

Alaska State Legislature

Select Committee on Legislative Ethics

425 G Street, Suite 711
Anchorage AK 99501
(907) 269-0150
FAX: 269-0152
ethics.committee@akleg.gov
Web Site: <http://ethics.legis.state.ak.us/>

Mailing Address:
P. O. Box 101468
Anchorage, AK
99510 - 1468

MINUTES from January 23, 2014 FULL COMMITTEE MEETING Thomas Stewart Building Beltz Room #105

1. **CALL THE MEETING TO ORDER:** Committee Chair H. Conner Thomas called the meeting to order at 9:05 a.m. Members present: Senator Cathy Giessel, Senator Berta Gardner, Representative Chris Tuck, Rep Craig Johnson (9:30 a.m.) Janie Leask, Herman G. Walker, Jr., Dennis “Skip” Cook, and Gary Turner; Staff present: Joyce Anderson; Others present: Dan Wayne, LAA Legal; Teleconference: Doug Gardner, LAA Legal, Sana Efird, DHSS, Jared Kosin, DHSS; Absent: Representative Charisse Millett

Chair Thomas welcomed Member Janie Leask who was appointed from alternate member to regular member as of September 19, 2013, replacing Former Member Toni Mallott following her resignation.

Chair Thomas welcomed new, alternate member from Ketchikan, Christena “Tena” Williams, who was appointed to serve on January 13, 2014.

Chair Thomas thanked the members for serving and Ethics staff Linda Leigh for organizing the meeting.

Chair Thomas stated that this was his last meeting chairing for the committee, and that Member Gary Turner will chair the next committee meeting.

Representative Tuck joins the meeting.

2. **APPROVAL OF AGENDA:** Motion to approve was made by Member Leask. There were no objections.

3. **APPROVAL OF MINUTES:**
 - a. **October 28, 2013 Full Committee** – Chair Thomas stated that these minutes were incomplete and not in today’s packet. They will be carried forward for approval at the next committee meeting.
 - b. **October 28, 2013 Senate Subcommittee** – Senator Gardner motioned to approve the minutes. There were no objections. Motion passes.
 - c. **November 21, 2013 House Subcommittee** – Member Turner motioned to approve the minutes. There were no objections. Motion passes.
 - d. **November 21, 2013 Senate Subcommittee** – Senator Giessel motioned to approve the minutes. There were no objections. Motion passes.
4. **PUBLIC COMMENT:** None.
5. **CHAIR/STAFF REPORT:**
 - a. Informal Advice Staff Report – Ms. Anderson informed the members that the reports were incomplete and being worked. It’s been extremely busy at the Ethics office due to the move out of our old office and into the temporary office, as well as preparing for committee meetings that were held in October and November.
 - b. Update: Public Member Committee Appointments – Ms. Anderson updated the members on Member Leask’s appointment to the committee as a regular member. She also stated that Ms. Leask’s and Ms. Williams’ names have been referred to the Senate and House Judiciary committees for confirmation hearings.
 - c. 2014 Ethics Training Update - Ms. Anderson stated that she conducted training last Friday for new and returning staff. It was a long class and interesting; good questions were asked. Additionally, Representative Guttenberg attended the class as he was unable to attend last January due to his wife’s health situation. The online training video is also available for those who are unable to make the in-person training session. It has been up since May.
 - d. Ethics Disclosures – Ms. Anderson referred members to the handout reflecting the number of ethics disclosures filed between January 1 and December 31, 2013, and the categories of disclosures that are being filed. There were 605 disclosures filed, most of them being Gift of Travel and/or Hospitality disclosures.
 - e. COGEL Conference – Ms. Anderson reported that she attended the Council on Governmental Ethics Laws (COGEL) conference in Quebec, Canada, this year. Dan Wayne, LAA Legal, and Joan Mize, APOC’s administrator in Juneau also attended. The conference covered elections, campaigning, financial disclosures, and ethics. One of the segments covered investigations and what you need to look for. They also gave helpful hints on how to conduct investigations, which sometimes the Ethics and APOC offices do. Another segment was called “Gobbledy

Gook” which provided examples on how to make your information clear and not use a lot of legal ease. They also provided resourceful websites.

f. Publications

- i. Advisory Opinions and Public Decisions – the Ethics office is in the process of updating these, hopefully by the end of this month.
- ii. 2014 Standards of Conduct Handbook – distributed to all legislators, legislative staff and legislative agencies.

6. **ANNUAL BENEFIT AND LOAN REVIEW AND DISCUSSION:** Chair Thomas stated that there were changes to the list of state programs and state loans, which needed to be reviewed and approved by the committee. Chair Thomas invited Ms. Anderson to provide details to the committee.

