



MONTANA STATE PUBLIC DEFENDER

17 West Galena, Butte, MT 59701
T: 406.496.6080 F: 406.496.6098
publicdefender.mt.gov

December 11, 2023

Interim Budget Committee – Section D

Via email with hardcopies provided at time of hearing

Chair Mercer and Members of the Committee,

Please find OPD's Responses to the Committee's Requests for the December 13, 2023, Interim Budget Committee Hearing.

Thank you for your patience with OPD while we work to provide the committee with the best possible responses.

Best,



Brett D. Schandelson
Director

Legislators would like the OPD to provide an estimate on the number of employees within its current staff that could be qualified to pursue the death penalty in capital cases. This would include a more general discussion on what would be needed for OPD to develop this capacity and how those costs might compare to contracting these cases out.

In response to this committee's inquiry regarding what resources OPD would need to effectively handle capital cases with in-house, OPD has prepared this estimate of what a capital defense unit consisting of FTE public defenders, investigators, and mitigations specialists (instead of contract public defenders and the private vendors) could look like. While OPD has prepared this estimate at the committee's request, please understand the following:

- Any legislative requests made by or on behalf of OPD must be part of the Governor's Executive Budget;
- This estimate has not been vetted or approved by the Governor's Office of Budget and Program Planning;
- This estimate is not a legislative request, nor is OPD suggesting that this or a similar request will be sought through the Executive Planning Process nor included as part of the Governor's Executive Budget; and,
- This is OPD's best estimate, as of this date, of what additional resources would be needed to ethically and effectively provide capital representation utilizing OPD employees.

Capital and Complex Litigation Unit Estimate

To effectively handle capital matters without relying on the private market, OPD would need to create an advanced capital and complex litigation unit, comprised of OPD FTEs, capable of providing ethical and effective representation to clients in capital matters. At a minimum, such a unit would require the following FTEs:

<u>Additional FTE Needed</u>	<u>Type of FTE</u>	<u>Estimated Costs of Salary & Benefits/Year</u>
2	FTE trial public defenders	\$240,000 - \$280,000
.5	FTE appellate public defender	\$60,000 - \$70,000
1	FTE fact investigator	\$90,000 - \$100,000
1	FTE mitigation specialist	\$80,000 - \$100,000
1	FTE legal support position	\$70,000 - \$85,000
5.5	TOTAL	\$540,000 - \$635,000

The approximate cost of a capital unit per fiscal year would be between \$540,000 and \$635,000 at current estimated salaries and benefits. Due to potential conflicts of interest in a capital matter, OPD would need to create one such unit in each trial level division, bringing estimated increased costs to between \$1,080,000 and \$1,270,00 per fiscal year.

Each unit would handle a maximum of two (2) capital matters simultaneously. During times there are less than two assigned capital matters to a unit, the units would be deployed throughout the divisions to provide support and joint representation in advanced and complex matters. To ensure availability for potential capital matters, the units would not serve as primary counsel in non-capital matters, enabling the unit to transition out of its non-capital work should a capital matter occur. Regardless of whether any

capital matters are pending, each unit would be fully deployed to OPD client services while remaining available for potential capital matter.

Legislators would like the OPD to provide an estimate on the number of times that collected fees have been ordered.

Since FY 2018 to December 7, 2023, OPD Fees have been Ordered and Paid as follows:

# of OPD Fee Assessments	11,028
Total Amount of OPD Fee Assessments	\$4,950,000
Total Amount Collected	\$955,000
Total Amount Uncollected	\$4,000,000

There are a few additional notes relevant to the Committee's inquiry:

