

# ***PUBLIC DEFENDER: INFORMATION PACKET***

prepared for the  
***Law and Justice Interim Committee***

***June 2006***

***\*Please Note:***

There is a \$30,000 dollar error  
in the audit report upon which this  
report is based. This error affects Yellowstone County.  
A corrected version of this report will be  
published as soon as possible.

by  
Sheri Heffelfinger, Research Analyst  
Office of Research and Policy Analysis



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#### **Other References (not included in packet)**

- *For the Defense: Enacting a Statewide Public Defender System in Montana*, Final Report of the LJIC, 2003-2004
- Legislative Audit Report 06C-09: *Public Defender Services in Six Selected Counties*, March 2006

## **I. Committee Bill to Adjust Entitlement Share**

### **Background**

Under SB 146 (Ch.449, L. 2005), funding for the new statewide public defender act is a shared responsibility of the state, the counties, and the cities. The state agreed to pay what the state was currently spending, plus all new costs; while the counties and cities were to pay what they were currently spending. (*See Attachment I-A: Fiscal Analysis used by LJIC in September 2004.*)

To pay for their share of the costs, the counties and cities took a one-time reduction in the amount they received as their FY 2007 entitlement share. (*See Attachment I-B: Sec. 21 of SB 146, amending entitlement share statute.*)

The amount of each county's and city's entitlement share reduction was calculated according to best estimates of city and county actual costs in FY 2004. However, the actual costs of the "big six" counties (Cascade, Flathead, Gallatin, Lewis and Clark, Missoula, and Yellowstone Counties) were a topic of dispute. Consequently, SB 146 included language providing for a legislative audit of actual costs in these counties. (*See Attachment I-C.*)

### **LJIC's duties**

Section 72 of SB 146 states that the "law and justice interim committee shall prepare legislation to be introduced in the 2007 legislative session that will amend 15-1-121 to provide that the base entitlement share for Cascade County, Gallatin County, Lewis and Clark County, Missoula County, Flathead County, and Yellowstone County is adjusted by an appropriate amount arrived at based on the audit and in consultation with the legislative finance committee, the legislative audit committee, representatives of the counties, the governor's office, the American civil liberties union, the attorney general's office, and all other interested and participating parties".

### **Audit findings**

Table 1 below compares the entitlement share reductions in SB 146 to the audit's findings of actual costs, but only for FY 2004. The difference is the amount that would be added or subtracted from the entitlement share reduction for the "big six" counties if the LJIC decides to use this data as the basis of the committee bill.

Table 2 below is the same comparison but uses the average of actual costs for FY 1999 through FY 2004.

Table 3 below compares the entitlement share adjustments using FY 2004 audit data with the entitlement share adjustments using and average of FY 1999 through FY 2004 audit data.

TABLE 1: FY 2004 COSTS

	<b>SB 146: Reduction in Entitlement Share</b>	<b>Audit Findings: Actual Costs in FY 2004</b>	<b>Adjustment</b>
<b>Total: All Counties</b>	\$ 1,631,513*	n/a	n/a
<b>Total: "Big Six" Only</b>	\$ 1,099,965	\$ 1,113,023	\$13,058
<b>Break Out For "Big Six"</b>			
<b>Cascade</b>	\$157,151	\$77,198	(\$79,953)
<b>Flathead</b>	\$33,655	\$39,080	\$5,425
<b>Gallatin</b>	\$222,029	\$258,096	\$36,067
<b>Lewis &amp; Clark</b>	\$247,886	\$160,812	(\$87,074)
<b>Missoula</b>	\$172,600	\$210,511	\$37,911
<b>Yellowstone</b>	\$266,644	\$367,326	\$100,682

\* The Fiscal Report upon which the SB 146 was initially based showed the total actual cost for all counties to be \$1,714,157. Subsequent amendments to entitlement share reductions reduced this by \$82,644, so that the total amount actually withheld from county entitlement share payments was \$1,631,513.

TABLE 2: AVERAGE COSTS

	<b>SB 146: Reduction in Entitlement Share</b>	<b>Audit Findings: Average FY 1999 thru FY 2004</b>	<b>Adjustment</b>
<b>Total: All Counties</b>	\$ 1,631,513*	n/a	n/a
<b>Total: "Big Six" Only</b>	\$ 1,099,965	\$ 1,096,852	\$ 3,113
<b>Break Out For "Big Six"</b>			
<b>Cascade</b>	\$157,151	\$182,771	\$25,620
<b>Flathead</b>	\$33,655	\$41,565	\$7,910
<b>Gallatin</b>	\$222,029	\$140,001	(\$82,029)
<b>Lewis &amp; Clark</b>	\$247,886	\$90,481	(\$157,405)
<b>Missoula</b>	\$172,600	\$284,118	\$111,518
<b>Yellowstone</b>	\$266,644	\$357,916	\$91,272

TABLE 3: FY 2004 COSTS COMPARED TO AVERAGE

	<b>SB 146: Reduction in Entitlement Share</b>	<b>Adjustment using FY 2004</b>	<b>Adjustment using Average</b>
<b>Total: All Counties</b>	\$ 1,631,513*	n/a	n/a
<b>Total: "Big Six" Only</b>	\$ 1,099,965	\$13,058	\$ 3,113
<b>Break Out For "Big Six"</b>			
<b>Cascade</b>	\$157,151	(- \$79,953)	\$25,620
<b>Flathead</b>	\$33,655	\$5,425	\$7,910
<b>Gallatin</b>	\$222,029	\$36,067	(\$82,029)
<b>Lewis &amp; Clark</b>	\$247,886	(- \$87,074)	(\$157,405)
<b>Missoula</b>	\$172,600	\$37,911	\$111,518
<b>Yellowstone</b>	\$266,644	\$100,682	\$91,272

