5     **MUNICIPAL CODE CHAPTER 2.60 TO UPDATE PROVISIONS FOR THE**  
6     **OFFICE OF THE OMBUDSMAN TO PROVIDE CLEAR AUTHORITY TO**  
7     **INVESTIGATE COMPLAINTS WITHIN THE OMBUDSMAN’S JURISDICTION AS**  
8     **ARTICULATED IN CHARTER.**

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10    At the March 5, 2024 regular meeting, the Assembly passed and approved AO  
11    2024-25, which clarifies the Ombudsman’s authority to investigate matters within  
12    their jurisdiction. On March 12, 2024, the Mayor delivered his written veto to the  
13    clerk in accordance AMC 2.30.100.

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15    The Mayor’s objections break down along two lines: 1) objections to the proposed  
16    indemnification process, and 2) objections to the proposed revision regarding  
17    jurisdiction. For reasons discussed herein, the veto demonstrates both a  
18    misunderstanding of the appropriate role of an Ombudsman, as well as a  
19    remarkable indifference to the rights and interests of the residents of Anchorage as  
20    guaranteed by the Municipal Charter.

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22    1.        Indemnification provisions.

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24    The bulk of the veto takes issue with the indemnification provisions of AO 2024-25,  
25    arguing that “it is imprudent to create different standards of evaluation from those  
26    standards that apply to all other employees and officials under the current general  
27    indemnification code.”<sup>1</sup> This statement is a mischaracterization. The ordinance does  
28    not create a different standard for the conduct of the Office of the Ombudsman. Like  
29    all employees the Municipality would only be obligated to indemnify the Ombudsman  
30    for actions taken within the scope of their employment, under AO 2024-25. The  
31    Mayor has implied that somehow AO 2024-25 requires the Municipality to indemnify  
32    the ombudsman from all claims including ones for personal, private activities in an  
33    individual capacity. That is incorrect. The distinction created by this AO comes in  
34    how the standard is applied and who must make the relevant determinations for the  
35    Ombudsman. Both changes are wholly appropriate given the unique nature of the  
36    Ombudsman’s Office, as discussed below.

37  
38    For the majority of the municipal employees, the Code requires an affirmative act  
39    by the Administration to indemnify them in the event they are sued in their personal  
40    capacity.<sup>2</sup> AO 2024-25 changes the obligations of the Municipality to indemnify the

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<sup>1</sup> Veto pg. 1

<sup>2</sup> “Whether or not the municipality is obligated to indemnify, hold harmless or defend shall be determined by

1 Ombudsman and his staff for the actions taken within the scope of their employment  
2 **automatically**. The reason for this change lies in the fact that the Ombudsman is a  
3 truly unique position within the Municipality as created in the charter, as it is the only  
4 position that is obligated to investigate the acts of the Municipal agencies and their  
5 employees. The shifting of the presumption from not indemnified to indemnified is  
6 done because it is more than just protecting an employee, it is a protection of a right  
7 of the people. As such the Ombudsman's office does merit presumed  
8 indemnification.

9  
10 The distinct nature of the Ombudsman's position is reflected in at the State  
11 Ombudsman's Office, where the official actions of the Ombudsman are entirely  
12 immune from suit.<sup>3</sup> This immunization is in keeping with the nationwide best  
13 practices articulated in the Model Ombudsman Act:

14  
15 As a public watchdog, the Ombudsman should be able to state his  
16 or her position freely and candidly without fear of pressure or reprisal.  
17 The judicial immunities afforded the Ombudsman are intended to  
18 protect against harassment when the Ombudsman deals with  
19 controversial issues or makes an unpopular decision. While the  
20 Ombudsman's findings are presented only after due consideration,  
21 no claim of infallibility is made and the Ombudsman's findings,  
22 conclusions and recommendations are always subject to criticism by  
23 government officials as well as members of the public."<sup>4</sup>

24  
25 The ordinance attempts to replicate this provision by first affirming the  
26 Ombudsman's immunity within AS 09.65.070(d). However, due to our status as a  
27 Municipality, the Municipal Ombudsman's immunity is arguably limited within state  
28 law in a way the State Ombudsman's is not. To address this, the ordinance further  
29 insulates the Ombudsman office from controversy by removing the need for an  
30 administration official to make an affirmative decision to indemnify the Ombudsman,  
31 and, in turn, removing any potential separation of powers concerns. Instead,  
32 indemnification becomes the default, and the Municipality may only be relieved of  
33 that obligation when the Risk Manager and the Assembly Counsel agree that the  
34 conduct at issue falls outside the scope of the Ombudsman's employment and  
35 official duties.

36  
37 Strangely, the veto insists that the Municipal Attorney must be the person advising  
38 the Risk Manager on the question of indemnification because "only the Municipal  
39 Attorney's office is concerned with the common good of the entire Municipality and  
40 all its Departments."<sup>5</sup> This statement is remarkable for a number of reasons: 1) the  
41 interests of the various municipal departments should make little difference in  
42 resolving the question as to whether an employee is acting within the scope of their  
43 employment; 2) the Ombudsman's Office is employed to investigate those very  
44 same departments. As the Ombudsman's job often requires actions contra to the

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the risk manager, in consultation with the municipal attorney." AMC 1.50.010G.

<sup>3</sup> See AS 24.55.250.

<sup>4</sup> MODEL OMBUDSMAN ACT FOR STATE GOVERNMENTS § 17(a) & (b) cmt. (U.S. Ombudsman Assoc. 1997)

<sup>5</sup> Veto, *supra* note 1, at 1.