- These numbers include OPD Fee Assessments for which no payments are actually yet due, as an incarcerated individuals are statutorily except from making payments towards their OPD Fee Assessments, as well as the Department of Revenue offset process where an owed state liability (like a tax return or rebate) if garnished by DOR and applied to apply towards an OPD Fee Assessment.
- Since FY 2022, OPD has had the ability to differentiate between clients making voluntary fee payments and involuntary payments made via a DOR offset. For OPD Fee Assessments made since FY 2022, OPD has collected a total of \$326,000 in OPD Fee Assessments, with \$187,000 of this coming via DOR offset. In other words, roughly 57% of all OPD Fee Assessments collected on obligations ordered since FY 2022 came from involuntary payments via DOR offset.
- There are some date integrity and accuracy issues with clients' social security numbers, and if the Court's, OPD's, and DOR's records on individuals do not reconcile exactly, an OPD Fee Assessment may be uncollectable.

Please see the spreadsheet titled "1 – OPD Fees Assessed and Paid", which provides additional detailed information regarding OPD Fees Assessed and Paid by County, Court, and Fiscal year.

Legislators would like the OPD to provide information regarding any policy that has been enacted to implement case assignments in a timely manner.

In response to previous questions regarding OPD's assignment protocol, OPD provided detailed descriptions of then-existing policies, procedures, standards, expectations, and directives that made up Ethical Case Management as implemented at OPD.

In November of 2023, OPD formalized this admittedly scattered process into a single policy, which contains an end-to-end description of OPD's workload weighting and assignment protocols, including assignment timelines. This policy is provided to the committee as a document titled "2 – Policy 201 – Ethical Case Management." As a specific reference, please see section (3) of this policy, titled *ECM Workload Limitations and Assignment Protocol*, for OPD's assignment protocol.

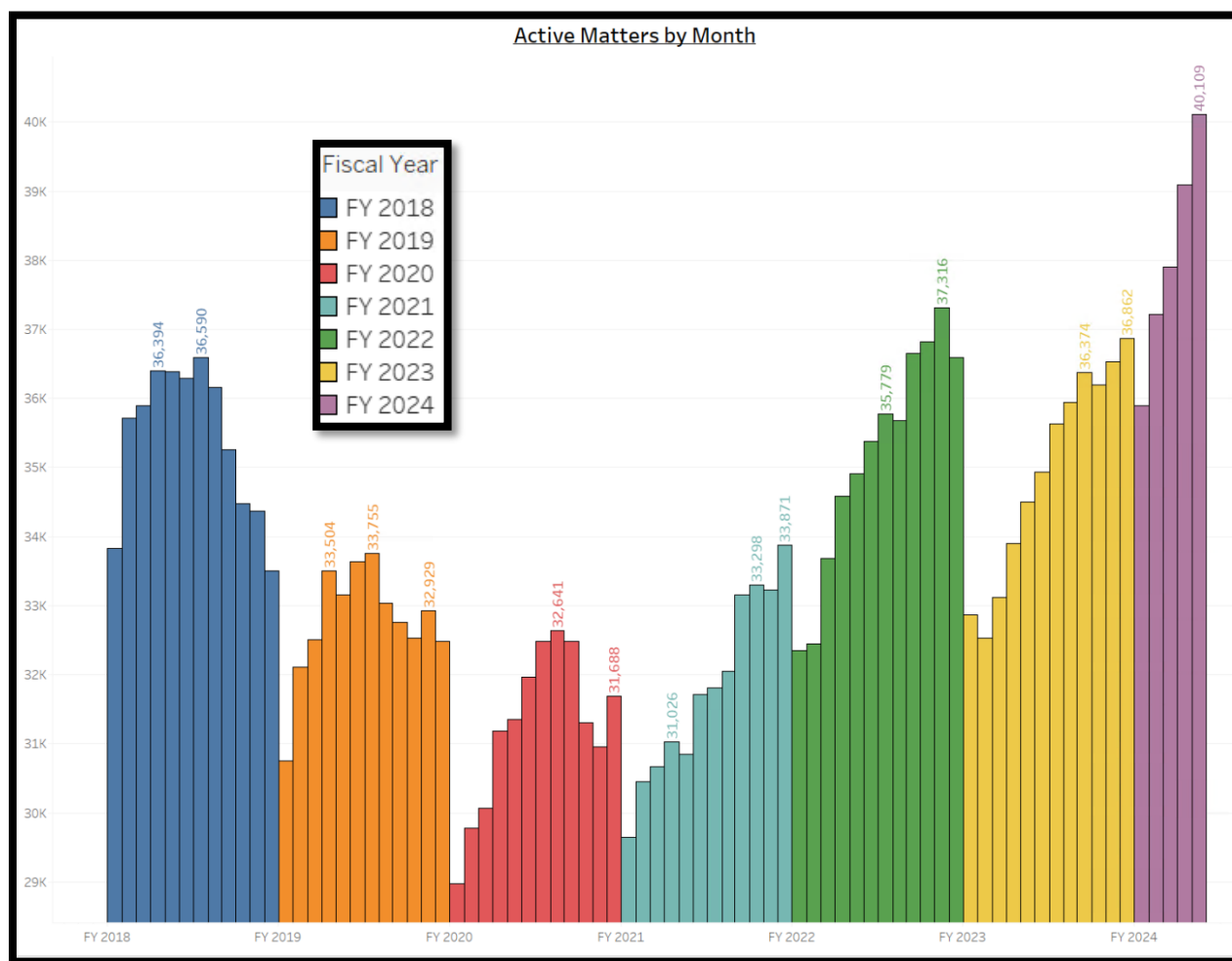
Additionally, OPD has created and is utilizing a variety of additional resources and tools to effectively manage assignments, workloads, and assignment timelines.