Ms. Anderson provided background stating that each year, the Ethics office sends out letters to a list of state offices who have reportable state benefit or loan programs. The departments are asked to provide updates if there are any. Major updates are presented to the committee for review and approval. Once approved, the list is updated and inserted in the Ethics handbook. Participating in certain state benefit and loan programs, requires disclosure. The reason these state benefit and loans need to be disclosed is because they are awarded on a discretionary basis; there is no fixed criteria.

This year, there were four changes to the list of benefit & loan programs. The Department of Commerce, Community, and Economic Development added a new loan program under AIDEA (Alaska Industrial Development and Export Authority & Alaska Energy Authority), called the “Development Finance Program”. DCCED has indicated on the form that this program does not meet the requirements of having “fixed, objective eligibility standards.”

Senator Giessel motioned that the “Development Finance Program” under the DCCED under the AIDEA be added to the list of Alaska State Benefit and Loan Programs. There were no objections. Motion passed.

Ms. Anderson stated that DHSS (Department of Health and Social Services) removed the “Construction License” program as it no longer exists. A motion to remove this item from the Alaska State Benefit and Loan Program was made. There were no objections. Motion passed.

Ms. Anderson stated that DHSS also recommends deleting the “Health Facilities Operating License” and “Certificate of Need” program. Ms. Anderson stated that Assistant Commissioner Sana Efir was on teleconference calling in from Anchorage, as well as Jared Kosin, who is with DHSS, calling in from Juneau.

Ms. Efir introduced herself to the committee, stating that she was new to the position and as someone reviewing these programs with new and fresh eyes, she reviewed that programs to see if both programs did not meet one or more of the standards as outlined, and determined that both the “Certificate of Need” and

“Health Facilities Licensing and Certification” programs do meet the standards under AS 24.60.050, therefore should be removed from the list. The licensing and certification is strictly administered through regulation and regulatory requirement; it is created by the Social Security Act, Section 1864, so there is no discretion. There are specific regulations and guidelines that must be met by health care facilities that are reviewed. This is for their Medicaid and Medicare regulatory and state licensing requirement.

Representative Tuck asked why the programs were listed from the start.

Ms. Efird and Ms. Anderson both responded that they had this discussion and neither she nor Ms. Anderson had reasons why the programs were placed on this list. Ms. Efird stated that she did not have background information that made this determination.

Ms. Anderson stated that she did not have any specific information on any of the individual programs that were selected on this list other than a box that was checked yes or no beside the individual programs for inclusion. Ms. Anderson stated that it was a very intensive study at the time, from what she gathered, but again, did not have any documentation on the determination.

Representative Tuck commented that if it was an intensive study, he was certain that each individual programs was reviewed; he stated that he thought it was odd that if the programs are regulatory, there must have been some reasoning for someone receiving a certificate of need for purposes of disclosure, as well as the licensing and certification.

Ms. Anderson stated that these programs have been around since 1992. Since that time, programs have been deleted periodically from the list.

Senator Giessel commented on the forms dated 1995, that the Facilities Manager for the facility and licensing judged that there was minimal discretion in determining qualification and that it was generally available to members of the public, which meant that the program qualified. Chair and members concurred with Sen Giessel’s statement.

Senator Giessel also noted that in the 1995, the manager of the “Certificate of Need” also qualified as it was subject to fixed, objective eligibility standards. Senator Giessel asked Ms. Anderson if it conflicted. Ms. Anderson explained that those are the two standards that the program “does not meet.” Senator Giessel commented that it was stated in the negative and that it appears to be the judgment of a person back in 1995. She also commented that clearly regulations are promulgated probably yearly on a subject such as this, so with fresh eyes, as Ms. Efird stated, changes the interpretation.

Chair Thomas asked Ms. Efird if it was her position that with the health facilities operating license that is generally available to the public.

Ms. Efird replied that it is generally available to members of the public, it is subject to very fixed, objective eligibility standards, and there basically is no discretion in determining the qualification because it is all laid out in regulatory requirements.

Chair Thomas stated that if an individual or entity meets the requirements, they're going to get the operating license. Ms. Efird replied yes.

Representative Tuck asked Ms. Efird if these were new regulations to which they were referring, and if yes, asked how recent they were. Ms. Efird stated that she did not know if these were new regulations or exactly when new regulations were enacted, but that she would be able to find out.

Representative Tuck stated that the reason he is asking is because they have documentation that says at one time, these programs were meeting the criteria for why they needed to be disclosed. If the regulations haven't changed since these programs were added, he has reservations for removing them since there were people prior to Ms. Efird who felt these programs needed to be disclosed.