1 interests of the various departments, what rational justification can there be to  
2 restore an official concerned with those departments' interests to the decision  
3 regarding Ombudsman's indemnification? Finally, there's actually nothing in the  
4 ordinance that precludes the Municipal Attorney from continuing to consult with the  
5 Risk Manager on the question of indemnification. The new language simply prevents  
6 one branch of the government from unilaterally denying indemnification to the  
7 Ombudsman for purposes not germane to the question of whether their actions fall  
8 within the scope of their employment.

## 9 10 2. Jurisdiction provisions

11  
12 The veto itself quite revealingly (and erroneously) argues that AO 2024-25 "granted  
13 discretion, otherwise properly within the jurisdiction of the Municipal Attorney's office  
14 (to decide whether an investigation should cease due to the existence of current or  
15 ongoing litigation), exclusively to the Ombudsman."<sup>6</sup> This statement not only greatly  
16 mischaracterizes the ordinance at issue, but also the unamended text of the Code  
17 as it currently stands. Neither the Charter nor the Code, *make any provision*  
18 *whatsoever* for the Municipal Attorney to inject their judgement into the scope of the  
19 Ombudsman's jurisdiction. AMC 2.60.125 currently states that the "ombudsman  
20 shall decline to review or investigate, and shall cease investigation, upon written  
21 determination *by the ombudsman* that any of the following factors apply: ... 9. The  
22 matter has been brought to the courts for resolution or is in litigation."<sup>7</sup>

23  
24 That the Administration reads the Municipal Attorney into this plain and clear  
25 language of Code speaks to the wisdom of the proposed ordinance removing any  
26 question over who makes such determination: the Ombudsman.

27  
28 Further, the very suggestion that the Ombudsman's jurisdiction should be precluded  
29 automatically by the existence of litigation is truly unique. The established best  
30 practices for Ombudsmen argues against strict limitations and for allowing for the  
31 exercise of discretion in order to best preserve their limited resources. But even  
32 then, the Model Ombudsman Act provides that "[t]he Ombudsman may choose to  
33 investigate a complaint even though the statute permits him or her to refuse. For  
34 instance, under paragraph (b)(1), if the Ombudsman believes that recourse to an  
35 administrative or legal remedy would be futile or overly burdensome to the  
36 complainant, the Ombudsman may investigate the complaint."<sup>8</sup> The American Bar  
37 Association echoed this sentiment when directly addressing the topic of litigation,  
38 arguing that that it may be "fully appropriate for an ombuds to inquire into matters  
39 that related to a controversy that is in litigation so long as they are not the subject of  
40 the suit."<sup>9</sup> In point of fact, the State Ombudsman's enabling statute contains no  
41 similar hard and fast limitation and its offices appear to routinely investigate matters  
42 that would expose the State to liability.<sup>10</sup>

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<sup>6</sup> Veto, *supra* note 1, at 1.

<sup>7</sup> AMC 2.60.125B. (emphasis added).

<sup>8</sup> MODEL OMBUDSMAN ACT, *supra* note 4, § 12(a) cmt.

<sup>9</sup> AMERICAN BAR ASSOCIATION, STANDARDS FOR THE ESTABLISHMENT OF AND OPERATION OF OMBUDS OFFICES, 16 (February 2004)

<sup>10</sup> See OFFICE OF THE OMBUDSMAN, PUBLIC SUMMARY REPORT, OMBUDSMAN INVESTIGATION, 2020-11-1469 investigating, and ultimately finding as justified, allegations of a hostile work environment in the Alaska

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2 The veto further argues that “[a]llowing an employee who may or may not be familiar  
3 with current or pending litigation of the Municipality to decide to investigate, produce,  
4 and make public a report about a subject of current or pending litigation, even over  
5 the objection of the Municipal Attorney, jeopardizes the Municipal Attorney's Office's  
6 ability to effectively prosecute or guide defense of those cases.”<sup>11</sup> While the sponsor  
7 acknowledges the legitimate interest of both the Department of Law and the  
8 Administration in limiting the liability of the Municipality, those interests are not, and  
9 by design should not be, shared by the Ombudsman. The Charter Commission  
10 chose to position the Ombudsman outside the executive branch and to further  
11 guarantee the people’s right to the assistance of an Ombudsman in the text of the  
12 Charter, precisely because the peoples’ interest in a transparent and accountable  
13 government should not be beholden to the interests of the Municipal Government  
14 or a particular litigation strategy.

15  
16 Herein lies perhaps the most unsettling aspect of the Mayor’s veto: not the  
17 arguments that it contains, but rather those arguments which it lacks entirely. Absent  
18 from the Mayor’s veto is any consideration given to the people’s right to “the  
19 assistance of a municipal ombudsman in dealing with grievances and abuses.”  
20 Nowhere does it even feign interest in guaranteeing Anchorage residents the most  
21 accessible and at times most effective means of petitioning their government for  
22 redress of grievances. In short, the entirety of the veto’s arguments are premised  
23 upon this Administration’s overriding assumption that the People’s rights should  
24 yield to the financial interests of the Municipal Government.

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26 I find this assumption as offensive as it is legally untenable.

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28 **I request your support for the ordinance.**

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30 Reviewed by: Assembly Counsel's Office

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32 Respectfully submitted: Christopher Constant, Assembly Chair  
33 District 1 - North Anchorage

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Psychiatric Institute.; *see also* OFFICE OF THE OMBUDSMAN, PUBLIC SUMMARY REPORT, OMBUDSMAN INVESTIGATION, A2013-1560, investigating, and ultimately finding as justified, allegations of workplace misconduct by Department of Corrections staff, to include instances of prisoner abuse.

<sup>11</sup> Veto, *supra* note 1, at 1.