

DEPARTMENT OF LAW
PROPOSED REGULATIONS RELATED TO THE ETHICS ACT
QUESTIONS AND ANSWERS
As of October 28, 2019

- Q:** Why would we insert a provision for confidentiality in an ethics law when the Ethics Act applies to all public employees doing public business?
- A:** The new provision was proposed to maintain consistency with both attorney-client privilege and the Alaska Rules of Professional Conduct regarding client confidentiality. 9 AAC 52.160 (the existing confidentiality sections) is based on situations where the Department of Law is acting as the “ethics prosecutor” and other confidentiality requirements may arise if the Department of Law operates in a different capacity. 9 AAC 52.160 requires that certain information collected in the course of an ethics investigation remains confidential, such as information that is not relevant to the underlying ethics complaint. This section also protects employee privacy in the event that the Attorney General decides formal ethics proceedings are not warranted at the end of an investigation.
- Q:** Who requested the proposed amendments?
- A:** The regulations were proposed to address an identified need – the Attorney General instructed the Department of Law to propose the amendments.
- Q:** How is the Department of Law supposed to be objective when reviewing ethic violations and defend the Governor at the same time?
- A:** The Department of Law does not investigate, evaluate, or adjudicate complaints filed against the Governor, Lt. Governor, or Attorney General. These complaints are investigated, evaluated, and adjudicated by private attorneys (not state employees) who are hired by the Personnel Board under AS 39.52.340(c). As the Department of Law is not involved in this review, there is no issue regarding department objectivity.
- Q:** Why would the Attorney General direct the Department of Law not to represent the Governor when he is directly employed by the taxpayers and installed by the Governor?

A: The Attorney General has a constitutional duty to follow the law and has sworn an oath to do so. The AG would only have discretion to determine if it is in the State's best interest to defend the Governor. It is important to remember that while the Department of Law may defend the Governor, Lt. Governor, or AG, the department does not indemnify them. If they have been found to have violated the Ethics Act, the Governor, Lt. Governor, or AG is personally responsible for whatever penalty is imposed.

Q: Why would these proposed regulations apply only to the Governor, Lt. Governor and Attorney General, when all executive branch employees are subject to the Ethics Act?

A: For all State employees, except the Governor, Lt. Governor, and Attorney General, the Department of Law is the entity that performs an initial investigation of an ethics complaint, accepts or rejects the complaint, and ultimately determines whether an ethics violation has occurred; therefore, it would be improper for the Department of Law to also represent these other executive branch employees.

Q: Why should these changes not apply to all executive branch employees?

A: See the response directly above.

Q: Why this regulation rule change and why now?

A: Once the Department of Law recognized the need for a revision, the Department began the process of revising the regulation.

Q: Why would these three positions specifically get free legal advice from the Department of Law, and not other executive branch employees, such as department commissioners for example?

A: As discussed more thoroughly in prior answers, the current regulation already treats these three positions differently than other executive branch employees.

Q: The changes states there will be no additional costs in FY 2021. How did the Department of Law calculate and determine the fiscal estimate?

A: The Department of Law anticipates that it can manage any new representation that would occur due to the proposed regulation changes through existing resources.

Q: Why should someone over me, who is clearly outside the law, get free legal defense?

A: The regulation change would require a determination that such representation is in the best interest of the state. Such a determination would consider all available information, including information that an act was “clearly outside the law.” This is similar to the process used in other settings. State employees, including the Governor, Lt. Governor, and AG, who are sued personally in litigation for their actions as an employee are typically represented by the State of Alaska after a threshold determination is made – did the acts or omissions at issue occur within the scope of the employee’s office or employment at the time of the incident out of which the claim arose, and did the employee’s act or omissions constitute willful, reckless, or intentional misconduct or gross negligence? Once the threshold is met, the employee’s representation is free and, unlike in the ethics complaint scenario, any damages awarded against the employee are paid for by the State.

Q: Could you please provide examples from the past or provide a specific situation where the complaint process was used to harass or became predatory?

A: The Attorney General is concerned that the current process could easily be used to harass or could become predatory. This process could cause an inordinate amount of expense to the subject of the complaint and become very distracting and time consuming for these public officials, even if the complaint is found baseless.

Q: Could you please specifically explain exactly how the proposed regulations would mitigate the risk that complaints are used to “harass or becomes predatory?”

A: Ethics complaints filed against the Governor, Lt. Governor, or Attorney General are investigated, evaluated, and adjudicated by private attorneys (not state employees) hired by the Personnel Board under AS 39.52.340(c). During that initial investigation and evaluation, the private attorney will reach out to the subject of the complaint for information, documents, and discussions. As discussed above, this process is currently expensive and time consuming for the subject of the complaint, even if the complaint is ultimately found baseless. While defending against one or two baseless complaints might be manageable and harassing, as the number of complaints increase, the process can quickly become unmanageable and predatory.

-Treg Taylor, Deputy Attorney General