Senator Giessel stated that she was personally familiar with the "certificate of need" in that there were some negotiated rule making approximately 5 years ago, which is more recent than when the persons judged these programs were discretionary. Sen Giessel also stated that these are very tight requirements to receive the operating license or certificate of need. She applauded the Deputy Commissioner's scrutiny on this.

Member Turner noted that he, too, wondered if it was a misinterpretation of the person who signed off on it. It's possible that the person did not understand it as it is very confusing because it is stated in the negative.

Representative Tuck reiterated his reservations, due to the fact that originally it was heavily discussed and determined to add it to the list.

Ms. Anderson stated that there were hundreds of programs that received these forms from the Ethics office. Ms. Anderson stated that she did not mean to imply that these particular programs were hotly debated or discussed; rather the process was humongous and time consuming.

Representative Tuck asked the committee if they were making their decision based on the fact that due diligence may have not been done originally, and that regulations may have changed, but we don't know when if so, and that people before us may have misinterpreted the forms.

Member Turner motioned that the committee approve the deletion of the Department of Health and Social Services Health Facilities Operating License of the requirement from reporting on the Annual Benefit and Loan Review.

A roll call vote was taken: YEAS: Sen Giessel, Rep Tuck, Member Leask, Member Walker, Member Cook, Member Turner, Chair Thomas. NAYS: None. ABSENT: Sen Gardner, Rep Millett. Motion passed.

Senator Giessel motioned that the committee approve the deletion of the Department of Health and Social Services Health Facilities Certificate of Need of the requirement from reporting on the Annual Benefit and Loan Review. Motion passed unanimously. No objections.

7. BUDGET:

a. FY 14 Budget Update - Ms. Anderson stated that the budget report in the packet is current as of January 14, 2014. At this time, the committee has used 53.77% of their budget which runs through June 30, 2014.

Member Turner asked if there were unanticipated expenses with regards to the Ethics office's temporary move and if this would be added to the budget request. Ms. Anderson stated that there were a few extra expenses that were not budgeted, such as the \$200 cable installation to watch Gavel to Gavel and an increase in a monthly cable fee because Ethics is the only office who has cable in the temporary buildings. It went from \$20 to \$70 because Ethics is no longer part of a package. Also, Ethics now has a water cooler since there are no facilities in the building, such as a kitchen area; this costs about \$18 per month. Ms. Anderson stated that it was her understanding, and she has a request in to Representative Hawker, that some money had been set aside for the move and these expenses would be covered.

b. FY 15 Submitted Budget Update – There was no discussion.

8. 2014 LEGISLATION UPDATE: Chair Thomas stated that there were no pre-filed bills in the area of ethics. Chair Thomas asked Ms. Anderson to update members on HB 235 which was introduced by Representative Higgins.

Ms. Anderson stated that HB 235 would require APOC to maintain confidentiality of certain proceedings (i.e., a complaint), documents and other information. Ms. Anderson stated Joan Mize, APOC Juneau administrator, is present today and would be happy to answer any question. Ms. Anderson also stated there are confidentiality proceedings already in place in the Ethics statutes.

9. DISCUSSION: ETHICS TRAINING on 1st Amendment Rights in relation to demonstrations at the Capitol—Recommended by Legislative Council on Aug 23, 2013:

Ms. Anderson stated the August 23, 2013, Legislative Council meeting discussed 1st Amendment Rights. Ultimately the Council decided to have Ethics add to their Standards of Conduct Handbook a segment on First Amendment Rights relating to demonstrations at the Capitol, as well as adding the subject to ethics training at the January staff orientation.

Member Walker stated that he didn't think 1st Amendment Rights training fell into the committee's purview. First Amendment Rights are distinct from Ethics, although they may cross over; and it would be an enormous undertaking for Ethics to take this on. It's too broad of a subject. There are many cases on First Amendment Rights and he did not see how Ethics would even structure a training segment that would address it, even on a general level. Member Cook commented that the Ethics Committee's purview was clearly defined in the Legislative Ethics Act.

A motion was made by Member Walker to reject adding training on First Amendment Rights to the Ethics Training and Ethics Standard of Conduct Handbook.

A roll call vote was taken: YEAS: Member Leask, Member Walker, Member Cook, Member Turner, Sen Giessel, Chair Thomas, Rep Tuck. NAYS: None. ABSENT: Sen Gardner, Rep Millett. Motion passed.

Ms. Anderson recommended that a letter be sent to Representative Hawker, chair of Legislative Council. Ms. Anderson and Chair Thomas agreed that the committee should send a letter stating that the committee considered the request but did not feel that training on First Amendment Rights was under their jurisdiction and therefore would not be adding it to ethics training or the handbook.

Ms. Anderson stated for the record that a policy memo from Rep Hawker was sent out to all Legislative Agency Employees on interacting with demonstrators.