Legislators would like the Director of the OPD to clarify the types of cases contained in the document titled [Matters Received Charges by Source Q4 2023](#).

The Director will discuss the Committee's questions during the hearing, as a request for clarification on this topic was not received in time to provide additional written information in advance.

Legislators would like the OPD to provide a comparison between trends in active caseloads for current data and FY 2021 or 2022 data.

Please see the following graph, which shows the total number of active matters in calendar month, which includes when open matters and certain events, like when the matter opened, closed, had time tracked to it, has external costs billed to it, or had an matter event, like a court hearing or appointment.



OPD currently believes that the trend of active matters experienced this fiscal year is primarily due to the lack of available contract public defenders to absorb the quantity of work over and above OPD's FTE resources, which increases the matter durations and keeps matters active longer. Please note, however, that there is also a recent rise in new filings, partly due to a one-time, mass assignment of previously unrepresented youths in DN Abuse and Neglect matters.

Legislators would like to know the current hiring status regarding all newly appropriated attorney FTEs for the 2025 biennium. Additionally, show current counts of filled vs budgeted FTE by location

As of December 4th seven (7) of the eight (8) newly appropriated attorney FTE positions are filled. OPD is actively recruiting to fill the eighth. The spreadsheet “3 – FTE allocation as of December 2023” shows all positions filled by location as of December 4th as well as OPD’s division-level budgeted FTEs and vacant positions.

For Q1 of FY 2024, Legislators would like OPD to provide detail regarding:

Cases in which the office of state public defender moved for waiver of the cost of counsel pursuant to 46-8-113(1) and the basis for the motion

Please see the spreadsheet titled “4 – Q1 FY 24 OPD Fees Assessed” which shows the number OPD Fee Assessments ordered by court and the number of criminal matters disposed by court in Q1 FY 2024 for which an OPD Fee Assessment could have been ordered.

Current employee and contractor time in cases involving defendants in capital cases

There were zero (0) FTE hours tracked to capital matters in Q1 FY 2024. For contract hours, please see the spreadsheet titled “5 – Q1 24 Contractor Capital Hours”. Please note, not all external costs are associated with an hourly rate, and those providers will show zero (0) hours submitted, although there were costs associated with their work in each matter listed.