Analysis: When considering the audit data, the following points should be kept in mind:

- Actual costs refer to the public defender expenses paid by the county minus state reimbursements.
- When accounting for their public defender expenses, counties varied in what expenses were considered public defender costs (e.g. some counties included as public defender costs jury fees, rent, and some other expenses that were not eligible for state reimbursement)
- In some counties (Cascade, Gallatin, Missoula), public defender costs were not differentiated by district court and justice court. Thus, without applying assumptions, it is impossible in those counties to determine what costs related to district court cases (which could arguably have been costs that the state should have paid) and what costs were for justice court cases, which the county is responsible to pay.
- In certain years, state funds to reimburse counties fell short. To manage the shortfall, the Court Administrator's Office would, for example, reimburse 80% of all claims as they came in, and reserve the balance, which would then be paid to the counties on a pro-rated basis. Thus, the percentage of eligible public defender expenses paid in each county varied county to county. For example, in FY 2002 and FY 2003, Missoula County received 80% reimbursement for its eligible expenses, while Yellowstone County received 71% and 97% respectively for those fiscal years, thus affecting the county's "actual cost" in those years.

- The guidelines and rules used to determine what expenses were eligible for reimbursement and what expenses were not varied year to year.

### **Conclusion**

The legislative audit confirms that the estimates used by the LJIC when crafting SB 146 were basically good estimates when viewed in the context of total expenses. However, because of all the variables and unknowns involved, the legislative audit was unable to dissect county "actual costs" and present data in a manner that would allow the LJIC to definitively parse through which expenses paid by the county should actually have been paid by the state.

## II. Committee Oversight of Implementation

### Background

SB 146 (Ch. 449, L. 2005) specified the following time line for implementation of the statewide public defender system:

- |               |  |
|---------------|--|
| July 1, 2005  | ✓ Governor must appoint Public Defender Commission   |
| Dec. 31, 2005 | ✓ Commission to hire chief public defender, Ms. Randi Hood<br>❑ Issue any RFPs for consulting services and technical assistance  |
| July 1, 2006  | ❑ Standards and procedures must have been established<br>❑ Transferred city and county employees become state employees<br>❑ Appellate defender becomes part of Office of Public Defender<br>❑ Judges no longer appoint counsel, but order OPD to assign |

### Current status

As of June 13, 2006, the following major tasks have been accomplished:

- ✓ Strategic plan approved (*See Attachment II-A*)
  - 11 public defender regions, staffed regional office in each
  - 11 local offices (6 from old system, 5 new ones)
  - Financial plan shows demographics and projected costs by region  
(*See Concerns* section about OPD exceeding its budget)
- ✓ Key staff hired
  - Administrative Director, Harry Freebourn
  - Training Officer, Eric Olson
  - Contract Manager, Larry Murphy
  - IT Manager, Teri Heiland
  - Human Resources Director, Barb Kain
  - Administrative Assistant for Randi Hood, Bonnie Anderson
  - Administrative Assistant for Harry Freebourn, Carleen Henderson
  - 10 of the 11 Regional Deputy Public Defenders (Region 1, Kalispell, still open)
- ✓ Training conference, July 12-14, 2006, MSU, Bozeman (*See Attachment II-B*)

Major tasks not completed, but in progress:

- Standards, including the following key items of interest (*See Attachment II-C*)
  - ✓ Handling conflicts of interest
  - ✓ Contracting process
  - ✓ Caseload standards
  
- Information technology and data collection systems intermediate plan and assessment
  - ✓ OPD is using existing systems rather than the centralized state system and plans on having a statewide case management system by the end of FY 2007
  
- Survey and negotiations for contract attorneys
  - ✓ Survey developed, being distributed, some coming back in
  
- Administrative Rules
  - ✓ Draft rules to be presented to Commission end of June

### Concerns

- ☞ Fiscal: (1) The ODP is \$3.3 million over budget for 2007 biennium, (2) District Court variable costs (largely indigent defense) also about \$3 million over; (3) projected on-going costs for the ODP may be as high as \$41 million for the 2009 biennium, compared to the \$27 million estimated on-going biennial costs during LJIC's 2004-2005 study.  
(*See Attachment II -D for LFD report to the LFC, May 31, 2006.*)
  
- ☞ Contracting: Although both SB 146 and the Public Defender Commission's standards require a competitive bidding process for awarding contracts, the OPD has stated that contracting efforts are based on receiving survey information from interested attorneys and that the OPD will negotiate contracts with those attorneys it determines are qualified. Legislative staff is concerned that this does not conform to statutory language or to the Commission's standards because it is not a competitive bidding process. Review of information provided in a survey does not provide for a systematic, consistent, or objective methodology for soliciting and awarding contracts. (*See Attachment II-E.*)

### Response

The Public Defender Commission has provided a letter to the LJIC in response to the LFD report presented to the LFC on May 31, 2006. The letter explains the Commission's position with respect to the concerns cited in the LFD report. (*See Attachment II-F.*)

**NOTE: THIS LETTER WILL BE DISTRIBUTED UNDER A SEPARATE COVER. IT WAS NOT AVAILABLE AT THE TIME THIS PACKET WAS PREPARED.**