10. **DISCUSSION: ETHICS TRAINING for Independent Contractors or Consultants, pursuant to AS 24.60.155:**

Ms. Anderson announced that Doug Gardner, Director of Legislative Legal Services, was online to answer questions pertaining to this subject and invited Representative Johnson to join the committee regarding this topic.

Ms. Anderson provided background on this subject explaining that recently there have been inquiries from legislative agencies asking if independent contractors and consultants were required to take ethics training.

Ms. Anderson read aloud AS 24.60.990(a)(11), which defines "legislative employee". She also stated that AO 99-01 describes a TEST which determines if a contractor or consultant was considered a 'legislative employee' under the definition in the Act. Ms. Anderson related the three steps that were used to make the determination. Ms. Anderson also related AO 84-06 which defined "professional services contracts". AO 84-06 also notes some exceptions.

Ms. Anderson stated AO 96-06 addressed whether employees of a contractor who provided legal services to the Ethics Committee were required to comply with AS 24.60.134(c), which addresses prohibited conduct and other requirements of the Act; specifically, activity relating to partisan political activity, campaigning, fundraising and lobbying. It was determined by the committee that employees of

the contractor were not required because the company for which they worked has adopted policies and procedures that preserve the confidentiality of the files and documents of the committee; Therefore, only those employees of the company who have access to the documents and perform regular or substantial services for the committee are subject to the restrictions set out in AS 24.60.134.

Ms. Anderson stated a short clause regarding ethics compliance was in all contracts through 2003. A contractor called the LAA Administration office requesting clarification of what the clause meant and the Ethics office and LAA Accounting revised the language to be more descriptive.

In the packet of materials is the CONTRACT INFORMATION for FY 2013. The report reflects the number of contracts issued and the dollar ranges by department.

Ms. Anderson stated that while compiling the background information for today's packet, the bigger question is if the entire Ethics Act and not just ethics training applies to independent contractors and consultants. One big area would filing ethics disclosures.

Ms. Anderson stated that she contacted other states for comparison. See Item 10: Ethics training for Independent contractors or Consultants. Research: Other Government Entities, the last document in packet.) None of the entities contacted covered third party contractors.

Chair Thomas stated that depending on what the committee decides, there could be a significant impact on the committee and contractors, if contractors fall under the Ethics requirements.

Member Walker asked if the committee was stuck with what is already in statute for Independent Contractors which would require a legislative change or could the committee issue another advisory opinion clarifying the issue.

Member Cook commented that he felt the issue required a legislative fix. If the legislature wants the committee to start keeping track of contractors who are considered employees and to start requiring that they take ethics training and file disclosures, etc., the committee is going to need to hire more staff. Member Cook also suggested the committee submit more research to the Legislature that reflects we are the only state that has this requirement or this definition.

Member Leask commented that she thought it was unusual for contractors to be paid under the state payroll system versus a line item for "contractual services." (See AO 99-01 TEST, #1) Member Leask stated that she agreed with the opinions voiced by Members Walker and Cook, and that she was in favor of a legislative change over something that the committee could do right now.

Chair Thomas asked Pam Varni, Executive Director of Legislative Affairs Agency, to explain how contractors are currently paid and if they are paid through the state payroll system.

Ms. Varni stated that there are a couple of definitions in the “personnel” sections, such as salaried employees and temporary employees that are paid through the state payroll system. There are also some employees that have retired from the state and return to work for that state during session and they fill out a “personal services contract”, which is saying ‘please do not take the retirement deduction when you put me on payroll’. They are still paid through the payroll system but not receiving retirement benefits.

Ms. Varni also stated there’s also the “professional services contract”. Those are paid through our accounting section or through her office. Wen Ibesate, Administrative Officer, pays these contractors. These contractors receive 1099 Forms. She stated these contractors are not receiving any benefits and she does not consider them employees; rather they are considered “consultants.” Ms. Varni stated that the definition, the way that it is now, has been troublesome over the years to different consultants, and stated she would like to see the committee come out with a different opinion and a legislative change that would clarify the definition. We don’t want contractors to see requirement as troublesome to them or their companies.

Representative Tuck stated that there are labor laws on the books that define what an employee is versus a contractor. Just because someone is salaried in the state of Alaska does not mean that they are exempt from overtime. Many times, employers misclassify and misuse some of the existing definitions. The fact that someone is temporary or salaried or hourly should prompt us to seek help from someone that specializes in Employment Labor Law. Representative Tuck stated that he did not think the Legislature should be exempt from the laws the legislature has imposed on employers.

Member Walker stated that he agreed with Rep Tuck, but what the committee is stuck with is the language that says that a legislative employee is an independent contractor. That broad language is what’s troublesome here. As a committee, since we’re controlled by statute, how do we get around language that already defines employee, and whether defining terms falls under our jurisdiction.