Cases in which the state has elected to seek the death penalty

There were no new matters in which a notice of intent to seek death was filed in Q1 of FY 2024.

Discussion of any protocols issued/adopted pursuant to 47-1-104

Please see the response above regarding Policy 201 – Ethical Case Management.

Cases in which the office of state public defender was appointed to represent defendants in each county, including a separate disclosure of the number of appointments to employees of the office of public defender compared to contract attorneys

Please see the spreadsheet titled “6 – Q1 24 Number of Matters by FTE – Contactor” which contains the number of matters received by whether the case is assigned to an FTE public defender, is assigned to a contract public defender, or is currently pending assignment.

Regarding the number of appointments reported above, the number of appointments made in each county for cases in which the offense or offenses charged allege violations of local ordinances and not state statutes

Please see the spreadsheet titled “7 – Q1 24 Number of Matters Without Any MCA Violations” which contains matters in which there were no alleged violations of an MCA statute.

Please note most cases that involve alleged violations of local ordinances *also* involve alleged violations of MCA, and those matters would not be represented in this numbers.

Regarding the number of appointments reported above, the costs incurred in each county to compensate contractors

Please see the table below for the external costs received to date related to matters received in Q1 FY 2024 in which there were no alleged violations of an MCA statute:

<u>County</u>	<u>Amount</u>
Gallatin	159.5
Flathead	7.1
Yellowstone	976.25
Cascade	660.3
Missoula	1656
Ravalli	134.9

Please note that due to the duration of case litigation, it is likely the majority of external costs incurred for matters received in Q1 FY 2024 will not be incurred until at least Q2 FY 2024.

Updated current caseload numbers

Please see the spreadsheet titled “8 – Active Matters and Weights as of December 7 2023” which contains the number of active matters and total active weight by county as of December 7, 2023.

How much did you pay to contractors?

Within its core services, in Q1 FY 2024 OPD paid \$2,450,771.55 to contract public defenders and \$380,498.30 to other contract providers, such as mental health evaluators, expert witnesses, investigators, and transcriptionists.

How much of the amount paid to contractors do you estimate is due to vacant positions?

OPD’s payments to non-attorney contractors are not related to vacant FTE positions as OPD has always relied upon the private market for such expert services and does not have FTE positions that would provide these services.

OPD’s payments to contract public defenders are directly related to the gap between new case appointments received by OPD and the number of OPD FTE attorneys available to work those cases. While there is always a need for contract public defenders, as well as many other types of external service providers, when we experience vacancies in public defender positions, it pushes additional work to the contracting attorney pool.

The historic vacancy rate OPD experienced, as well as the continuing and existing gap between the amount of work OPD has received and the number of OPD FTEs to effectively handle that work, are responsible for much of OPD’s usage of contract attorneys. A simple way to look at the relationship between vacant FTE public defenders and the increased need for contracting is that for every month there is a vacant FTE public defender position, there is work of *at least* 125 new matter weight hours that needs to be assigned to the contracting pool.

While OPD is nearly fully staff at the FTE public defender position, which it accomplished in Q1 FY 24, OPD continues to incur costs for matters previously assigned due to vacancy in the past. It is currently impossible for OPD to determine what amount of costs incurred in Q1 FY 24 are as a result of vacancy, but given the above, it is not an insignificant factor.

If contractors were paid because of vacant positions, what are the types of vacant positions that resulted in the need for contractors?

The primary type of vacancy that causes a need for contractors are vacancies in the FTE public defender positions; although, vacancies or lack of staffing in support positions do make FTE public defenders less efficient.

How much did you pay in overtime?

Through November of 2023, OPD has paid \$4,869.57 in overtime in FY 2024.

How much of the overtime paid do you estimate is due to vacant positions?

No overtime was paid due to vacant positions.

If overtime was paid because of vacant positions, what are the types of vacant positions that resulted in the need for overtime?

No overtime was paid due to vacant positions.