Chair Thomas asked the committee if that wasn’t what happened in AO 99-01, where the test was laid out. Didn’t the committee basically narrow the definition of an independent contractor with that test, whether or not that was appropriate, is another question, but at least at that time, they felt that they had some leeway.

Member Walker commented that the committee’s contract investigators would be required to take ethics training because they meet the criteria. I don’t think we want to open that door.

Chair Thomas stated that one of the options the committee has would be to look at revising the opinion. The committee at that time took the position to narrow the definition of independent contractor thus reducing the number of contractors required to comply with the Act.

Member Cook stated that in the final recommendation of AO 99-01, the committee said that the Legislature may wish to consider amending legislative procurement policies or related procurement code to include a disclosure requirement for those who contract with the Legislature regardless of contract type.

Chair Thomas invited Doug Gardner, Director of Legal Services, to weigh in on the discussion. Mr. Gardner stated his perspective comes from the fact that contracts the Legislature enters into need to be approved as to form by his office. In the course of the last three years and going into four, he does not know whether the volume of contracts is higher now or lower, but it seems very significant and robust right now. What concerns him about the current ethics language included in all contracts is that it pitches the responsibility of ethics coverage back to the contractor. The contract provision basically warns the contractor that they may be subject to the provisions of the Ethics Act. Mr. Gardner stated he was concerned when clients, a committee, or another legislative entity come to him with a concern like this--and I think Ms. Anderson has found herself in this same situation. We've collaborated trying to work through these issues. Contracts are not places for uncertainty. Contracts are places where we establish the rights and liabilities of both parties, and we tell people what we expect, and when Legal Services and the Ethics Administrator can't provide a straight answer on whether or not we think in a particular situation a person is covered, we're left in the situation where we can't call it a ball or a strike. He would like to be able to place language into a contract stating the contractor is either covered or not covered; take the ethics course, don't take the ethics course. He'd prefer not to include language that is general in nature. Presently, they continue to include the language at the direction and guidance of the Ethics Committee.

Mr. Gardner has some opinions about what he feels ought to happen but he's policy neutral and trying to maintain that stance. Although he agreed with Member Walker who said earlier that we're stuck with the language in AO 99-01. However, failure to comply is murky in that the Ethics Act section on violations does not have an applicable sanction for an independent contractor or consultant, short of a termination for a problem that occurred, or for misuse of a state asset or something. The Ethics Act doesn't seem to have a lot of detail or guidance as to what would happen if there was a violation. The other point he would make is that there have been some concerns from legislative entities attempting to enter into contracts that feel the pool of potential contractors has shrunk or been chilled by the uncertainty over this provision. It was described to him by a client that some of the more qualified people just didn't feel comfortable or weren't sure what their responsibilities were. In the cover page of Item 10, Ms. Anderson states the bigger question at the bottom of page 3 of 6; what is the independent contractor's responsibility? Is it limited to ethics training, the disclosures, etc. Presently, he did not believe that there was any following up on whether or not these contractors were complying with any of the bulleted items listed or even being advised on bullets 2, 3, 4, and 5.

In closing, Mr. Gardner stated that the other piece that makes it difficult for him is—according to Ms. Anderson’s research on other government entities—that we appear to be a distinct minority in terms of having a third party independent contractor covered by the Ethics Act. (Although a fifty-state survey hasn’t been done, that he’s aware of, and which might be something that the committee wants Legislative Research to do), there isn’t a lot of guidance for him (Legal Services) or Ms. Anderson in the context of trying to work through areas and voids that aren’t covered by the prior opinions of the Ethics Committee, which is always the case—we can’t reach out to case law or reach out to other examples. Because he is in a policy neutral position, this is as far as he can go.

Member Cook asked Mr. Gardner in reference to his statement that some contractors might simply step out of the pool, that if he thought that there might be others who actually run their costs up a bit because of this uncertainty. Mr. Gardner replied he would need to be careful on how he answered this question, and stated he wanted the committee to know that he did not deal with the contractors directly or the pool as it were. He gets this information through his clients. There was one discussion that occurred with a very significant contract where the contractor was very expensive and was bringing an extremely unique skill set to the Legislature and there was discussion between either internally with his staff or with the client, or possibly with Ms. Anderson about, he believed, the concept came up that if this particular person and all of these people behind them that are working on this project need to take this course, at a substantial billing rate, sitting and taking the ethics training, he agreed that it is affecting the dollar amount and the Legislature is paying for that. Although he did not think it was astronomical, he thought it to be probably significant, and in the thousands of dollars. Mr. Gardner stated that he did think it is a cost issue; his clients report that it is a deterrent issue. This is especially true with more sophisticated clients that are involved in a lot of different issues of legal services, in particular. He stated that there are concerns where these clients are working for others and they’re concerned about the law of unintended consequences and becoming entangled in an ethics responsibility and then backing into a problem later with some other conduct that they engage in on behalf of another client.

Member Walker asked Mr. Gardner if he recommended scrapping AO 99-01 or fixing it with tighter language, (until we get a legislative fix to this), and asked if he would he like to see an interim fix from the Ethics Committee until there’s a legislative fix.

Mr. Gardner replied that he felt it was a policy call and the legislature needed to address it. There might be some flexibility in AO 99-01. He also recommended consulting with Dan Wayne on their options. Presently, he did not foresee an interim fix.

Member Cook suggested considering Mr. Gardner’s offer of asking Legislative Research to do a nation-wide study on whether any other states do this. Ms. Anderson stated that Legislative Research is open to the committee. She also suggested using COGEL’s services where you can ask a question to all of the

COGEL members and after members reply, you receive all the information. She recommended trying COGEL first and then Legislative Research. Representative Johnson stated that NCSL has the capability with a phone call that is similar to COGEL's; you ask a question and they might have this type of information at their fingertips.

Representative Johnson addressed Mr. Gardner stating that after reading the definition of "professional services", hypothetically, if he had a company that has done research and testifies in front of a legislative body, if that would be considered representing the legislator in a policy related capacity. Mr. Gardner stated that he would think so.

Representative Johnson asked Mr. Gardner that with regards to everything that they have been doing with the oil and gas and the pipeline over the last six years if all of those consultants that testified in front of the committee would fall under this Ethics Act. Mr. Gardner replied that that would be a significant likelihood. Under the current statute, those are the contractors who fall under the Legislative Ethics Act.

Member Cook stated that many of those consultants come from outside of Alaska or are headquartered outside of Alaska and asked how this would be enforced, such as attending training. Members discussed the online training option. Ms. Anderson stated that a user name and password was required for online training. Prior to today's meeting, she said she spoke to Tim Powers, Media Services, who monitors the Ethics website. He said we could assign an individual user name and password for contractors. The Ethics office and whoever takes the training receives an email confirmation on completion of training.

Representative Johnson stated that they have consultants who have hundreds of people working on contract, if not thousands. There have been some huge issues for which we've hired consultants. If we start requiring hundreds of people to take ethic training at a rate that Mr. Gardner wouldn't quote, we've escalated the cost of the contract by thousands of dollars, for just sitting in front of the computer. He suggested involving Legislative Council, the Rules Chair to draft legislation and have it introduced to fix this. This is not something that can be tabled.

Representative Tuck stated that they need to make sure the statute doesn't create a loophole where a legislative office hires an independent contractor to avoid having to report anything ethically.

Chair Thomas agreed that the committee needed to do something to move this forward, but a legislative fix is one option that is not available to the committee. The suggestion that was made to request an opinion from our legal counsel to narrow the definition of "independent contractor" along with requesting the research on other states would be his option.

Senator Giessel read aloud AS 24.60.134(c). She stated she shared some of the same concerns as expressed by Representative Tuck, in that she does not want to create a loophole. Alaska is very small when it comes to people and it's possible to hire a consultant who does have political influence and in that instance the contractor would be required to take the ethics training. Under AS 24.60.134(c), however, the committee has an option to provide exemptions. When we're talking about an oil and gas consultant, they have a vast number of staff behind one or two main people. The one or two people should be required to complete training and staff behind the scenes should be exempt.

Ms. Anderson pointed out the fact that this particular part in statute only applies to contractors (legal services) to the Ethics Committee, however, it may certainly be useful to what we're working on.

Member Walker stated that Ethics has never required contractors to complete ethics training in the past and asked the committee what the next step should be; more specifically, will the committee start requiring this of them? According to the statute, they are required.

Ms. Leask asked if anyone else had concerns besides Ethics. Ms. Anderson replied that concerns have developed in the last couple of months. In the past she has only received one or two calls from contractors since she's worked for Ethics. She referred them to the existing clause in the contract as there has not been any other guidance in which to refer them. The one caller was a sole person. It's only been recently that she and Mr. Gardner were faced with the issue after receiving some concerns from agencies within the Legislature.

Ms. Leask asked when the definition was put into statute. Ms. Anderson replied since 2001; however, during the 2012 Legislative Session, there were several changes. Statutory language was deleted for the following positions: Security, Messenger, Maintenance, and Print Shop employees. Also, language was added to exclude employees who perform functions incidental to the legislature. Further, the term Supply was changed to Procurement Officer. Nothing was added or changed relating to the term "independent contractor."

Member Turner asked Mr. Gardner if the committee could legally set aside AO 99-01 until further research or a legislative fix could be made. Mr. Gardner stated the committee can always reconsider, withdraw, or modify previous opinions. He stated that for the record, he did not want the committee to create some type of vacuum inconsistent with the statute. He stated that it would help his office to get some clarity and referred the committee to Mr. Wayne who has more experience with the committee's practices and procedures. Mr. Gardner stated he had one additional comment, stating that the real struggle here may be in implementing the requirements of the contractor because contractors, (as the ones described by Rep. Johnson), want all their obligations to be nailed down in their contracts. Contractors are required to follow certain federal and state laws, such as the law on human trafficking, but when it comes to *detailed, Alaska-specific* things, if the fix were a statutory fix, whether the ethics statute would direct that in legislative

contracts, that there be provisions in the contract that require certain types of behavior, with the result being the person's termination from the contract if they don't do those things. Deal with it as a contract matter, if you want to reach out and address the contract and not risk the loop hole that Rep Tuck and Sen Giessel mentioned, and try and create a situation where there are standards of conduct that are narrower, that are important, but more enforceable through the contract, we have termination provisions in the contract. If someone isn't complying, or doing something inappropriate, the committee or whoever supervises the contract can terminate the person or contractor. Maybe the idea of trying to do that in statute and reaching all the way to the contract is what's causing the problem here. Contractors look at the contract and see what their responsibilities are, that's how they price their job, and that's how they conduct themselves. Maybe there's a way to address this in the statute that requires the agency and the rest of the legislative agencies to include some language in the contract that has a checklist of things that are required but maybe isn't quite as extensive as all of the bullets on page 3 of Ms. Anderson's summary. Language that's more tailored to a contractor, but may be a policy call. Maybe this can be dealt with in a contract required through a statute.

Representative Tuck asked Ms. Varni if the definition of legislative employee in AS 24.60.990(a)(11) was the reason why we pay our independent contractors through payroll. He wanted to know why they are not paid through a separate fund. Ms. Varni replied that we do not pay any of our contractors through the state payroll system. The only reference to a contract is a Personal Services contract and that is to exclude the retirement deduction. All of the contractors, whether it's a services contract, someone snow plowing, a construction contract, someone doing policy or legal services, those are professional service contracts or services contracts and paid through our accounting services system through the state-wide Department of Administration.

Representative Tuck stated that this was one of the criteria for the TEST is whether or not the contractor will be paid through the state payroll system. That is a major criteria, because if they meet that question, then several other ones kicks in. He suggested clarifying this administratively.

Member Cook stated that it was his belief that the purpose of that question was to bring in those who are under the personal services contract, who are essentially like an employee except they're not taking the deductions. That person should still probably be considered an employee, but the rest probably should not.

Representative Johnson asked if there was an action being required of the committee on this matter and if the committee has time to do more deliberating and time to take it through the legislative process. If the committee does not have to take action on the matter immediately, his concern is that when it comes time, he suggested that it be retroactive to avoid possible ethics complaints.

The question was presented to Mr. Gardner as to whether or not there would be any immediate issues that would be impacted if the committee did not make any

decisions today. Mr. Gardner replied no. The issue has been on-going. He stated that he felt that the Legislature needed to balance policy considerations and provide something crisp we can use. However, as a practical matter, a lot of the contracts for this remaining legislative session we've got under our belt. People are going to struggle with or deal with this issue on a case-by-case basis. The volume of additional contracts will be low from here on out.

Representative Johnson asked Mr. Gardner if the fix he recommended was addressing it through a procurement code and then include it in the contract language. Mr. Gardner replied that the Ethics Act could be modified to require a provision that addresses independent contractors and it could specifically say that any contracts entered into by the Legislative Branch require as a term and condition of the contract the following five things (for example only) and identify what those items are. Although he did not know who would enforce them, whether it would be the Ethics Committee or Legislative Council. Should Legislative Council require a procurement procedure to include the following five things, which would give the Ethics Committee the option to deal or not deal with independent contractors or consultants. As a procurement matter, we've made it a terminable condition that if a certain thing happens, maybe removing it from the committee and all of the problems that it's created would be a potential fix. Mr. Gardner interjected that he wanted to reiterate the fact that he was not advocating here, but simply responding to scenarios presented to him, and that he, too, wanted clarity to this issue.

Representative Johnson thanked Mr. Gardner for answering his questions and acknowledged Mr. Gardner's last statement, additionally asking Mr. Gardner if this was something that could be done through policy of Legislative Council. Mr. Gardner replied that Legislative Council could make changes to the procurement procedures at any point in time. In fact, Leg Council recently changed procurement procedures at its November meeting. This office has typically drafted procurement procedure changes for Leg Council.

Representative Johnson asked Mr. Gardner if Leg Council changed procurement policy would that override the statute that the committee is following. Mr. Gardner stated no, but stated it was a reasonable question. The procurement procedures, if changed, would be a partial fix, in that it would take out the ethics piece. Either way, the statute still needs to be fixed.

Ms. Leask asked if there was a standard definition of a Legislative Employee in state law as a whole, not just in the Ethics statute, and if there is, she asked if they differed. Ms. Anderson replied yes, there is one on the Executive level, which covers state employees. Each branch, Executive, Legislative, and Judicial has their own definition and they were substantially different from each other.

Member Cook verified that that was found under the research that Joyce had started and that they would be delving into more, as agreed to earlier—which was to see how other jurisdictions defined Legislative Employee.

Ms. Anderson stated that in her research, our statutes have definitions for public officer and public employee Title 39. When she spoke to Dave Jones action Executive Branch ethics attorney, he said that Title 36 addresses state contracts, but nothing under 36 mentions that state contracts fall under the definition of Employee.

Chair Thomas invited Mr. Wayne to the discussion. Mr. Wayne stated the issue has been covered very well by Ms. Varni and Mr. Gardner. He stated he agreed with Mr. Gardner statement that it would be difficult for the committee get around the fact that the statute requires independent contractors to be covered as legislative employees. He stated that he reviewed the old decision in 1999, and saw that these issues were wrestled with back then, and thought deleting the third portion of the TEST where it requires application of the independent contractor would provide some clarification; however, he didn't think we could do that. What came to mind when Mr. Gardner was talking about a procurement code change that would require a certain code of conduct and the Legislature deleting independent contractor from the definition that required certain contractors take Legislative Ethics Training, this would make Legislative Council responsible for determining whether or not the training was completed.

Mr. Wayne stated that as far as compliance with other parts of the code, that might be more work for the council and more difficult for the council to determine whether or not other parts of the code had been complied with, but requiring them to watch a video or show up at a training seems like something that can easily be added to the check list of things Mr. Gardner was talking about. All of that would still require a change to the definition of legislative employee.

Chair Thomas stated that as of today, if the person that falls under the definition of a legislative employee and is an independent contractor, they're subject to the entire Ethics requirements. The committee could not limit it to (for example) just the online video. (Mr. Wayne stated yes.) Chair Thomas stated that it appears to him what happened in AO 99-01 is that the focus of the opinion did not define legislative employee but instead defined independent contractor or consultant. He suggested that one of the things they could do to move forward is to look again at the decision and see whether or not there is a different way those two terms could be defined based on the research already done.

Mr. Wayne stated there might be some room for adjustment because those terms aren't defined in the Legislative Ethics Act. However, because they're not defined, the committee might be in the situation where if it adopts a definition, the definition would have to be based on common usage and understanding. When looking at dictionaries for clarification, we might run into some limits as to how far you can go.

Ms. Leask suggested that in our research going forward, it would be helpful if there was discussion on the financial implications of making sure all contractors have received ethics training, how the Ethics office is going to monitor the training, and the follow up required by staff to assure compliance. In other words, how much staff time and additional expense would be required to accomplish this task.

Chair asked members for helpful suggestions. He stated it was reasonable that they request a review of the AO 99-01 regarding the definition of independent contractor/consultant, obtain additional research, and maybe suggest a legislative change. Who falls under the definition of independent contractor/consultant is what needs to be tackled.

Member Cook motioned that the committee request additional research through Legislative Research, COGEL, and NCSL to determine if any other entities have a similar definition. He suggested we also keep on our agenda the goal of requesting and recommending a legislative change. We could work with our legal counsel and perhaps Legislative Council. Representative Tuck asked Member Cook if he would be willing to allow other organizations that might be able to help us so as to not limit our resources. Member Cook agreed to include other resources if there were other organizations that the members had in mind to do the research.

Member Walker again referred to AO 99-01. Member Cook stated that if Mr. Wayne is going draft some language, he will probably take into account AO 99-01. He stated that Mr. Wayne already said that fixing AO 99-01 isn't going to get them around the problem. Legislation would be the best option to solve the problem. Mr. Wayne added that whatever opinion the committee might pursue it is very likely the committee would have to address the terms "independent contractor" / "consultant" as they are noted in the current definition of legislative employee.

A roll call vote was taken: YEAS: Sen Giessel, Sen Gardner, Rep Johnson, Member Leask, Member Walker, Member Turner, Rep Tuck , Member Cook, Chair Thomas. NAYS: None. ABSENT: Rep Millett. Motion passed.

11. **OTHER BUSINESS:** None.
12. **ADJOURN:** Senator Giessel motioned to adjourn the meeting at 10:55 am. No objection.